

1992

# Juanita Wintle v. Georgia Ferguson : Brief of Appellant

Utah Supreme Court

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BRIEF

1.9

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DOCKET NO. 920231

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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JUANITA WINTLE,	/	
Plaintiff/Appellee,	/	Case No. 920231
		860996935
vs.	/	
GEORGIA FERGUSON aka	/	
GEORGIA CARBAJAL,	/	Priority No. 16
Defendant/Appellant.	/	

---

BRIEF OF APPELLANT

---

APPEAL FROM SECOND JUDICIAL DISTRICT COURT  
OF WEBER COUNTY, STATE OF UTAH  
THE HONORABLE DAVID E. ROTH, DISTRICT COURT JUDGE

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**FILED**

AUG 11 1992

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UTAH

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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### STATEMENT OF JURISDICTION

Jurisdiction to hear this appeal is vested in the Supreme Court of the State of Utah, pursuant to Utah Code Annotated, §78-2-2(3)(j) (Supp, 1992), which states:

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(j) orders, judgments, and decrees of any court of record, which the Court of Appeals does not have original appellate jurisdiction.

### STATEMENT OF ISSUES ON APPEAL AND STANDARD OF APPELLATE REVIEW

1. Did the trial court error by permitting the plaintiff to proceed on different claims, when such claims were first presented to the court at the time of trial when no prior request to amend the pleadings had been made by plaintiff and defendant/appellant objected to such amendment at such late date.

THE STANDARD OF REVIEW Where the lower court is given broad discretion to permit leave to amend pleadings, the Appellate Court does not disturb such ruling unless the appellant establishes an abuse of discretion resulting in prejudice to appellant. Chadwick v. Nielsen, 763 P2d 817 (Utah App., 1988).

2. Did the District Court error in making an equitable determination that a constructive trust exists and that the existence of such constructive trust was established by clear and convincing evidence.

THE STANDARD OF REVIEW Where the District Court is making an

equitable determination, it is the duty of the Supreme Court on appeal of an equity case to weigh the facts as well as to review the law. Jensen v. Brown, 639 P2d 150 (Utah, 1981) Reed v. Alvey 619 P2d 1374 (Utah, 1980); Matter of Hock's Estate, 655 P2d 1111 (Utah, 1982); Adams v. Gubler, 731 P2d 494 (Utah, 1986).

It is further the duty and prerogative of the Supreme Court to review both the law and the facts and to consider the weight and sufficiency of the evidence where the proceeding to be reviewed is in equity and is an attempt to establish an interest in land where legal title is vested in another. Richens v. Struhs, 412 P2d 314 (Utah, 1966).

DETERMINATIVE CONSTITUTIONAL PROVISIONS,  
STATUTES AND RULES

There are no constitutional provisions, statutes or rules which are applicable and determinative of the issues presented in this case.

STATEMENT OF THE CASE

The plaintiff/appellee herein commenced a quiet title action on or about August 1, 1986, alleging a fraudulent deed and/or invalid delivery. (R. 1-5)

Subsequent to the death of the plaintiff/appellee, Larry Wintle, was substituted as plaintiff in the above entitled matter by order of the court, dated April 21, 1988. (R. 21) The matter came on regularly for trial before the Honorable David E. Roth on the 18th day of March, 1991, at which time the plaintiff/appellee herein presented its case, under an



amended claim (TR. 3-5) despite objection by defendant/appellant (TR. 5-6).

The court declared that it was not going to decide this case without seeing the deposition of the decedent, Juanita Wintle (TR. 54) and at the conclusion of the case reserved ruling on motions pending submission of the deposition (TR. 97-99).

After receiving the unsigned original deposition of Juanita Wintle, the court issued a Memorandum Decision dated February 13, 1992, finding a constructive trust was created and each of Juanita Wintle's four (4) children were entitled to an equal share of this parcel of real property. (R. 91-93)

Judgment in favor of the plaintiff and against the defendant was entered by the court on or about March 31, 1992, (R. 111-112) from which the defendant filed the instant appeal on the 29th day of April, 1992. (R. 114)

#### STATEMENT OF FACTS

The plaintiff, Juanita Wintle, filed a Quit Claim Deed with the Weber County Recorder's Office on July 9, 1979, wherein Juanita Wintle, did quit claim to Juanita Wintle and Georgia Carbajal as joints tenants with full rights of survivorship, certain real property located in Weber County, State of Utah. (R. 75)

This action was commenced by non-verified Complaint on August 1, 1986, alleging same to be a quiet title action based

upon a fraudulent deed or delivery. (R. 1-5)

Additionally, a Lis Pendens was signed, filed and recorded on November 3, 1986, by plaintiff's attorney, Douglas M. Durbano. (R. 70)

After the defendant/appellant herein, filed an Answer to plaintiff's Complaint on September 15, 1986, (R. 8) the plaintiff's own deposition was scheduled through her attorney (R. 10) for the 16th day of October, 1986. (Dep. 1)

Other than the substitution of Larry Wintle and Brent Wintle as personal representative, no discovery was undertaken by either party, which is evidenced by the lack of any documentation in the file showing any discovery being undertaken.

Plaintiff filed a witness and exhibit list and Notice of Use of Loss of Deposition on or about March 4, 1991. (R. 66-67) which indicated the plaintiff intends to have the deposition retyped, published and used at trial on March 18, 1991 pursuant to the Utah Rules of Civil Procedure. (R. 64)

The above entitled matter did come on regularly for trial before the Honorable David E. Roth, Judge of the above entitled court, sitting without a jury on March 18, 1991, and in plaintiff's opening statement counsel indicated the plaintiff would be presenting evidence to show a purchase money resulting trust or a constructive trust. (TR. 4)

Upon plaintiff presenting its opening statement and its intent to produce evidence on amended claims, defendant

objected to the plaintiff proceeding upon such claims, five (5) years after the lawsuit was instituted when such claims had not been presented previously and defendant indicated witnesses had been brought from the State of New Mexico on the basis of plaintiff's Complaint. (TR. 5-6)

Plaintiff's counsel indicated it could proceed by virtue of The Matter of the Estate of Hock, 65 P2d 1111, and the court indicated that it would reserve ruling on the objection since it did not have the Hock's case referred to by plaintiff's counsel, (TR. 7) when in fact the Hock's case does not discuss amendment of pleadings.

Brent Wintle, the substituted Personal Representative and one of the four heirs of Juanita Wintle's estate testified to a conversation between himself, Brent Wintle and his deceased mother, Juanita Wintle, as follows:

She told me she was intending on doing that and that Georgia would, at the time of her death, divide the house up amongst all four of us, but she wanted to provide Georgia with a place to live, because she was divorced and had no place to stay.  
(TR. 13)

The defendant objected to such testimony pursuant to Rule 601(c) of the Utah Rules of Evidence related to trustworthiness and corroboration to which the court indicated it would allow such statements and the weight to be given such statements could be argued. (TR. 14-15)

Brent Wintle further testified after six or eight months, Georgia moved to an apartment in South Ogden and he did not discuss any joint tenancy arrangement with his mother again,

until 1986, when Juanita Wintle wanted to sell such property.  
(TR. 17)

Brent Wintle further testified that he did not know the Quit Claim Deed had been prepared and recorded until 1986.  
(TR. 24)

While Larry Wintle a son and heir to Juanita Wintle's Estate was testifying and was asked a question relating to the deposition of Juanita Wintle taken in October, 1986, the court after defendant objected to Larry Wintle testifying to what Juanita Wintle said in her deposition, declared:

**The court: "Why don't I tell you right now I am not going to decide this case, without seeing that deposition."**

**Mr. Carmichael: "I can get ..."**

**The court: "Finish the evidence. I am going to see the deposition before I make a decision."**

The plaintiff also called Georgia Carbajal Ferguson as a witness who testified she felt it was in her mother's best interest to keep the house in case of medical problems and that older people are better off in their own homes unless they cannot be there any longer. (TR. 60)

Georgia Ferguson, appellant herein, also testified Juanita Wintle told her she brought this lawsuit because of her sons, and that she really wanted Georgia Ferguson to have the house. (TR. 61)

Georgia Ferguson also testified her mother, Juanita Wintle, indicated subsequent to requesting the property back, she didn't want it back any more. (TR. 64)

Georgia Ferguson testified she was married on May 30, 1979 in Covington, Kentucky to Truman Ferguson and she remained with him in Carlisle, Ohio until November, 1979 when they moved back to the State of Utah. (TR. 62-63) Defendant's marriage certificate was brought to court and was stipulated to as May 30, 1979 by plaintiff so that it would not be necessary for her to surrender the actual certificate. (TR. 63)

The defendant further testified on July 9, 1979, approximately six (6) weeks after her marriage, which is the date that the Quit Claim Deed was recorded, she was residing in Carlisle, Ohio with her husband, Truman Ferguson and had nothing to do with the recording of the Quit Claim Deed. (TR. 64)

At the close of the plaintiff's evidence, plaintiff indicated Juanita Wintle's deposition would be available within two months (TR. 70) and the defendant-appellant herein, motioned the court to dismiss plaintiff's complaint because the allegations contained in the plaintiff's complaint had not been established, and secondly, upon the basis that the plaintiff had not met its burden of clear and convincing evidence to establish either type of trust referred to in plaintiff's opening argument. (TR. 71-72)

The court thereupon indicated it would take defendant's motion to dismiss under advisement by virtue of the "haphazard" way this case has finally ended up in court. (TR

72) Defendant expressed concern with respect to how the deposition testimony which was not presented at the time of trial would effect defendant in presenting her case. (TR. 72-73)

Sheila Willie was called as a witness by defendant and testified as follows:

**Q: When you say she told you about her kids and her grandkids, what did she say?**

**A: Well, at one time when we were talking, she told me that she did not want any of her other kids having anything because none of them cared anything about her, except for Georgia. And she was the only one that ever did anything for her. She was the only one there when she needed her.**

**Q: Okay, now when she was making this statement there in the hospital, was she... in your opinion, was she able to understand what she was saying?**

**A: Yes, she knew what she was saying. She was coherent. She knew. (TR - 76)**

Ginger Millikan testified to a conversation in Easter of 1978, when Juanita Wintle had told her she wanted everything to go to Georgia and her kids. (TR. 80)

Larue Loock testified Juanita Wintle had told her she had signed the property over to Georgia and that she wasn't going to tell anybody about having done so. (TR 82-83)

Georgia Ferguson then testified Juanita Wintle, with whom she spoke to daily during her lifetime including when the lawsuit was proceeding, told her before her deposition of October, 1986, what she (Juanita Wintle) was going to say:

**A: She said she was going to say that she put it my name so the house did not go through probate**

or something like that. I think that's what Larry... you know, I don't know anything about probate myself so I am naive on it. She was going to say she didn't know Ginger and Austin and Willy Taylor. That she had only met them once. And where she had spent a lot of time at their homes. I said mother that is perjury, and you can't do that. She said I have to because Larry is going to be with me at the deposition and I don't want him to be mad at me. (TR 90-91)

Defendant further testified Juanita Wintle after the deposition stated that she would never sign the deposition because she did lie on it. (TR. 91)

During the trial, the Last Will and Testament of Juanita Wintle was admitted as evidence without objection. (R 76-82)

Juanita Wintle provided in her Will:

"The personal representative of my estate shall be reimbursed from my estate for any and all legal and related expenses incurred in legal action filed on my behalf entitled "Wintle v. Ferguson", filed in the Weber District Court, Civil Number: 96935."

The Will also provided as follows:

1. INCLUDED PROPERTY. It is my intent that all of the assets of which I may be possessed at my death, including all items of real, personal and mixed property, including all insurance policies which should be located with this Will, shall be included in the estate contemplated by this, my Last Will and Testament. (R 77-78)

Such Will was signed on December 17, 1986, and was witnessed by Douglas M. Durbano, who was also her attorney in this proceeding at that time. Such Will was signed approximately one and one half months after the original deposition was prepared for signature by Juanita Wintle and such deposition was never signed by Juanita Wintle (Dep. 35)

and no explanation other than the explanation advanced by defendant that she would not sign the Will has ever been presented.

Plaintiff/appellee's attorney submitted the original deposition of Juanita Wintle on or about December 11, 1991, approximately nine (9) months after the trial of March 18, 1991 (R. 104) and the court issued its Memorandum Decision, dated February 13, 1992. (R. 91-93)

With respect to the unsigned deposition of Juanita Wintle, (which was conducted on October 16, 1986) and which was noticed for hearing through her attorney, (Dep. 4) Juanita Wintle testified Georgia Ferguson lived with her for approximately six (6) months and that she was living with her at the time she signed the Quit Claim Deed, (Dep. 7) which is contrary to the evidence because of defendant's marriage in Kentucky.

Juanita Wintle also testified in her deposition she remembered going down to the Weber City and County Building and signing the Quit Claim Deed. (Dep. 10)

Juanita Wintle also testified Georgia Ferguson did not exert any pressure on her to prepare or record the Quit Claim Deed. (Dep. 16)

Juanita Wintle also stated she had told "the lady" at the City and County Building that she wanted Georgia's name on the deed with her and the Deed was prepared there in the City and County Building that same day by the lady that was in charge



at the Weber County Recorder's Office. (Dep. 17-18)

After such document was prepared, she indicated she signed it and had it recorded.

Juanita Wintle testified additionally as follows:

Q: (Mr. Perkins) You knew at the time, didn't you Mrs. Wintle, that when you put Georgia's name on it, that when you died, it went to Georgia?

A: No I didn't.

Q: Now..

A: I knew it would go to Georgia, but she was supposed to, like a said, supposed to have sold it and divided it equally. (Dep. 25-26)

Juanita Wintle was further asked the following questions and gave the following responses:

Q: That's not my question, though Ma'am. My question is, if you would like me to repeat it, is that you knew that you were signing a document that put the property in your name and Georgia's name, didn't you?

A: Yes.

Q: And you knew that it was being recorded that day, because you signed it right there at the county building, right?

A: Yes.

Q: And it is just that now... and at that time you trusted Georgia?

A: That's right?

Q: And now you don't trust Georgia?

A: That's right.

Q: But at the time you signed it and when you signed it in 1979, at that time, you knew that you were conveying it in Georgia's name?

A: Yes.

**Q: And she didn't lie to you about anything regarding you signing it, did she?**

**A: No. (Dep. 31-32)**

**SUMMARY OF ARGUMENT**

Defendant Georgia Ferguson asserts the lower court committed error in allowing the plaintiff to proceed on amended claims of action first presented at the time of trial.

Defendant asserts the trial court's decision to take under advisement defendant's objection to proceeding on amended claims and then rendering its decision after receiving the deposition of Juanita Wintle some nine (9) months later without considering the effect of allowing such different claim constituted an abuse of discretion and unfairly prejudiced the defendant.

Defendant asserts the plaintiff, personal representative of Juanita Wintle's estate, did not establish by clear and convincing evidence the existence of a constructive trust. The personal representative failed to establish the existence of a confidential relationship nor the existence of undue influence, fraud or inequitable conduct by the defendant herein which would justify reformation of the deed.

Additionally, the District Court made no finding of such confidential relationship but based its decision upon the unsigned deposition of Juanita Wintle who expressed an intent to avoid probate by conveying the property to herself and the defendant. Allowing the grantor, Juanita Wintle, through her personal representative to attack and impeach her own deed in

the absence of fraud, duress, mistake or other proper conduct attributable to the defendant, Georgia Ferguson constitutes further error by the trial court.

#### ARGUMENT

##### I.

#### **THE LOWER COURT ABUSED ITS DISCRETION IN ALLOWING PLAINTIFF TO PROCEED UPON A NEW CAUSE OF ACTION RAISED FOR THE FIRST TIME AT TRIAL**

The Utah Supreme Court in Girard v. Appleby, 660 P2d 245 (Utah, 1983) held where plaintiff on the morning of trial, motioned to amend the Complaint comprising new and different causes of action as follows:

Rule 15(a) Utah Rules of Civil Procedure, permits the amendment of pleadings by leave of court, and the Rule is to be liberally construed so as to further the interest of justice. However, the Rule is to be applied with less liberality when the amendments are proposed during or after the trial rather than before trial.

In Girard v. Appleby, cited supra, the Utah Supreme Court upheld the lower court's refusal to allow such amendment where such changes were a significant change in the cause of action, were not consented to by the defendant, and no reason was adduced for not timely moving to amend his claim prior to trial. Girard's inability to state an adequate reason for the untimeliness of the motion did not present a case where "justice requires an amendment".

In Lloyd's Unlimited v. Nature's Way, 753 P2d 507 (Utah App., 1988), the Court of Appeals held the second part of Utah Rules of Civil Procedure 15(b) is permissive and must be

looked at to both afford the privilege of presenting legitimate contentions pertaining to the dispute balanced with the adverse side having reasonable notice of the issues raised and an opportunity to meet them.

Similarly, in Kelly v. Utah Power and Light, 746 P2d 1189 (Utah App. 1987), the Utah Court of Appeals affirmed the lower court, which had denied plaintiff's request to amend his complaint one week prior to trial where it had been pending over three years and such request to amend within one week of scheduled trial could have required a continuance which could have prejudice consolidation in cases, specifically declaring:

In considering a motion to amend, the trial judge must decide whether the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not time to prepare. Bekins Bar V. Ranch v. Huth, 664 P2d 455, 464 (Utah, 1983).

In Chadwick v. Nielsen, 763 P2d 817 (Utah App., 1988) the Court of Appeals held it could not say the trial court had abused its discretion in denying plaintiff's motion to amend her complaint on the morning of trial, declaring:

Generally, relief to amend is liberally allowed in the interest of justice, but justice is often uninterested in amendments alleging new and different causes of action on the eve of trial. See Staker, 664 P2d at 1190; Girard, 660 P2d at 248; Utah Rules of Civil Procedure 15(a). The amendment of pleadings on the eve of trial causes great disruption to the legal process and is unfair to an opponent who has conducted discovery, fully prepared the case and scheduled trial time based on the moving party's prior pleadings.

Nonetheless, there are certainly occasions

where justice excuses untimeliness. A motion to amend raised shortly before or at trial, in response to facts discovered subsequent to the prior pleading, should be allowed if there is a reasonable explanation for the delay in discovering the facts and the amendment is not unduly prejudicial to the opposing party.

In the instant proceeding, the plaintiff commenced her lawsuit in August, 1986, and trial was not conducted until March 18, 1991, and the decedent's unsigned deposition was not presented until December 11, 1991 and plaintiff had made no motion to amend its pleadings until the morning of trial when plaintiff's counsel suggested its evidence would show the existence of a constructive and/or purchase money resulting trust to the court. (TR 3-5)

Defendant-appellant asserts the defacto permitting of such amendment of plaintiff's pleading by the lower court without having made findings upon defendant-appellant's objection to such amendment being made at trial constitutes an abuse of discretion by the trial judge who failed to consider "whether the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not time to prepare" as stated in Kelly v. Utah Power and Light, 746 P2d 1189 (Utah App. 1987).

## II.

### **THE DISTRICT COURT ERRONEOUSLY HELD THAT A CONSTRUCTIVE TRUST WAS CREATED BY JUANITA WINTLE**

Juanita Wintle, the decedent herein, in her unsigned deposition dated October 16, 1986, gave testimony she knew she was signing a document that placed the property in her name

and in the name of Georgia Carbajal, the defendant herein and that she could not recall any misrepresentations being made by the defendant herein. (Dep. 31-34)

The defendant herein presented her marriage certificate which indicated she was married on May 30, 1979 in Covington, Kentucky and she and her husband, Truman Ferguson, remained in Carlisle, Ohio, from that time until she returned to the State of Utah November, 1979 at Thanksgiving and was not in the State of Utah when her mother, Juanita Wintle signed and recorded the Quit Claim Deed on July 9, 1979. (TR. 64-65)

In Mattes v. Olearain, 759 P2d 1177 (Utah App., 1988), the Utah Court of Appeals held:

A constructive trust is an equitable remedy to prevent unjust enrichment in the absence of any express or implied intention to form a trust. In the Matter of the Estate of Hock, 655 P2d 1111, (Utah, 1982). If the challenging party establishes a constructive trust by clear and convincing evidence, the trial court may alter a deed regular in form and presumed to convey clear title. Ashton v. Ashton, 733 P2d 147 (Utah, 1987). A constructive trust may be imposed if the grantee was in a confidential relationship with the grantor.

The Court of Appeals in considering what constitutes a confidential relationship in the legal sense in Mattes v. Olearain, cited for authority Webster v. Lehmer, 742 P2d 1203, 1206, wherein the Utah Supreme Court held:

The doctrine of confidential relationship rests upon the principle of inequality between the parties, and applies a position of superiority occupied by one of the parties over the other.

In Hiltsley v. Ryder, 738 P2d 1024 (Utah, 1987) Justice

Zimmerman in a concurring opinion wrote:

"The burden of proof is upon the one asserting a constructive trust to show by clear and convincing evidence that equitable ground for imposing a trust exists..." (citations omitted) This burden cannot be met by simply showing that there was a transaction between the parties apparently for the benefit of one and that they had a close family relationship.

In order to impose a constructive trust, in addition to the family relationship, there must be shown: [the grantor's] age and infirmity on one hand, actual dominance on the part of the grantee, an established course of management of the grantor's affairs by the grantee, or other similar facts making it inequitable to make the grantee to prevail. Matter of the Estate of Coffin, 137 Ariz, 480, 482, 671 P2d 921, 923 (Ariz. Cr. App. 1983).

In VonHake v. Thomas, 704 P2d 766 (Utah, 1985), the Utah Supreme Court declared the law does not lightly recognize the existence of a confidential relationship and the law presumes one would ordinarily make his own judgments however imperfect and act on them.

Similarly in Webster v. Lehman, 742 P2d 1203, (Utah, 1987) Justice Durham in a concurring opinion wrote:

"Given the drastic consequences a finding of the confidential relationship has for the parties to a contract, we should be very careful in defining the circumstances under which such a relationship can be found to exist."

Defendant-appellant asserts and testified that Juanita Wintle told her she would not sign the deposition because she had lied in parts of it. (TR. 96)

Inasmuch as this lawsuit was commenced in 1986 (non verified Complaint); whereas Juanita Wintle's deposition was

taken on October 16, 1986 with Larry Wintle also being present; whereas, the shorthand reporter subscribed her name (Joanne Pratt) on the 30th day of October, 1986 to such deposition and; whereas a Lis Pendens was filed by Attorney Douglas Durbano on November 3, 1986; and whereas Juanita Wintle signed her Will dated December 17, 1986 the Appellant asserts all such factors lead to the result that a constructive trust was not formed in the instant proceeding.

Appellant asserts the sua sponte action by the Court declaring it would read at a later date the deposition of Juanita Wintle not knowing if it had been signed or the circumstances surrounding the deposition not being signed, did so without considering the factors enumerated in the preceding paragraph and led to the lower court's erroneous result.

Appellant further asserts plaintiff who is in reality the heirs of Juanita Wintle's estate did not establish by clear and convincing evidence a constructive trust was created and suggests the lack of further action by Juanita Wintle while she was alive, supports the conclusion a constructive trust should not be applied.

Juanita Wintle had not divested herself from real property in North Ogden, Weber County, State of Utah, but had, by Quit Claim Deed, made herself a joint tenant with rights of survivorship with her daughter, Georgia Carbajal Ferguson. (R. 75) Juanita Wintle as a joint tenant could have severed the joint tenancy by voluntary conveyance to a third party as



provided in Tracy-Collins Trust Company v. Goeltz, 301 P2d 1086 (Utah, 1956) and defendant asserts that this lack of action by the plaintiff during her lifetime, negates the claim for a constructive trust.

Similarly, the Last Will and Testament of Juanita Wintle, dated December 17, 1986, provided as follows:

The personal representative of my estate shall be reimbursed from my estate for any and all legal and related expenses incurred in the legal action filed on my behalf entitled Wintle v. Ferguson, filed in the Weber District Court, Civil Number 96935. (R 77)

Juanita Wintle's Will also provided:

"1. Included Property. It is my intent that all of the assets of which I may be possessed at my death, including all items of real, personal and mixed property, including all insurance policies, which should be located with this will shall be included int he estate contemplated by this, my Last Will and Testament. (R 78)

Defendant asserts such Last Will of Juanita Wintle signed over four (4) months after this lawsuit was instituted and six (6) weeks after her deposition was prepared for her signature which was never signed by her does not indicate an intent to change the status of the Quit Claim Deed conveying the real property located in North Ogden, Utah to Georgia Carbajal Ferguson, defendant-appellant herein.

In the instant proceeding, the evidence showed Juanita Wintle's health problems developed subsequent to her signing and recording the Quit Claim Deed conveying the real property to herself and the defendant as joint tenants with right of

survivorship. The evidence also shows a lack of any dominance being imposed upon Juanita Wintle by the defendant herein for the defendant was residing in the State of Ohio when the deed was recorded and had been so residing for approximately a month and a half prior to Juanita Wintle going to the Recorder's office and recording the Quit Claim Deed.

The Utah Supreme Court in Nielsen v. Rasmussen, 558 P2d 511, (Utah, 1976) provided the existence of a constructive trust upon property must be proven by clear and convincing evidence and such burden of proof must be shown to exist at the time of the transfer and that a confidential relationship existed at the time of transfer.

Defendant-appellant asserts there can be no finding of a confidential relationship existing in July, 1979, when Georgia Ferguson was residing in Ohio and Juanita Wintle recorded the deed on her own volition which is necessary to impose a constructive trust in this case.

In Barlow Society v. Commercial Security Bank, 723 P2d 398 (Utah, 1986) the Utah Supreme Court held:

"Absent fraud, duress, mistake or the like attributable to grantee, competent grantor will not be permitted to attack or impeach his own deed." Desert Centers Inc., v. Olen Canyon, Inc., 11 Utah 2d 166, 356 P2d 286 (1960). As between the parties a deed is good, with or without consideration. Brown v. Peterson Development Co., Utah, 622 P2d 1175 (1980)."

In the instant proceeding, there is no evidence the grantee committed any of those acts enumerated in Barlow Society, cited supra, necessary for a grantor to attack her


own deed. Further, as between parties, such deed is good with or without consideration.

Consistent with Barlow Society v. Commercial Security Bank, cited supra Bown v. Loveland, 678 P2d 292 (Utah, 1984) held, for reformation of a deed the moving party must show either a mutual mistake by the parties or a mistake by one and fraud or inequitable conduct by the other party. Neither of these elements exist in this case and reformation of the deed should not be permitted.

#### CONCLUSION


Based upon the above and foregoing arguments, the defendant, Georgia Carbajal Ferguson, requests that this court reverse the District Court granting judgment in favor of the plaintiff and requests this court determine and declare defendant-appellant to be the owner of the real property forming the subject matter of this law suit.

RESPECTFULLY SUBMITTED, this 5 day of August, 1992.

  
\_\_\_\_\_  
RONALD W. PERKINS  
Attorney for Defendant/Appellant

**PROOF OF SERVICE**

I hereby certify that I served four (4) true and exact copies of the foregoing appellant's brief to Larrie Carmichael at: 65 North 3700 West, #313, Hurricane, Utah 84737 on this 5 day of August, 1992.

  
\_\_\_\_\_  
RONALD W. PERKINS  
Attorney for Defendant/Appellant

## APPENDIX "A"

4786 3050 N  
North Ogden 84404

FILED AND RECORDED FOR  
JAN 8 8 33 AM '79  
RUTH EAMES OLSEN  
WEBER COUNTY RECORDER  
DEPUTY *Ruth Eames Olsen*

Platted ☐ Indexed ☐  
Recorded ☐ Abstracted ☐  
Compared ☐ Paged ☐  
Microfilmed ☐

DO NOT WRITE ABOVE THIS LINE

## QUIT CLAIM DEED

Platted ☒ Indexed ☒  
Photocopied ☐ Card File ☐  
Microfilmed ☐ Abstracted ☒

Juanita Wintle  
of County of  
hereby QUIT CLAIMS to Juanita Wintle and Georgia Carbajal as joint  
tentants with full rights of survivorship.

GRANTOR(S)  
State of Utah

of County of  
for the sum of  
the following described tract(s) of land in

GRANTEE(S)  
State of Utah  
Dollars (\$ 10.00 )  
Weber County, State of Utah:

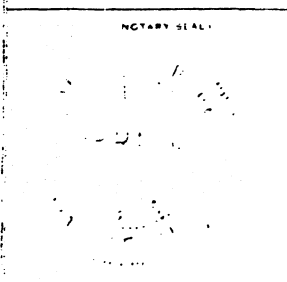
All of Lot 19, Block 5, Lomond Acres Subdivision,  
North Ogden City, Weber County, Utah.

Plaintiff's Exhibit 4  
Case No. 860796935  
Date: 13-18-71  
Clerk's Initials JH

WITNESS the hands of said Grantors this

day of A D 19

*Juanita Wintle*



State of Utah } ss. On the 2nd day of February A D 1979  
County of Weber

personally appeared before me JUANITA WINTLE

the signers of the within instrument, who duly acknowledged to me that he  
executed the same.

Residing at: Syracuse, Utah My Commission expires 8-9-79

MAIL DEED TO

MAIL TAX NOTICE TO

APPENDIX "B"

9877744

DOUGLAS M. DURBANO (#4209)  
Attorney for Plaintiff  
United Savings Plaza, #320  
4185 Harrison Boulevard  
Ogden, Utah 84403  
Telephone: (801) 621-4111

DOUGLAS M. DURBANO  
DEPUTY CLERK  
NOV 3 3 08 PM '86 # 6  
FILED IN: 1400000 FOR  
J. M. Durban

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

JUANITA WINTLE, : LIS PENDENS  
Plaintiff, :  
vs. :  
GEORGIA FERGUSON, a/k/a : Civil # 46935  
GEORGIA CARBAJAL, :  
Defendant. :

TO THE WEBER COUNTY RECORDER:

NOTICE IS HEREBY given that an action has been commenced and is now pending in the above-entitled Court on the Complaint of the above-named Plaintiff, JUANITA WINTLE, against the above-named Defendant, GEORGIA FERGUSON, a/k/a GEORGIA CARBAJAL, for a Quiet Title action, etc., in regards to the real property described as follows:

All of Lot 19, Block 5, LOMOND ACRES  
SUBDIVISION, North Ogden City, Weber  
County, Utah.  
Property Address: 478 East 3050 North  
North Ogden, UT. 84404

DATED this 11 day of August, 1986.

DOUGLAS M. DURBANO  
Attorney for Plaintiff

1

STATE OF UTAH }  
COUNTY OF WEBER }

I HEREBY CERTIFY THAT THIS IS A TRUE COPY  
OF THE DOCUMENT THAT APPEARS OF  
RECORD IN MY OFFICE.

WITNESS MY HAND AND SEAL

THIS 15 DAY OF March 1991  
DOUG CROFTS WEBER COUNTY RECORDER  
BY Jean P. Hughes DEPUTY

070

24

Plaintiff's Exhibit 2  
Case No. 860996935  
Date: 3-18-91  
Clerk's Initials H

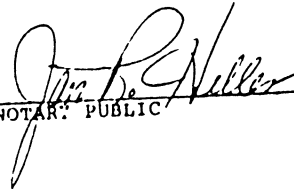
DOUGLAS M. DURBANO  
ATTORNEY AT LAW  
United Savings Plaza  
4185 Harrison Boulevard Suite 320  
Ogden Utah 84403  
Telephone (801) 621-4111

1502 No. 1498



LIS PENDENS

I hereby attests that DOUGLAS M. DURBANO, appeared before me on this 1st day of August, 1986, and signed the foregoing instrument.

  
NOTARY PUBLIC

Residing At: Sydney, Utah  
My Commission Expires: April 29, 1989

DOUGLAS M. DURBANO  
ATTORNEY AT LAW  
United Savings Plaza  
4185 Harrison Boulevard • Suite 120  
Ogden Utah 84403  
Telephone (801) 621-4111

811-4 1502 PAGE 1499

## APPENDIX "C"

Case No. 86099 135  
Date: 3-18-91  
Clerk's Initials JH

# Last Will and Testament

OF

ALICE JUANITA W. WINTLE

I, Alice Juanita Wintle, residing at 478 East 3050 North, City of North Ogden, Weber County, State of Utah, at the age of 74 years old, having been born on February 24, 1912, being of sound and disposing mind, and not acting under any undue influence or persuasion from any person, do hereby make and declare this my Last Will and Testament.

## ARTICLE I

### Preliminary Provisions

1. PRIOR WILLS. I hereby revoke any and all wills and codicils heretofore made by me. I hereby declare that this will shall not be revoked, amended or modified by another will or codicil in whatever form made unless such instrument is dated subsequent to the date of this will.

2. FAMILY STATUS. I declare that I am a widow and not married and that I have four (4) children, ("my children") whose names, date of births, and addresses are as follows:

<u>Name &amp; Date of Birth</u>	<u>Location</u>
George Larry Wintle (11/28/38)	Ogden, Utah
Gloria Lee Crouch (11/28/38)	Perry, Utah
Brent Albert Wintle (04/04/40)	Ogden, Utah
Georgia May Ferguson (05/24/43)	Ogden, Utah

J.W.

076

LAST WILL AND TESTAMENT  
OF  
ALICE JUANITA W. WINTLE

3. PERSONAL REPRESENTATIVE/GURARDIAN. I hereby nominate and appoint my son, George Larry Wintle, to serve without bond as Personal Representative hereof. In the event George Larry Wintle shall, for any reason, be unable to so serve, I nominate and appoint my son, Brent Albert Wintle, as Personal Representative to serve without bond in the probate of my Last Will and Testament. The Personal Representative of my estate shall be reimbursed from my estate for any and all legal and related expenses incurred in the legal action filed on my behalf entitled Wintle vs. Ferguson, filed in the Weber County District Court, Civil #96935.

4. PAYMENT OF DEBTS, TAXES AND FUNERAL EXPENSES. I direct my Personal Representative to pay, as soon after my death as is convenient, my expenses of my last illness, funeral expenses, just debts, and any estate, inheritance, or other succession tax payable by reason of my death, whether or not attributable to property subject to this Will. My instructions for interment, which should be followed, are attached to or located with this Will.

5. DEFINITIONS. Whenever it shall be necessary to interpret this instrument, the masculine shall include the feminine and the singular the plural, unless the context indicates a different intent. The terms "children" or "descendants" is

LAST WILL AND TESTAMENT  
OF  
ALICE JUANITA W. WINTLE

intended to identify those children specifically named above, also children conceived but not yet born, provided they are hereafter born living, but does include adopted children. The term "spouse" refers to my present spouse, as named above. If I am not married to the above named spouse at the time of my death, this Will shall be void and of no effect.

ARTICLE II

Dispositive Provisions

1. INCLUDED PROPERTY. It is my intent that all of the assets of which I may be possessed at my death, including all items of real, personal and mixed property, including all insurance policies which should be located with this Will, shall be included in the estate contemplated by this, my Last Will and Testament.

2. SEPARATE WRITING GIFTS. I give and bequeath all of my personal effects, including my wardrobe, jewelry, guns, sporting equipment and similar belongings, and my household effects all of which is personal property, other than money or securities, in accordance with such written statement or list as I may have prepared and signed prior to my death, pursuant to Utah Code Ann. 1953, 75-2-513, which writing is in my own handwriting, describing the property and to whom such is given and which is signed by me and kept with this Will or elsewhere among my

*J W*

LAST WILL AND TESTAMENT  
OF  
ALICE JUANITA W. WINTLE

personal effects. In the event that I have not prepared a writing pursuant to this paragraph or to the extent that I have not disposed of my household and personal property pursuant to a separate writing, I direct that such household and personal property shall pass pursuant to paragraph 3 of this Article.

3. CONTINGENT GIFT/RESIDUE. All property included in this Will not otherwise disposed of shall be distributed in kind or as cash from the sale of such property, if my Personal Representative should determine that it would be in the best interest of the children to sell such property, as follows:

I give and bequeath to my children, to be divided equally among and between them, per stirpes, all my remaining personal and household effects, any automobile or automobiles, all real property, and all other assets or interests which are property included in this Will. Such property shall be divided equally among them as they may agree. If they cannot agree among themselves as to the division and disposition of such property my Personal Representative shall divide such property into articles or groups of articles and such persons shall then draw lots to determine the order in which each shall select an article or group of articles. After each has made a selection in the order as determined by lot, the order of choice shall be reversed and this system shall continue until all said property has been

J.W.

LAST WILL AND TESTAMENT  
OF  
ALICE JUANITA W. WINTLE

selected. The division of such property into articles or groups of articles made by my Personal Representative shall be binding and conclusive with respect to all persons interested in my estate.

4. PRETERMITTED HEIRS. I have in mind all persons who are natural objects of my bounty. Except as expressly provided for in this Will, I have intentionally omitted to provide in my Will for any person claiming to be an heir of mine.

5. NON-CONTEST PROVISION. If any person, be he or she an heir, devisee, or legatee under this Will, or their successors in interest, or any other person who, if I died intestate, would or may be entitled to any part of my Estate, shall either directly or indirectly, singly or in conjunction with other persons, seek to set aside this Will, or attack, oppose, or seek to set aside the probate of this Will, or to impair, invalidate, or set aside its provisions, or shall consent to, acquiesce in, or fail to contest such proceedings, then in any or all of the above-mentioned instances and events, I hereby give and bequeath to such person or persons, the sum of \$1.00 and no more, in lieu of any other share or interest in my Estate.

IN WITNESS WHEREOF, I Alice Juanita W. Wintle, the testatrix, sign my name to this, my Last Will and Testament which consisting of 7 type written pages, each bearing my initials,

JW

LAST WILL AND TESTAMENT  
OF  
ALICE JUANITA W. WINTLE

on this 17<sup>th</sup> day of DECEMBER, 1986, and being first duly sworn, do hereby declare to the undersigned individuals that I sign and execute this instrument as my Last Will and Testament and that I sign it willingly, that I execute it as my free and voluntary act for the purposes expressed in it, and that I am eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

Alice Juanita W. Wintle  
ALICE JUANITA W. WINTLE

We, Douglas M Durbin, JAN R. HELLER

\_\_\_\_\_, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testatrix signs and executes this instrument as her Last Will and that she signs it willingly, and that each of us, in the presence and hearing of the testatrix and of each other, hereby signs this Will as witness to the testatrix's signing, and that to the best of our knowledge the testatrix is eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

Douglas M Durbin  
WITNESS

# 1018 E. 370 S. Layton  
RESIDENCE

Jan R. Heller  
WITNESS

Layton, Utah  
RESIDENCE



LAST WILL AND TESTAMENT  
OF  
ALICE JUANITA W. WINTLE

STATE OF UTAH                    )  
                                      ) ss:  
COUNTY OF WEBER            )

Subscribed, sworn to, and acknowledged before me by  
Alice Juanita W. Wintle, the Testatrix, and subscribed and  
sworn to before me by Douglas M. Dubano,  
and John P. Heller, witnesses, this 17th  
day of December, 1986.

John P. Heller  
NOTARY PUBLIC

Residing at: Cody, Utah  
My Commission Expires: April 29, 1989

86-221

---

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

---

JUANITA WINTLE,

Plaintiff,

vs.

GEORGIA FERGUSON

Defendant.

}

}

}

DECISION

Case No. 860996935

---

The trial in this case case conducted on March 18, 1991. At the conclusion of the testimony I determined that I could not properly decide the case without reading the deposition of Juanita Wintle who was deceased. The deposition was provided to me in December 1991, and a scheduling conference was conducted on January 10, 1992, to determine if either attorney wanted to have a hearing to present final arguments. On January 16, 1992, defendant's attorney advised me by letter that he did not see a need for oral argument. A copy of that letter was sent to plaintiff's attorney. I have heard nothing from either attorney since then and assume the case is submitted to me for decision.

Having reviewed the evidence produced a the trial and having read the deposition of Juanita Wintle, I find and rule as follows:

I find that the following facts have been proved by clear and convincing evidence.

Juanita Wintle's husband died in 1976, leaving her in sole possession of the home and property in question. Ms. Wintle owned no other property of significant value. Ms. Wintle had four adult children.

In 1979, Ms. Wintle deeded her home to herself and her daughter Georgia Ferguson as joint tenants. Ms. Ferguson did not pay her mother anything as consideration for this transaction.

I find that it was Ms. Wintle's intention, in making this transaction to avoid probate. It was also her intention and belief that upon her death, the property would be divided equally among her children.

In 1986, Ms. Wintle wanted to sell her home so she could move to a place that would require less maintenance. Ms. Ferguson would not allow her mother to sell the house and Ms. Wintle then initiated this action.

Ms. Wintle executed a will on December 17, 1986, directing that all her property be divided equally among her children. The will names her son George Wintle, as personal representative.

Juanita Wintle died on June 3, 1987, and her son took over the prosecution of this case on behalf of her estate.

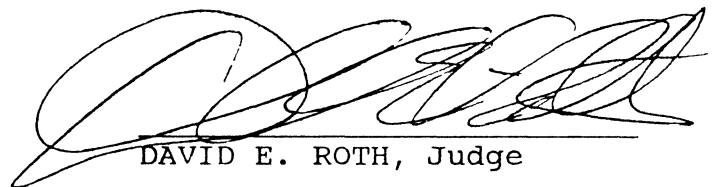
Georgia Ferguson remains in sole possession of the property in question. Ms. Wintle's estate does not consist of any other property of any significance.

Based upon the above findings, it is my opinion that Ms. Ferguson will be unjustly enriched if allowed to keep the property. I find that a constructive trust was created when Ms. Wintle transferred the property to herself and her daughter and that the intended result was that upon Ms. Wintle's death that all her children would share equally in the property.

I therefore find that each of Juanita Wintle's children is entitled to an equal share of the property in question.

Plaintiff is directed to prepare documents consistent with this decision for my signature.

DATED this 13 day of February, 1992.



DAVID E. ROTH, Judge

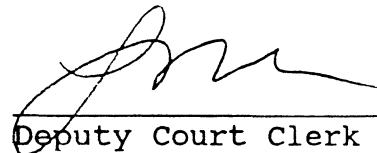
Decision  
Case No. 860996935  
Page 4

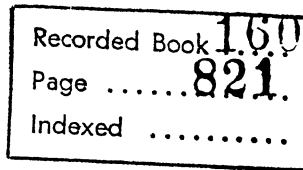
CERTIFICATE OF MAILING

I hereby certify that on the 13 day of February,  
1992, I sent a true and correct copy of the foregoing Decision  
to counsel as follows:

Larrie A. Carmichael  
65 North 3700 West #313  
Hurricane, Utah 84737

Ronald W. Perkins  
205 26th Street  
Ogden, Utah 84401

  
Deputy Court Clerk



LARRIE A CARMICHAEL (0580)  
Attorney for Plaintiff  
65 North 3700 West #313  
Hurricane, Utah 84737  
Telephone (801) 635-0815

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

JUANITA WINTLE,

)

JUDGMENT

Plaintiff,

)

vs.

)

GEORGIA FERGUSON, aka

)

GEORGIA CARBAJAL,

Civil No. 860996935

)

(Hon. David E. Roth)

Defendant.

MAR 31 1992

This action came on for trial on March 18, 1991 (and was submitted for decision on January 16, 1992), before the Court sitting without a jury, Honorable David E. Roth, District Judge, presiding, Larrie A. Carmichael appearing a counsel for the plaintiff, and Ronald W. Perkins appearing as counsel for the defendant, and the Court having reviewed the evidence produced at the trial and having read the deposition of Juanita Wintle, and the Court having rendered its memorandum Decision dated February 13, 1992, and the Court having made and filed its findings of fact and conclusions of law, now therefore, upon motion of plaintiff's attorney, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. Prior to June 7, 1979, plaintiff, Juanita Wintle, owned in fee simple a home and real property located at 478 East 3050 North, North Ogden, Utah 84404, more particularly described as follows:

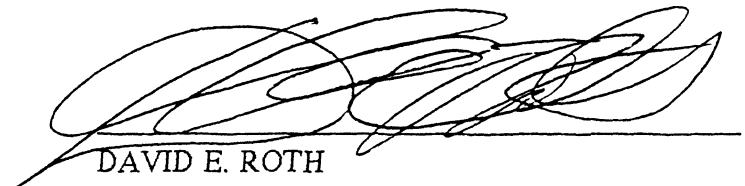
All of Lot 19, Block 5, LOMOND ACRES SUBDIVISION, in North Ogden City, Weber County, Utah, according to the Official Plat thereof.  
(Serial No. 17-032-0019)

2. On or about June 7, 1979, Juanita Wintle, executed a Quit Claim Deed conveying title to the home to herself and her daughter Georgia Ferguson, also known as Georgia Carbajal, as joint tenants, which deed was recorded on June 9, 1979. A constructive trust in favor of Juanita Wintle was created when Juanita Wintle transferred title to the above described property from herself to herself and Georgia Ferguson, also known as Georgia Carbajal, as joint tenants, and upon the death of Juanita Wintle on June 3, 1987, title to the above described real property vested in her children equally, namely, GEORGE LARRY WINTLE, GLORIA LEE CROUCH, BRENT A WINTLE and GEORGIA MAY FERGUSON.

3. Plaintiff is awarded costs of Court against defendant in the sum of \$238.00.

DATED: March 31, 1992.

BY THE COURT:

  
DAVID E. ROTH  
DISTRICT JUDGE

Approved as to form:

(No response as of 3-23-92)

Roland W. Perkins  
Attorney for Defendant

CERTIFICATE OF MAILING

This certifies that the undersigned mailed the foregoing Judgment for approval as to form to the following this 9th day of March, 1992.

Ronald W. Perkins, Esq.  
Attorney for Defendant  
205 26th Street #34  
Ogden, Utah 84401

A handwritten signature in cursive script, reading "Larrie A. Carmichael", written over a horizontal line.

LARRIE A. CARMICHAEL  
Attorney for Plaintiff



LARRIE A. CARMICHAEL (0580)  
Attorney for Plaintiff  
65 North 3700 West #313  
Hurricane, Utah 84737  
Telephone (801) 635-0815

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

JUANITA WINTLE,	)	
	)	FINDINGS OF FACT
Plaintiff,	)	and
	)	CONCLUSIONS OF LAW
vs.	)	
GEORGIA FERGUSON, aka	)	
GEORGIA CARBAJAL,	)	Civil No. 860996935
	)	(Hon. David E. Roth)
Defendant.	)	

MAR 31 1992

This action came on for trial on March 18, 1991 (and was submitted for decision on January 16, 1992), before the Court sitting without a jury, Honorable David E. Roth, District Judge, presiding, Larrie A. Carmichael appearing a counsel for the plaintiff, and Ronald W. Perkins appearing as counsel for the defendant, and the Court having reviewed the evidence produced at the trial and having read the deposition of Juanita Wintle, and the Court having rendered its memorandum Decision dated February 13, 1992, now, upon motion of plaintiff's attorney, makes and files its findings of fact and conclusions of law.

### FINDINGS OF FACT

1. Prior to June 7, 1979, plaintiff, Juanita Wintle, owned in fee simple a home and real property located at 478 East 3050 North, North, Ogden, Utah 84404, more particularly described as

follows: All of Lot 19, Block 5, LOMOND ACRES SUBDIVISION, in North Ogden City, Weber County, Utah, according to the Official Plat thereof. (Serial No. 17-032-0019)

2. On or about June 7, 1979, Juanita Wintle, executed a Quit Claim Deed conveying title to the home to herself and her daughter Georgia Ferguson, also known as Georgia Carbajal, as joint tenants, which deed was recorded on June 9, 1979. Plaintiff made a Lis Pendens dated August 1, 1986, in this case describing the above property and which was recorded November 3, 1986, in Book 1502, Page 1498, as Entry No. 987744 of Official Records in the Office of the Weber County Recorder, Utah.

3. The Court finds that the following facts have been proven by clear and convincing evidence.

4. Juanita Wintle's husband died in 1976, leaving her in sole possession of the home and property in question. Juanita Wintle owned no other property of significant value. Juanita Wintle had four adult children, namely, George Larry Wintle, Gloria Lee Crouch, Brent A. Wintle, and Georgia May Ferguson the defendant herein.

5. In 1979, Juanita Wintle deeded her home to herself and her daughter Georgia Ferguson as joint tenants. Georgia Ferguson did not pay her mother anything as consideration for this transaction.

6. The Court finds that it was Juanita Wintle's intention, in making this transaction to avoid probate. It was also her intention and belief that upon her death, the property would be divided equally among her children.

7. In 1986, Juanita Wintle wanted to sell her home so she could move to a place that would require less maintenance. Defendant would not allow her mother to sell the house and Juanita Wintle then initiated this action.

8. Juanita Wintle executed a will on December 17, 1986, directing that all her property be divided equally among her children. The will names her son, George Wintle, as personal representative. (Her son, Brent A. Wintle, is presently the appointed personal representative.)

9. Juanita Wintle died on June 3, 1987, and her son took over the prosecution of this case on behalf of her estate. (The will has been admitted into probate in the Matter of the Estate of Juanita Wintle, deceased, Probate No. 87-3916630 in this Court.)

10. Defendant Georgia Ferguson remains in sole possession of the property in question. Juanita Wintle's estate does not consist of any other property of any significance.

#### CONCLUSIONS OF LAW

1. Based upon the above findings, it is the Court's opinion that defendant, Georgia Ferguson, will be unjustly enriched if allowed to keep the property.

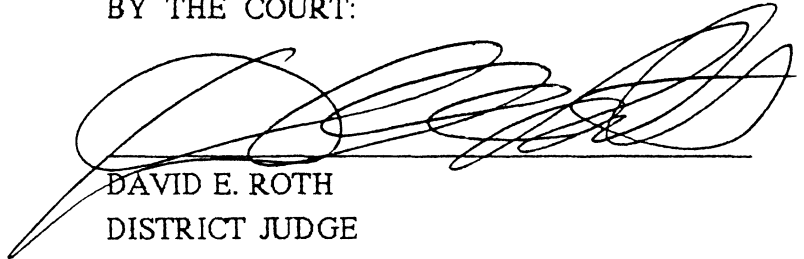
2. The Court finds that a constructive trust was created when Juanita Wintle transferred the property to herself and her daughter and that the intended result was that upon Juanita Wintle's

Wintle's death that all her children would share equally in the property.

3. The Court therefore finds that each of Juanita Wintle's children is entitled to an equal share of the property in question.

DATED: March 31, 1992.

BY THE COURT:



DAVID E. ROTH  
DISTRICT JUDGE

Approved as to form:

(No response as of 3-23-92)

Ronald W. Perkins  
Attorney for Plaintiff

CERTIFICATE OF MAILING

This certifies that the undersigned mailed a copy of the foregoing Findings of Fact and Conclusions of Law to the following this 21<sup>st</sup> day of February, 1992.

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