

1961

# John D. Glynn v. Marjorie Doctorman Dubin et al : Brief of Plaintiff-Appellant

Utah Supreme Court

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John D. Glynn; In Propria Persona;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

JOHN D. GLYNN,  
*Plaintiff and Appellant,*

vs.

MARJORIE DOCTORMAN  
DUBIN, aka MARJORIE  
DOCTORMAN and DESERET  
FEDERAL SAVINGS AND  
LOAN ASSOCIATION,  
a corporation,

*Defendants and Respondents.*

FILED

Clerk, Supreme Court, Utah

Case No. 9388

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BRIEF OF PLAINTIFF - APPELLANT

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Appeal from the District Court of the Third  
Judicial District in and for Salt Lake County,  
State of Utah

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JOHN D. GLYNN  
*In Propria Persona*

9171 Wilshire Boulevard  
Beverly Hills, California

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*Defendants and Respondents.*

Case No. 9388

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BRIEF OF PLAINTIFF - APPELLANT

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STATEMENT OF THE CASE

This is an appeal to the Supreme Court from a judgment of the District Court dismissing plaintiff's complaint seeking partition of real property held under a joint tenancy deed and granting judgment on defendant's counterclaim quieting title to said real property in defendant Marjorie Doctorman Dubin. The word defendant used herein shall refer only to Marjorie Doctorman Dubin unless otherwise indicated.

## STATEMENT OF FACTS

On or about July 22, 1957, defendant and Martin F. Dubin acquired as joint tenants property known as All of Lot 24, East Millbrook No. 2 in the County of Salt Lake, State of Utah, according to the plat thereof, recorded in the Office of the County Recorder of said county. On said date defendant and Martin F. Dubin were husband and wife and were residing in Salt Lake City while Martin F. Dubin was interning at Holy Cross Hospital. In December, 1958, defendant filed an action (cause number 119467) in the District Court of Salt Lake County, State of Utah wherein she sought separate maintenance. Later amended complaints were filed in which defendant sought to obtain a divorce upon the ground among others, that Martin F. Dubin was incapable of reproduction and was further deficient in sexual capabilities. At the time of the filing of the original action for separate maintenance defendant had not been a resident of the State of Utah or the County of Salt Lake for three (3) months preceding the date of the filing of the complaint. In the Amended Complaints the aforesaid parcel of property was put in issue as a result of defendant's request that the court enter an order conveying to her all of Martin F. Dubin's right, title and interest in and to the property, or in the alternative for an order requiring Martin F.

Dubin to make a conveyance of the property to defendant. In said amended complaints defendant alleged that the property was accumulated prior to her marriage to Martin F. Dubin even though said complaints alleged that the marriage occurred March 18, 1956, which was prior to the date of the joint tenancy deed. Martin F. Dubin filed an Answer and Cross-Complaint in which he alleged as his grounds for divorce, among other things, that defendant had failed to advise him that she had been married before and had had said marriage annulled. Martin F. Dubin further alleged in his cross-complaint that the real property was acquired through the couple's joint efforts and to their joint benefit and asked the court to award him a just and equitable share of the property and the income therefrom.

In connection with said action, Martin F. Dubin, who had been residing in California with defendant, retained plaintiff herein as his California legal counsel. Plaintiff thereafter associated himself with E. R. Callister as Utah counsel and upon Mr. Callister's appointment to the Supreme Court with Walter Budge, Esq. also of the Utah Bar Association. On December 6, 1959, plaintiff and Dr. Martin F. Dubin flew to Salt Lake City for trial of the action scheduled for December 8, 1959. On December 7, 1959, Martin F. Dubin at the instance and request of plaintiff by Quit-Claim Deed



conveyed to plaintiff all of his right, title and interest in and to his portion of the joint tenancy property. The consideration for said deed as alleged by plaintiff was the cancellation of \$3,000.00 in legal fees owing to plaintiff by Martin F. Dubin, the sum of \$100.00 and the execution of a promissory note by plaintiff in favor of Martin F. Dubin for \$5,000.00, payable \$100.00 per month, including interest, commencing January 7, 1960, until principal and interest had been paid. Said deed was recorded on December 7, 1959.

On the morning of December 8, 1959, plaintiff and Walter E. Budge, Esq. appeared in Judge Ellett's court as co-counsel for Martin F. Dubin. On said morning said counsel successfully argued that the Court was without jurisdiction to proceed in that at the date of filing of the original complaint for separate maintenance defendant did not meet the necessary residence requirement. The court granted a dismissal of the action on or about 2:00 p.m. on said date.

Later, on the afternoon of December 8, 1959, Martin F. Dubin executed at the instance and request of plaintiff another Quit-Claim Deed in favor of plaintiff to said property in form and substance more or less identical to the earlier deed. Plaintiff also executed another similar promissory note in favor of Martin F. Dubin and said note and said quit-claim deed were recorded on said date.

Prior to December 7, 1959, defendant had caused to be recorded a lis pendens as to said property in which notice was given of the law suit filed in December, 1958, which suit was dismissed on December 8, 1959. After the action was dismissed on December 8, 1959, defendant on the afternoon of said date caused a second suit (cause number 123578) to be filed and allegedly thereafter caused another lis pendens to be recorded pertaining to said real property.

Prior to the dismissal of the first action on December 8, 1959, plaintiff withdrew as counsel for Dr. Martin F. Dubin in open court and the court minutes so indicate. The summons and complaint applicable to the second action filed on December 8, 1959, were served upon Martin F. Dubin some time later in Los Angeles, California. Plaintiff did not represent Martin F. Dubin in said action and an appearance and answer was not made to said complaint.

On or about the 27th day of January, 1960, a default hearing was held on the second divorce action at which time defendant was granted a divorce and in which the decree signed by Honorable Ray A. Van Cott stated in part:

“Plaintiff be, and she hereby is, awarded as her sole and separate property free and clear of any claims of the Defendant the following described real property located in Salt

Lake County, State of Utah, to wit: Lot 24, East Mill Brook No. 2, according to the official plats of Salt Lake County.”

At the time of the hearing on said default divorce the District Court was not advised that either of the quit-claim deeds had been executed and recorded even though defendant and both defendant's counsel, Bernard Rose and Dean Conder, had personal knowledge of such facts.

In May, 1960, plaintiff commenced the instant action by filing a complaint in which he sought to partition the aforesaid real property. Defendant filed an Answer and Counter Claim in which among other things, defendant admitted that plaintiff's complaint set forth a cause of action for partition. The exact nature of defendant's counter-claim is uncertain although it prays for a judgment quieting title to the real property in defendant.

A trial of the instant action was had before Honorable Ray A. Van Cott (who had heard the default divorce case) on November 9, 1960. At the conclusion of plaintiff's case defendant moved for a dismissal of plaintiff's complaint and for judgment on her counter claim. Although no evidence was introduced or presented by defendant the court granted both of defendant's requests. Before granting defendant's judgment on her counter claim the court specifically asked (T. R. p. 35) defen-

dant's counsel whether he was satisfied with the evidence on the counter claim to which said counsel replied that he was. This is an appeal from that decree.

## STATEMENT OF POINTS

### *A. DEFECTIVE PLEADING OF COUNTERCLAIM OF DEFENDANT.*

#### POINT I.

THE COUNTERCLAIM OF DEFENDANT FAILS TO STATE A CAUSE OF ACTION UNDER THE FRAUDULENT CONVEYANCE ACT, AT 25-1-8, UTAH CODE ANNOTATED, 1953.

#### POINT II.

THE ANSWER AND COUNTERCLAIM OF DEFENDANT FAIL TO ALLEGE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION TO ESTABLISH A RESULTING TRUST IN FAVOR OF DEFENDANT AND ANY EVIDENCE THEREON IS IN VIOLATION OF THE PAROL EVIDENCE RULE.

### *B. FAILURE OF PROOF ON DEFENDANT'S COUNTERCLAIM OR DEFENSE.*

#### POINT III.

DEFENDANT FAILED TO PROVE HER CAUSE OF ACTION OR DEFENSE UNDER THE FRAUDULENT CONVEYANCE ACT, AT 25-1-8 UTAH CODE ANNOTATED, 1953, OR ANY CAUSE OF ACTION TO ESTABLISH A RESULTING TRUST.

### *C. DEFENDANT DID NOT HAVE STANDING TO BRING AN ACTION UNDER THE FRAUDULENT CONVEYANCE ACT, AT 25-1-8 UTAH CODE ANNOTATED, 1953.*

#### POINT IV.

DEFENDANT IS NOT A CREDITOR OR OTHER PERSON WITHIN THE MEANING OF THE UTAH

FRAUDULENT CONVEYANCE ACT SINCE SHE WAS NOT AWARDED SUPPORT OR MAINTENANCE.

*D. FAILURE TO FIND ON MATERIAL ISSUES.*

POINT V.

THE COURT FAILED TO FIND ON MATERIAL FACTS OR ISSUES UNDER AN ACTION BASED ON THE FRAUDULENT CONVEYANCE ACT AT 25-1-8, UTAH CODE ANNOTATED, 1953.

POINT VI.

ASSUMING THAT DEFENDANT'S ANSWER AND COUNTERCLAIM SET FORTH A CAUSE OF ACTION TO ESTABLISH A RESULTING TRUST THE COURT FAILED TO FIND ON MATERIAL FACTS OR ISSUES.

*E. EFFECT OF INSTITUTION OF DIVORCE PROCEEDINGS BY WIFE.*

POINT VII.

THE INSTITUTION OF A DIVORCE ACTION DOES NOT PUT THE PROPERTY INTO THE CUSTODY OF THE COURT AND DOES NOT PREVENT THE EXERCISE OF THE HUSBAND'S POWERS OVER THE PROPERTY.

*F. ATTORNEY'S FEES AS CONSIDERATION FOR A CONVEYANCE.*

POINT VIII.

A CONVEYANCE MADE TO THE HUSBAND'S ATTORNEY IN A DIVORCE ACTION IS AS VALID AS ANY OTHER CONVEYANCE MADE FOR VALUABLE CONSIDERATION AND WITHOUT INTENT TO HINDER, DELAY OR DEFRAUD CREDITORS OR OTHER PERSONS.

*G. LIS PENDENS.*

POINT IX.

THE LIS PENDENS ARE NOT MATERIAL TO A DETERMINATION OF THE ISSUES.

## ARGUMENT

### A. DEFECTIVE PLEADING OF COUNTERCLAIM OF DEFENDANT.

#### POINT I.

THE COUNTERCLAIM OF DEFENDANT FAILS TO STATE A CAUSE OF ACTION UNDER THE FRAUDULENT CONVEYANCE ACT, AT 25-1-8, UTAH CODE ANNOTATED, 1953.

It is difficult to determine the exact nature of the counterclaim filed by defendant. The prayer of the counterclaim requests that defendant's title in the property be quieted against plaintiff and that the two quit-claim deeds be vacated and cancelled. The Pretrial Order states that defendant claims that the conveyance to plaintiff was in violation of the Fraudulent Conveyance Act, at 25-1-8 Utah Code Annotated, 1953. Assuming that the counterclaim was intended to be framed under said code section, it is obvious that the counterclaim does not set forth facts sufficient to constitute a cause of action. Said code section provides in pertinent part:

“Every conveyance or assignment in writing or otherwise . . . made with the intent to delay, hinder or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts or demands . . . shall be void.”

Section 25-1-13 of said Act further provides:

“The provisions of this chapter shall not be construed to affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his

immediate grantor, or of the fraud rendering void the title of such grantor.”

Section 25-1-7 of said Act further provides that “actual intent” to hinder, delay or defraud creditors is necessary in order to invoke the provisions of said Act in point herein. *Smith, et al v. Edwards*, Utah 1932, -----, states:

“*And the rule is that the facts upon which fraud is predicated must be specifically pleaded.* A mere general averment of fraud is nothing more than the averment of a conclusion, and will not suffice. It presents no issue for trial, and is bad on demurrer. Such an averment not only renders the bill or complaint demurrable but it will not even sustain a decree.” (Emphasis supplied)

In *Smith v. Edwards*, supra, the court pointed out that the complaint was further deficient in that there was no allegation of the amount of the indebtedness, the value of the land conveyed, nor the value of assets remaining after the conveyance. In the instant case essential elements of the cause of action are not alleged. There is no allegation that Martin F. Dubin made the conveyance “with the intent to delay, hinder or defraud creditors or other persons . . .” as required by the code section. Paragraph 5 of defendant’s counterclaim alleges that *both deeds* were executed, recorded and delivered with the calculated purpose by plaintiff herein and Martin F. Dubin “to obstruct orderly judicial pro-



cedure as it might be determined in the case of *Dubin v. Dubin*, file number 123578, which was filed on December 8, 1959, and prior to the execution, delivery and recordation of the quit-claim deed which is the basis for plaintiff's complaint." The obstruction of "orderly judicial procedure" is not the same as the required pleading of an intent "to delay, hinder or defraud creditors or other persons." It should also be noted that it is claimed that the deed of December 7, 1959 (under which plaintiff claims) was executed for the purpose of obstructing orderly judicial procedure in action number 123578 which action was not even filed until the next day and which plaintiff and Martin F. Dubin had no way of knowing would be in existence on said date! Suffice it to say that the counter claim fails to allege the required element of fraudulent intent on the part of Martin F. Dubin. Likewise there is no allegation that plaintiff "had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor." In *Heidelberg v. Smith*, 1959, 214 Ga. 785, 107 SE 2d 844, it is stated: "In the present case, it is not alleged that the defendant had actual notice or reasonable grounds to suspect fraudulent intent on the part of the husband. *The petition therefore, failed to allege a cause of action based on fraud*" (emphasis supplied). Defendant's allegation that plaintiff had



knowledge of the “claims of Defendant Marjorie D. Dubin” is not capable of being construed as an allegation that plaintiff had notice of the *fraudulent intent* of Martin F. Dubin. It is immaterial whether or not plaintiff knew of the “claims” of Marjorie D. Dubin if (1) in fact Martin F. Dubin did not have the requisite “fraudulent intent;” or (2) if he did have such intent plaintiff did not have knowledge of the said intent of Martin F. Dubin. Knowledge of the “claims” might be considered as one factor in determining whether or not Martin F. Dubin had such fraudulent intent, but mere knowledge of the claims does not per se constitute a pleading of a fraudulent intent.

Furthermore, the counterclaim fails to state that defendant is a “creditor” or “other person” within the meaning of the Act. This point will be discussed in detail under a point hereinafter.

## POINT II.

THE ANSWER AND COUNTERCLAIM OF DEFENDANT FAIL TO ALLEGE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION TO ESTABLISH A RESULTING TRUST IN FAVOR OF DEFENDANT AND ANY EVIDENCE THEREON IS IN VIOLATION OF THE PAROL EVIDENCE RULE.

The pleadings and Pretrial Order are most confusing as to the defendant’s theory upon which her defenses or claims are based. Paragraph 9 of the main Pretrial Order states that defendant contented that the conveyance to plaintiff was fraudulent be-

cause “it was an effort to convey property that belonged to the defendant” and further states that the court held that since the defendant admits that the property is held in joint tenancy that defendant had made a gift of it to the grantor and that such was no defense. Later the Pretrial Judge, Honorable Joseph G. Jeppson, allowed paragraph 9 to be amended to read that plaintiff received property from Martin F. Dubin which defendant alleges that although title was held in joint tenancy that she was the equitable owner of the entire property. The Pretrial judge, however, stated in said Amended Pretrial order

“Although the court has *grave doubt* about the validity of the contention, it was left for the trial court to determine whether or not it amounts to a defense.” (Emphasis supplied)

It is axiomatic that a resulting trust arises when there is a transfer of property under circumstances showing that the transferee was not intended to take the beneficial interest. Restatement Trusts, Section 404. It has been termed an “intention enforcing” trust to distinguish it from the other type of implied trust, the constructive or “fraud rectifying” trust. There is no claim that fraud was involved when the property was taken in joint tenancy. Likewise, there are *no* allegations in defendant’s answer or counterclaim in which it is claimed

that it was intended at the time of the creation of the joint tenancy that defendant was to be the beneficial owner of the entire property. In *Neill v. Royce*, Utah, 120 P. 2d 327 it is stated:

“However, at all times where an expressed intention appeared on the face of the instrument indicating a joint tenancy, equity would allow the joint tenancy to prevail.”

In *Lundgreen v. Lundgreen*, Utah, 184 P. 2d 670 it is stated:

“The most widely accepted view is that the property passes as a gift inter vivos, provided there is donative intent and delivery. *Christensen v. Ogden State Bank*, 75 Utah 478, 286 P. 638.”

“Where however, the parties have entered into and expressed a writing a complete agreement which is clear as to intent and purpose of the deposit, the intent so expressed will be given effect unless the instrument is successfully attacked for fraud, mistake, incapacity, or other infirmity, or unless it is shown by “clear and convincing proof” that the parties intended to have a different effect from that expressed.”

It is therefore, apparent that the joint tenancy deed from defendant to Martin F. Dubin was ambiguous and may not be varied by parol evidence. In *Anderson v. Cercone*, 180 Pac. 586, 588, Utah, it is stated:

“We are not unmindful of the rule that to establish a resulting trust . . . in favor of

one who furnished purchase money, public policy and the safety and security of titles to real estate, demand that the proof be scrutinized with great caution, and that it be clear, definite, unequivocal, and conclusive. (Citing *Chambers v. Emery*, 13 Utah 374, 45 Pac. 192)”

In the instant case the pleadings are completely devoid of *any* allegations upon which a resulting trust can be predicated. In 13 Cal. Jur. 2d Section 13 Cotenancy, P. 299 it is said:

“Extraneous Matter to Change Character where the effect of the agreement is to create a joint estate extraneous evidence cannot be introduced to change the terms or legal effect of the agreement (*Gurnsey Estate*, 177 C. 211 170 P. 402). Hence, oral declarations of the joint tenants may not be shown to establish a different estate. Nor is the former character of the property in such a case of any consequence to alter the declaration of it as joint tenancy property (*Kennedy vs. McMurray*, 169 C. 287, 146 P. 647).”

#### B. FAILURE OF PROOF ON DEFENDANT'S COUNTERCLAIM OR DEFENSE.

##### POINT III.

DEFENDANT FAILED TO PROVE HER ALLEGED CAUSE OF ACTION OR DEFENSE UNDER THE FRAUDULENT CONVEYANCE ACT, AT 25-1-8 UTAH CODE ANNOTATED, 1953, OR ANY CAUSE OF ACTION TO ESTABLISH A RESULTING TRUST.

In equity cases, such as the instant case, the Supreme Court has authority to review the evidence and reverse the judgment on the facts. Art. VIII,

Section 9, Utah Constitution. *Givan vs. Lambeth*, May, 1960, Utah, 351, P. 2d 959, 10 Utah 2nd, 287. The party seeking to set aside a conveyance on the ground of fraud has the burden of proving a fraudulent conveyance, which requires clear and convincing proof. *Barker vs. Durham*, Utah, 1959, 342 P. 2d, 867, 9 Utah 2d 244. It is a maxim of our law that honesty is presumed. The burden of proving fraud is on the party alleging it, and it is a heavy burden. Circumstances which are merely suspicious are not enough to render a conveyance fraudulent. All of the elements must be supported by very substantial proofs. *Columbia International Corporation vs. Perry*, 344 P. 2d 509.

Even if it be assumed that a cause of action was pleaded under the Fraudulent Conveyance Act or to establish a resulting trust, the record is devoid of evidence to support either cause of action. As hereinafter discussed, certain findings necessary to support either action were not made. However, the findings that were made by the trial court are not supported by substantial evidence and in most cases are not supported by *any* evidence.

Finding No. 4 states in part that Exhibit No. 4, a lis pendens applicable to Cause No. 123578 (the second divorce action filed December 8, 1959) was recorded at 1:45 P.M. on December 8, 1959. There was no competent evidence presented as to the re-



ording time. Plaintiff stipulated to the admission of said exhibit but he specifically stated that he was not stipulating to the recording time since it appeared on its face to have been altered (T.R. p. 30). No evidence was put on by defendant to verify the recording time. Plaintiff alleged in his complaint that the recording time was 11:45 A.M. which would be before the time when the complaint mentioned in the lis pendens was filed. This claim by plaintiff was based upon his personal inspection of the files in the County Recorder's office on December 8, 1959.

The findings of the trial court (Finding No. 4) that the \$12,000.00 down payment was paid from the funds of the defendant which she acquired before her marriage and that Martin F. Dubin had made no payments in connection with said property is irrelevant and there is no substantial evidence or any evidence to support such findings. It was admitted in the pleadings that the property was taken by defendant and Martin F. Dubin in joint tenancy. *There was no allegation of any fraud connected with the creation of such joint tenancy and there was no allegation that the joint tenancy deed did not accurately set forth the intention of the parties when said deed was executed.* It was not until several weeks before the trial of the instant action before defendant claimed that she was the equitable

owner of the property. This claim was embodied in paragraph 9 of the Amended Pre-Trial Order but, significantly, the entire pleadings are devoid of any facts upon which such a conclusion can be based. The trial court at the Pre-Trial expressed “grave doubt about the validity of this contention.” As heretofore discussed to allow evidence to be presented on this contention does violence to the parol evidence rule. However, we need not reach that point since there was no competent evidence presented to establish and prove such contention. It is to be noted that defendant in her amended complaint in the first divorce action (Civil No. 119467), claimed in paragraph 5 that plaintiff accumulated the *real property prior to* her marriage to Martin F. Dubin, while the Pre-Trial order in said action states (p. 2) that she claims the \$12,000.00 was from earnings she made *during* her marriage to Martin F. Dubin. She further claimed in said Pre-Trial Order that she “*contributed*” said \$12,000.00 to build up an equity in the home. In her Answer to Interrogatory #15 in Cause No. 119467 she claimed that the monies were accumulated *prior to* her marriage to Martin F. Dubin. Where the parties have expressed in writing a complete argreement which is clear as to intent and purposes, the intent so expressed will be given effect unless the instrument is successfully attacked for fraud, mistake, incapacity, or other infirmity, or unless it is shown by clear and convinc-

ing proof that the parties intended the instrument to have a different effect from that expressed. *Neill vs. Royce*, 120 P. 2d 327, Utah. And it cannot be said that defendant did not present all the evidence at her disposal to establish such ownership. At the trial the Court asked defendant's counsel, Dean Conder, "Are you satisfied with the evidence on your counterclaim?" Mr. Conder replied: "I am, your honor." (T. R. p. 35)

Finding No. 2 states that defendant claimed in the suit filed in December, 1959, all of the right, title and interest in and to the real property. She did not claim that she owned all of the property or that she had a presently existing right to the property, or that the original joint tenancy deed was void. Rather, her complaint in both divorce actions merely alleged the circumstances surrounding the creation of the joint tenancy. Nowhere was it claimed in the divorce actions that she was the complete owner of the property. Rather, she sought to invoke the court's discretion to award to her all of the property as a result of the divorce action. This is quite different than saying that she claimed a "right" to the property above and beyond what the court might do with the property in resolving a division of property. In her divorce action she, in one instance, claimed that she "contributed" the property as hereinabove stated. The testimony of the plain-



tiff in the instant action was *not* to effect that he knew that defendant claimed a "right" to all of the property. His testimony dealt with his knowledge as to what defendant claimed were the *circumstances* surrounding the creation of the joint tenancy.

*C. DEFENDANT DID NOT HAVE STANDING TO BRING AN ACTION UNDER THE FRAUDULENT CONVEYANCE ACT, AT 25-1-8 UTAH CODE ANNOTATED, 1953.*

#### POINT IV.

DEFENDANT IS NOT A CREDITOR OR OTHER PERSON WITHIN THE MEANING OF THE UTAH FRAUDULENT CONVEYANCE ACT SINCE SHE WAS NOT AWARDED SUPPORT OR MAINTENANCE.

There is a scarcity of Utah case authority construing the meaning of the words "creditor" or "other person" as used in the Fraudulent Conveyance Act. At Common Law there was a split of authority as to whether or not a wife or child by virtue of right to support could maintain an action to set aside a fraudulent conveyance without reducing the claim to judgment. With the adoption of the Uniform Fraudulent Conveyance Act the claim of the creditor or other person can be matured, unmatured, liquidated, unliquidated, absolute, fixed or contingent. *However, there still must be a "claim" of some type.* In the instant case it is to be noted, significantly, that the counterclaim was not filed until *after* the divorce action had been decided. If we assume that Utah law recognizes a "claim" in the wife due

to her right to support or maintenance it is then necessary to ascertain whether or not defendant at the time of the filing of her counterclaim had such a "claim" to support or maintenance. It is obvious from the decree entered in the second divorce action (cause No. 123578) that defendant was not awarded alimony or support as maintenance. She was granted a divorce, her maiden name was restored and she was awarded as her sole and separate property free and clear of *any claims of the defendant Martin F. Dubin* in the described property. All she was awarded was her interest of record in one-half of the property free and clear of the claims of Martin F. Dubin. Plaintiff herein was not a party defendant to said divorce action even though under case authority defendant herein could have made plaintiff herein a party. He could not have his rights affected in his absence. It is to be noted that defendant and her two attorneys had personal knowledge of the fact that Martin F. Dubin had conveyed his interest in the property to plaintiff herein, but at the trial of the divorce action they chose to remain silent on this point when the property was being discussed and was at issue by the court. In fact an estoppel may well exist against defendant to now assert her alleged claims after once having deceived the court into a mistaken belief as to the status of the legal title to the property. A case squarely in point is

*Adamson v. Adamson*, 55 Utah 544, 188 Pac. 635, in which proceedings for divorce were not contested and a decree was entered in favor of the wife. There was no alimony awarded and no child support. Prior to the divorce action the husband and wife were joint owners of real property. In the action seeking to set aside a conveyance made by the husband of his interest to his father just before the commencement of the divorce action, the wife alleged that conveyance was fraudulent in that it was made to defraud her of some \$2,300 owing to her by the husband and of any alimony that might be awarded to her by the court. The property had a value of \$2,500 and it was conveyed to the husband's father for \$1,250, payable \$250.00 in cash and in two installment payments of \$500 each over a two year period. The lower court held against the wife, stating that the complaint was insufficient as a creditor's bill since it didn't show that the wife had procured a judgment or that the husband was insolvent. The appellate court affirmed, citing *Nielson v. Nielson*, 30 Utah 391, 85 Pac. 429 and stating

“Under the authority above cited the husband had the right to sell his interest subject only to his wife's one-third interest in case she continued to be his wife and survived him.”

The instant case is even stronger in that Martin F. Dubin did not owe his wife any money at the

time of the conveyance as in the *Adamson* case and he did not owe or was he obligated to pay his wife alimony after his wife's divorce decree was granted.

In *Tully v. Tully*, 137 C 60, 69 P. 700 and *Clopton v. Clopton*, 162 C 27, 121 P. 720, it is said:

“It is only to the extent that the wife's *right to support* has been affected by the transfer that she has any legal ground of complaint entitling her to avoid the transfer.”  
(Emphasis supplied)

It is to be noted that in the *Clopton* case there was no consideration for the transfer. In *Murray v. Murray*, 115 C 266, 47 P. 37 it is held that even a fraudulent transfer should not be set aside any further than is necessary to secure the *maintenance* allowed the wife by the court and any property not needed for such security should be restored to the transferee. See also *Huellmantel v. Huellmantel*, 124 C 583, 57 P. 582 where there was a fraudulent transfer but the court held that the interest of the grantee may be adjudged to be subject only to the wife's lien for alimony, counsel fees, and legitimate costs.

In the instant case it is the position of plaintiff that the conveyance was not fraudulent but that under the facts of the instant case it would not make any difference in any event due to the fact that at the time of defendant's counterclaim she was not a “creditor” or “other person” since there was no

“claim” of any type that she might or could assert against Martin F. Dubin. When she failed to secure alimony or support any claim that she might have had was destroyed. In *Parker v. Parker*, 148 Ga. 196, 96 SE 211 it was held that a plaintiff wife’s right to have a conveyance cancelled is dependant on her right to a judgment for alimony. In *Arteaga v. Arteaga*, 169 Ga. 595, 151 SE 5 it was held that since the wife couldn’t get a decree for alimony (the husband had died) she couldn’t set aside a fraudulent conveyance. See also *Draper v. Draper*, 68 Ill. 17, where it was held that a conveyance by the husband to his brother pendente lite, in order to defraud his wife in her claim or alimony, was fraudulent only to the extent of the claim for alimony, and that it was error to set aside the conveyance. In *Sorrells v. Sorrells*, 162 Ga. 734, 134 SE 76 an action for divorce was filed and then there was a reconciliation. Husband then died and wife sought to set aside a conveyance because it was allegedly in fraud of her claim for alimony. The court held that since death of husband made award of alimony impossible equity has no jurisdiction or power to cancel the deed. See also *Wallace v. Wallace*, 189 Ga. 220, 5 SE 2d 580 where it was held that the wife was not a “creditor” if the husband wasn’t in default in alimony payments. In the instant case no alimony payments are possible. For a general



discussion of the wife's right to maintenance or alimony as within protection or rule avoiding conveyances or transfers in fraud of creditors or persons to whom maker is under a legal liability. See annotation at 79 ALR 421.

*D. FAILURE TO FIND ON MATERIAL ISSUES.*

POINT V.

THE COURT FAILED TO FIND ON MATERIAL FACTS OR ISSUES UNDER AN ACTION BASED ON THE FRAUDULENT CONVEYANCE ACT AT 25-1-8, UTAH CODE ANNOTATED, 1953.

It is reversible error for the court to fail to make findings of fact on material issues. Under the Fraudulent Conveyance Act certain essential elements must be found. In the instant case the following findings were not made by the court:

1. That Martin F. Dubin did or did not have a fraudulent intent to delay, hinder or defraud creditors or other persons when the conveyance was made.

2. That defendant was or was not a creditor or other person under said act.

3. That the conveyance to plaintiff was or was not for a fair consideration as defined at 25-1-3, Utah Code Annotated, 1953.

4. That plaintiff was or was not a purchaser for a valuable consideration within the meaning of 25-1-13, Utah Code Annotated, 1953.

5. That plaintiff did or did not have notice of the fraudulent intent of his grantor or of the fraud rendering void the title of such grantor.

6. The value of the land conveyed.

7. The value of the consideration paid to Martin F. Dubin by plaintiff.

These findings were not made even though defendant's counsel stated in open court that he was satisfied with the evidence.

#### POINT VI.

ASSUMING THAT DEFENDANT'S ANSWER AND COUNTERCLAIM SET FORTH A CAUSE OF ACTION TO ESTABLISH A RESULTING TRUST THE COURT FAILED TO FIND ON MATERIAL FACTS OR ISSUES.

As heretofore stated an action to establish a resulting trust has been called an "intention enforcing" cause of action. In the instant case the court failed to make the following findings:

1. That at the time of the execution of the joint tenancy deed the parties did or did not intend to create a joint tenancy with all its incidents of ownership.

2. What was the intention of the parties when the joint tenancy deed was executed.

3. What portion, if any, of the interest in the land is subject to a resulting trust.

4. What were the respective contributions of the parties to the consideration paid for the property.

*E. EFFECT OF INSTITUTION OF DIVORCE  
PROCEEDING BY WIFE.*

POINT VII.

THE INSTITUTION OF A DIVORCE ACTION DOES NOT PUT THE PROPERTY INTO THE CUSTODY OF THE COURT AND DOES NOT PREVENT THE EXERCISE OF THE HUSBAND'S POWERS OVER THE PROPERTY.

In the leading case of *Sun Insurance Co. v. White*, 123 C 196, 55 P. 902 it was held that the pendency of proceedings for divorce does not of itself interrupt the exercise of the husband's power of disposition of the community property or of his separate property though he is held to good faith. The Sun case cites *Lord v. Haugh*, 43 Cal. 581 and states:

“The pendency of proceedings for divorce does not of itself interrupt the exercise of the husband's powers. The property does not come into the custody of the court by institution of the suit. The husband has still the control of it and full power of disposition of it. He is held to equal good faith in all transactions relating to it as before the commencement of the action.” (Emphasis supplied)

See also *Estate of Harris*, 9 C 2d 649, 659 where it is stated:

“It is one of the incidents of a joint tenancy that either joint tenant may convey his separate estate by way of gift or otherwise without the approval or consent of his other joint tenant and upon such conveyance the



joint tenancy is terminated. (*Delaney v. Delaney*, 216 Cal. 23, 13 P. 2d 513)”

See also *Adamson v. Adamson*, 55 Utah 544 188 Pac. 635 and *Nielson v. Nielson*, 30 Utah 391, 85 Pac. 429 wherein it is held that the husband had the right to sell his interest subject only to his wife's one third interest in case she continued to be his wife and survived him.

*F. ATTORNEY'S FEES AS CONSIDERATION FOR A CONVEYANCE.*

POINT VIII.

A CONVEYANCE MADE TO THE HUSBAND'S ATTORNEY IN A DIVORCE ACTION IS AS VALID AS ANY OTHER CONVEYANCE MADE FOR VALUABLE CONSIDERATION AND WITHOUT INTENT TO HINDER, DELAY OR DEFRAUD CREDITORS OR OTHER PERSONS.

In the instant case the trial court suffered under the misapprehension that in order for plaintiff to prevail he must be “innocent of her (defendant) rights” (T. R. p. 34). The “right” the trial judge made reference to was defined by him as “a right to have this property disposed of in the divorce action” (T. R. p. 34). The court did not bother to make a determination as to whether or not the plaintiff's grantor had a fraudulent intent or whether or not plaintiff had knowledge of such fraudulent intent. The court likewise was not concerned as to whether or not the consideration paid by plaintiff to his grantor was fair. Apparently, the trial

court's view of the fraudulent conveyance statute is that if a purchaser knows that his grantor is being divorced and knows that the wife is seeking an interest in the property that the conveyance to such purchaser is void and it is immaterial that: (1) there was valuable and fair consideration for the transfer (2) there was no fraudulent intent by the grantor (3) there was no knowledge by grantee of any fraudulent intent of his grantor, or (4) that the wife may or may not be a "creditor" or "other person" under the statute. By no stretch of the imagination can it be said that the state of the law is as held by the trial court. Under the theory advanced by the trial court no creditor or potential creditor of the husband could ever deal effectively with the husband if such creditor knew of the divorce action. In the instant case plaintiff had rendered approximately one and one-half years legal services to his grantor in connection with the involved and complex divorce actions and in connection with his grantor's business and practice in California. The grantor testified that it was agreed that said fee was reasonably worth \$3,000.00 and that plaintiff was the one who requested the conveyance. Can it be said that plaintiff should be discriminated against as a creditor merely because he happens to be grantor's attorney and has been willing to permit the amount of the bill for legal services

to increase substantially because his grantor is just commencing the practice of medicine? At the trial plaintiff attempted to point out to the court that there were many cases (which plaintiff was ready to cite) in which a conveyance to an attorney who represented a grantor in a divorce action was held not fraudulent and entirely proper. Upon attempting to do so the court showed its prejudice and failure to understand the principles of the Fraudulent Conveyance Act when the court stated without any justification: (T.R. p. 35)

“THE COURT: If you were a member of this Bar, I would recommend to the Disciplinary Commission that you be brought before them for discipline. That is what I would do as far as the case is concerned, but being a member of the State of California Bar we are not concerned with your law practice. I would suggest as far as you are concerned, your ethical morals are pretty low.”

It is to be noted that the very judge making said statement is the same judge who apparently was not at all concerned that at the defendant's divorce trial, over which he presided, two attorneys representing defendant, as officers of the court failed to disclose the material fact that the interest of Martin F. Dubin as a joint tenant in the property had been previously quit-claimed to plaintiff! Normally matters such as the court's remarks to plaintiff would not be included in a brief such as this, but

in view of the seriousness and severity of the court's comments and the complete lack of foundation (based upon applicable law) the plaintiff as a member of the Bar and a proud member of his profession feels that it is necessary to call the matter to the court's attention.

There are innumerable cases in which a conveyance made to an attorney has been held entirely proper. In point is the following quotation from 16 Cal. Jur. 2d Section 250 Divorce and Separation: "In the absence of actual fraud, a transfer by a husband to a creditor in consideration of the extinguishment of an antecedent indebtedness is not an unlawful preference that can be set aside by the wife seeking divorce."

For an excellent annotation discussing attorneys fees as affecting conveyance for value and consideration see 45 ALR 2d 514. In *Thiess v. Thiess*, 111 Nebraska 805, 198 NW 151 a mortgage was given to attorneys for services to be performed and at that time performed. The attorneys had appeared twice in the Superior Court in the divorce action and twice in the district court. The fees were held to be in an amount not exceeding a reasonable fee for services which might reasonably be anticipated. The court upheld the validity of the mortgage citing *Farmers' and Merchants' Bank v. Mosher*, 63 Nebraska 130, 88 NW 552, where it is stated:

“An insolvent debtor has the right to employ attorneys to defend his estate and himself and to transfer his property in payment of such contemplated services, provided it is done in good faith and the property transferred does not exceed a reasonable fee for the service which might be reasonably anticipated.”

In the instant case the conveyance was for past services, cash and the execution of a promissory note for \$5,000.00 which plaintiff and his grantor testified together approximated one-half of the equity defendant and plaintiff's grantor had in the real property. The mortgage was also assumed. For other cases upholding conveyances involving attorney's fees see: *Reina v. Erossarret*, 90 Cal. App. 2d 1, 203 P. 2d 72; *Morroquin v. Barriall*, 345 P. 2d 30, 175 Cal. App. 2d 540 and *Reinheimer v. Rhedans*, 327 SW 2d 823 (1959). See also *Hedden v. Waldeck*, 9 Cal. 2d 631, 72 Pac. 2d 114 wherein a deed conveying real property to an attorney in payment for services was upheld against the contention that the purpose of the transfer was to prevent collection of a judgment subsequently obtained in a suit against the grantor pending at the time of transfer.

Plaintiff calls the court's attention that in *Adamson v. Adamson*, Utah, 55 Utah 544, 188 Pac. 635, a divorce action, the grantee (father of the husband) knew of the divorce action and paid \$1,250, one-half the value of the property for a

one-half interest therein, payable \$250 in cash and remainder in two installments of \$500 during a two year period. The court said that the installment method of payment was proper. The court's attention is also called to the leading case of *Sun Insurance Co. v. White*, 123 C 196, 55 P. 902 in which a lis pendens was filed and in which the plaintiff grantee had actual notice of the divorce action. The conveyance was there upheld.

In *Lewis v. Lewis*, 1954, 210 Ga. 330, 80 SE 2d 312, a husband conveyed a house and lot to his attorney for \$500 attorney's fees, a note for \$700 and assumption of loan against the property. The court therein stated: "As to whether the defendant Graham knew or had reasonable ground to suspect the fraudulent intention of the husband — this issue likewise was one for the jury. The fact that the conveyance was one from a client to his attorney does not of itself show that the transaction was fraudulent, but such a transaction was subject to a more careful scrutiny than one between strangers." The court pointed out that the jury could consider the fact that the attorney didn't look at the premises or make an independent examination of the value of the husband's equity. In the instant case plaintiff and his grantor testified that they both inspected the property and visited Deseret Federal Savings and Loan Association to determine the amount still owing on the mortgage.



See also the recent Utah case of *Givan v. Lambeth*, Utah, May, 1960, 10 Utah 2d 287, 351 P. 2d 959, wherein Chief Justice Crockett states that the evidence can be reviewed by the Supreme Court and in which a transaction between close relatives was upheld.

G. *LIS PENDENS*.

POINT IX.

THE LIS PENDENS ARE NOT MATERIAL TO A DETERMINATION OF THE ISSUES.

It is the position of plaintiff that the lis pendens are not material to a determination of the issues of the case since plaintiff stipulated in open court that he had full knowledge of the pleadings in the first action. As attorney of record along with E. R. Callister and then Walter Budge plaintiff knew full well the claims asserted by defendant. However, under the case authority herein cited such knowledge is immaterial if in fact the conveyance was made without fraudulent intent on the part of the grantor or without knowledge by grantee of the fraudulent intent of his grantor. Mere knowledge of the claims of defendant is not tantamount to a finding that the grantor had a fraudulent intent or that grantee had knowledge of such fraudulent intent. True, such knowledge of defendant's claims may be a factor to be considered in determining intent but such knowledge per se is not tantamount to fraudulent intent.

It is to be noted, however, that the deed of December 7, 1959, under which plaintiff claims his interest was executed, delivered and recorded prior to the lis pendens filed on December 8, 1959. The earlier lis pendens is ineffective since the action was dismissed. It has been held that where the action is not prosecuted to judgment but instead is settled or dismissed, the subsequent purchaser or encumbrancer is unaffected by the lis pendens, for he takes subject only to a judgment concerning the title. *Alson v. Cornwell*, (1933) 134 CA 419, 427, 25 P. 2d 879; *Harris v. Whittier B. & L. Association* (1936) 18 CA 2d 260, 266, 63 P. 2d 840.

The lis pendens is incidental to the action in which it is filed, and is ineffective to give notice of a future, though similar action. *Garcia v. Pinhero*, (1937) 22 CA 2d 194, 70 P. 2d 675.

## CONCLUSION

The trial court has erred in a number of particulars, any one of which require a reversal and a judgment in favor of plaintiff on his complaint for partition of real property and an accounting of rental income. The judgment should be reversed with judgment in favor of plaintiff and a retrial should not be ordered since defendant stated in court that



she was satisfied with the evidence presented on her counterclaim. A retrial will cause hardship on plaintiff due to his residence outside the State of Utah.

Respectfully submitted,

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