

1992

Lisa Hamilton Kunz, Stuart G. Hamilton, Vincent C. Hamilton, Amber Hamilton McKelvey and Tonua Hamilton v. Mary M. Hamilton, Susan Ferguson and Andrew Ferguson : Petition for Rehearing

Utah Court of Appeals

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**UTAH COURT OF APPEALS  
BRIEF**

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THE STATE OF UTAH

IN THE UTAH COURT OF APPEALS

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LISA HAMILTON KUNZ, STUART )  
G. HAMILTON, VINCENT C. )  
HAMILTON, AMBER HAMILTON )  
McKELVEY and TONUA HAMILTON, )

Plaintiffs-Appellants, )

vs. )

MARY M. HAMILTON, SUSAN )  
FERGUSON and ANDREW FERGUSON, )

Defendants-Respondents. )

Case No. 920692-CA  
~~920692-CA~~  
920400114

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PETITION FOR REHEARING

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DEC 14 1992

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THE STATE OF UTAH  
IN THE UTAH COURT OF APPEALS

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LISA HAMILTON KUNZ, STUART )  
G. HAMILTON, VINCENT C. )  
HAMILTON, AMBER HAMILTON )  
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Case No. 920692-CA  
920409-SC  
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PETITION FOR REHEARING

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THE STATE OF UTAH  
IN THE UTAH COURT OF APPEALS

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LISA HAMILTON KUNZ, STUART	)	
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HAMILTON, AMBER HAMILTON	)	PETITION FOR REHEARING
McKELVEY and TONUHA HAMILTON,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
vs.	)	
	)	
MARY M. HAMILTON, SUSAN	)	Case No. 920409
FERGUSON and ANDREW FERGUSON,	)	920400114
	)	
Defendants-Respondents.	)	

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Appellants, Lisa Hamilton Kunz, Stuart G. Hamilton, Vincent C. Hamilton, Amber Hamilton McKelvey and Tonua Hamilton (collectively the "Appellants"), pursuant to Rule 35, Utah Rules of Appellant Procedure, submit this Petition for Rehearing, and move that the Court grant a rehearing on Appellee's Motion for Summary Disposition.

STATEMENT OF DISPUTE POINTS OF LAW  
AND/OR FACT

1. Did the Court err as a matter of fact and law in concluding that "cohabitation" consists of two elements, "residency

and sexual contact evidencing a conjugal association," given the terminology found in the Antenuptial Agreement?

The qualifying phrase of "any other person" eliminates any consideration of sexual contact. The Court's sole focus on the term "cohabit" in effect rewrites the Antenuptial Agreement. All of the terms of the Antenuptial Agreement are not being harmonized or given effect. The only relevant Haddow element is common residency.

2. Did the Court err as a matter of fact and law in finding and concluding that the disputed phrase of " . . . cohabit therein with any other person" is unambiguous and therefore not subject to further interpretation through extrinsic evidence?

The two terms of "cohabit" and "any other person" when taken together create an ambiguity. When an ambiguity exists, extrinsic evidence as to the parties' interest must be received and considered; therefore, requiring the taking of evidence and the making of factual findings.

#### STATEMENT OF FACTS

1. Gordon Dean Hamilton and Appellee Mary M. Hamilton ("Mary Hamilton") were married on September 26, 1986. Prior to the marriage, the parties entered into an Antenuptial Agreement dated September 26, 1986 (the "Antenuptial Agreement"). The Antenuptial

Agreement was ratified by Gordon Dean Hamilton's Last Will and Testament, dated December 7, 1989 (the "Will").

2. Gordon Dean Hamilton died January 17, 1990. Mary Hamilton is not a devisee under the Will. All of the residual property was devised to Gordon Dean Hamilton's five children from a previous marriage. Gordon Dean Hamilton's five children from a previous marriage constitute the Appellants in this case.

3. The Antenuptial Agreement purports to grant a life estate to Mary Hamilton in the residence and building lot of the couple " . . . so long as she does not cohabit therein with any other person (emphasis added)." Gordon Dean Hamilton intended the phrase "cohabit therein with any other person" to mean that Mary Hamilton was not to have any person cohabit with her in the home.

4. Mary Hamilton moved her daughter, son-in-law and family into the house on or about December 1, 1991. According to the terms of the Antenuptial Agreement, when Mary Hamilton's daughter, son-in-law and family moved into the house, Mary Hamilton's life estate terminated.

5. Both the Appellants and the Appellees filed Motions for Summary Judgment, the trial court considered the motions and entered a Memorandum Decision on May 13, 1992 granting the Appellees' Motion for Summary Judgment. On July 8, 1992, the trial court entered an amended Memorandum Decision denying the

Appellants' Motion for Summary Judgment. On August 6, 1992, the trial court entered its Order Granting Summary Judgment which is the judgment being appealed.

6. Appellees filed their Motion for Summary Disposition on September 25, 1992. Appellants filed their Response in Opposition to Appellees' Motion for Summary Disposition on October 22, 1992. The Court of Appeals filed its Memorandum Decision (the "Memorandum Decision") on November 30, 1992, which decision the Appellants are petitioning for rehearing.

#### ARGUMENT I

#### **THE QUALIFYING PHRASE OF "ANY OTHER PERSON" ELIMINATES ANY CONSIDERATION OF SEXUAL CONTACT; THEREFORE, THE ONLY RELEVANT HADDOW ELEMENT IS COMMON RESIDENCY.**

"[T]he term 'cohabitation' does not lend itself to a universal definition that is applicable in all settings . . . [T]o some extent, the meaning of the term depends upon the context in which it is used." Haddow v. Haddow, 707 P.2d 669, 671 (Utah 1985). The term "cohabit" can have more than one meaning. Webster's has two different definitions for the term "cohabit": 1. To live together as husband and wife; and 2. To live together (emphasis added). Webster's New World Dictionary 276 (1982). The determination of whether a given set of circumstances constitutes cohabitation requires the application of the terminology found in a document to a given said of facts. Haddow, supra, at 671.

The Supreme Court in Haddow construed language which was found in the parties' Divorce Decree which stated that the former wife was to pay the former husband one-half of the equity in the parties' home in which she was living if she moved out, remarried, or "cohabited with a male person (emphasis added)." In construing the Divorce Decree in Haddow, the Supreme Court decided that there are two key elements to be considered in determining whether cohabitation existed: common residency and sexual contact evidencing a conjugal relationship. Haddow, supra, at 674 (which this Court used in its Memorandum Decision). The obvious thrust of the terminology found in the Divorce Decree in Haddow was that a sexual relation was part of the intended definition. However, the set of facts and terminology found in this case are very different than those found in Haddow.

The terminology used in the Antenuptial Agreement is that Mary Hamilton's life estate shall be terminated if she " . . . cohabit[s] therein with any other person (emphasis added)." The obvious thrust of the phrase "any other person" eliminates any consideration of sexual contact. By eliminating any consideration of sexual contact, the only relevant element to be considered under the Haddow test is whether common residency exists.

The elimination of any consideration of sexual contact is bolstered after an examination of the intent of the parties. The



meaning of the term "cohabitation" depends upon the context on which it is used and that the intent of the parties should be preserved. Haddow, supra, at 674. The cardinal rule in construing a contract is to give effect to the intentions of the party, and if possible, these intentions should be gleaned from an examination of the text of the contract itself. Buehner Block Co. v. U.W.C. Assoc., 752 P.2d 892 (Utah App. 1989); G.G.A., Inc. v. Leventis, 773 P.2d 841 (Utah 1989). The qualifying language of "any other person" is very clear. "Any other person" is not limited to mean only to live with a male person, an unrelated male or as husband and wife. "Any other person" means just that, that if Mary Hamilton lives with any other person, then her life estate is terminated.

The terminology in the Antenuptial Agreement, when read together, comports with Webster's second definition of "cohabit" (i.e. to live together). The Court in its Memorandum Decision states that "[i]f Mr. Hamilton had intended that Mary Hamilton's life estate terminate under the circumstances of this case, he could and should have used a term other than 'cohabit'. . . ." By simply focusing in on the term cohabit, the Court has completely ignored the qualifying language of "any other person." "A contract should be interpreted so as to harmonize all of its terms and provisions, and all of its terms should be given effect if

possible." G.G.A. Inc., supra, at 854 (citations omitted). Therefore, by ignoring the qualifying language after cohabit, the court has not interpreted the Antenuptial Agreement as to harmonize all its terms and provisions and in essence has rewritten the Agreement. Hal Taylor Associates v. Unionamerica, Inc., 657 P.2d 743 (Utah 1982) (A court will not rewrite a contract.).

The Supreme Court in Haddow defined common residency as " . . . the sharing of a common abode that both parties consider their principle domicile for more than a temporary or brief period of time." Haddow, supra, at 672. The Supreme Court also discussed common residency factors which aid in the determination of a finding of common residency. Haddow, supra, at 673. The trial court did not examine or make findings of fact and conclusions of law whether common residency or factors of common residency existed. The Appellees admit that the Fergusons have moved into the home with Mary Hamilton. That, in and of itself, is sufficient to terminate Mary Hamilton's life estate.

The phrase "any other person" eliminates any consideration of sexual contact in determining whether Mary Hamilton's life estate should be terminated. This Court's focus on the term "cohabit" in effect rewrites the Antenuptial Agreement. All of the terms of the Antenuptial Agreement are not being harmonized or given effect. The only relevant Haddow element is

common residency. This Court's determination should be whether Mary Hamilton's admission of moving her family into the home constitutes common residency or whether the case should be remanded to the trial court to make findings of fact and conclusions of law whether common residency or factors of common residency existed.

### ARGUMENT II

**THE TERMINOLOGY FOUND IN THE ANTENUPTIAL AGREEMENT  
CREATES AN AMBIGUITY; THEREFORE, EXTRINSIC  
EVIDENCE AS TO INTENT MUST BE RECEIVED AND  
CONSIDERED, REQUIRING THE TAKING OF EVIDENCE AND THE  
MAKING OF FACTUAL FINDINGS.**

"A contract is considered ambiguous if 'the words used to express the meaning and intention of the parties are insufficient in a sense that the contract may be understood to reach two or more plausible meanings'." C.J. Realty, Inc. v. Willey, 758 P.2d 923 (Utah App. 1988) (citations omitted). See also Saunders v. Sharp, 197 Utah Adv. Rep. 25 (1992). In this case, there are two terms "cohabit" and "any other person." The two terms taken together, may be understood to reach two or more plausible meanings; therefore, an ambiguity exists.

According to the trial court, the term cohabit means "to live together as husband and wife." According to this Court, the term cohabit means "common residency and sexual contact evidencing a conjugal association." However, the second term, "any other person," has not been defined by either court. If the ordinary and

usual meaning is attached to the second term, the qualifying language of "any other person" is very clear. The ordinary and usual meaning of "any other person" is just that, any other person. If the definition of "cohabit" is dependent upon the context in which it is used, then no ambiguity exists, and any consideration of sexual contact is eliminated. (See Argument I, above.)

If the trial court's and this Court's definitions are applied to the term "cohabit," then an ambiguity exists. If the Antenuptial Agreement is ambiguous, then extrinsic evidence as to the parties' intent must be received and considered in an effort to glean what the parties actually agreed to. This requires the taking of evidence and the making of factual findings. C.J. Realty, supra, at 929. See also John Call Engineering v. Manti City Corp., 743 P.2d 1205 (Utah 1987) (The intentions of the parties to a contract are controlling, and generally those intentions will be found in the instrument itself. However, if a writing is not sufficient to establish meaning, resort may be had to extraneous evidence manifesting the intentions of the parties. Id. at 1207).

If a husband and wife relationship or sexual contact is required, then an ambiguity exists. The two terms taken together may be understood to reach two or more plausible meanings. Extrinsic evidence as to the parties' interest must be received and

considered, requiring the taking of evidence and the making of factual findings.

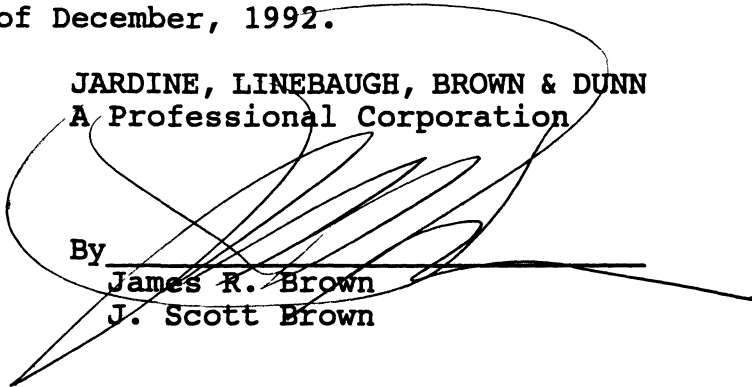
#### CONCLUSION

The term cohabit can have more than one meaning; therefore, the qualifying language is required to determine the meaning and the intent of the parties. The qualifying language found in the Antenuptial Agreement of " . . . any other person" is clear. If the term "cohabit" is harmonized and given effect with the qualifying language, then any consideration of sexual contact is eliminated. The only determination is whether common residency existed when Mary Hamilton moved her family into the house. If the Court attaches the sterile definition that the term cohabit means "to live together as husband and wife" or that both prongs of the Haddow test apply, than an ambiguity exists. If an ambiguity exists, then extrinsic evidence must be received and considered and findings of fact are required to be taken. The undersigned counsel hereby certifies in conformity with Rule 35(a), Utah Rules of Appellate Procedure, that this Petition for Rehearing is made in good faith and not for delay.

DATED this 14 day of December, 1992.

JARDINE, LINEBAUGH, BROWN & DUNN  
A Professional Corporation

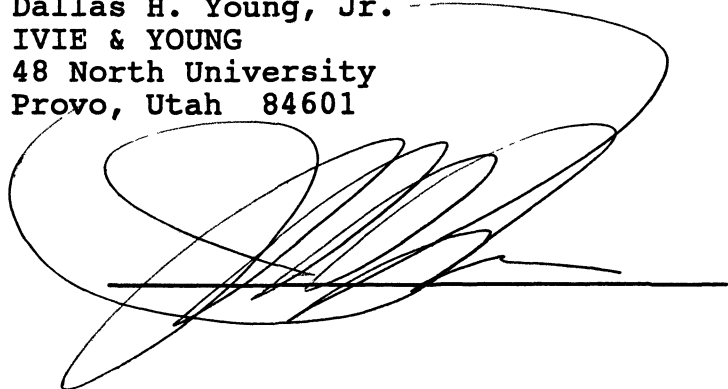
By

  
James R. Brown  
J. Scott Brown

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of December, 1992,  
I caused a true and correct copy of the foregoing PETITION FOR  
REHEARING to be served by hand-delivery to:

Dallas H. Young, Jr.  
IVIE & YOUNG  
48 North University  
Provo, Utah 84601



\SB\P\0227

## **ADDENDUM**



IN THE UTAH COURT OF APPEALS

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Lisa Hamilton Kunz; Stuart G. )  
Hamilton; Vincent C. Hamilton; )  
Amber Hamilton McKelvey; and )  
Tonua Hamilton, )  
Plaintiffs and Appellants, )  
v. )  
Mary M. Hamilton; Susan )  
Ferguson; and Andrew Ferguson, )  
Defendants and Appellees. )

MEMORANDUM DECISION  
(Not For Publication)

Case No. 920692-CA

F I L E D  
(November 30, 1992)

**FILED**

NOV 30 1992

*Mary T Noonan*

Mary T Noonan  
Clerk of the Court  
Utah Court of Appeals

Fourth District, Utah County  
The Honorable Ray M. Harding

Attorneys: James R. Brown, Salt Lake City, for Appellants  
Dallas H. Young, Provo, for Appellees

Before Judges Jackson, Bench, and Garff (Law & Motion).

PER CURIAM:

This matter is before the court on defendants' motion for summary disposition. We summarily affirm.

Plaintiffs filed this action seeking to terminate defendant Mary Hamilton's life estate in real property devised to plaintiffs by Gordon Hamilton. The trial court granted summary judgment in favor of defendants and plaintiffs appealed.

Plaintiffs contend that defendant Mary Hamilton's life estate in the residence she shared with Gordon Hamilton prior to his death terminated when she allowed her daughter and son-in-law, the other defendants, to move into the residence with her. Mary Hamilton's life estate in the property apparently derives from two sources, an antenuptial agreement and Gordon Hamilton's will.<sup>1</sup> The antenuptial agreement provides, with respect to the subject residence, that "In the event, however, that Gordon predeceases Mary, it is the intent of the parties that she be

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1. Plaintiffs dispute that any devise was made to Mary Hamilton by Gordon Hamilton's will. That dispute is the subject of a separate appeal.

given a life estate in the residence and building lot so long as she does not cohabit therein with any other person." The will ratifies the antenuptial agreement and further provides that the residence is bequeathed to plaintiffs "subject to a life estate my wife Mary M. Hamilton who [sic] shall have unless she remarries."

Both sides rely exclusively on the antenuptial agreement with respect to the existence of Mary Hamilton's life estate. The antenuptial agreement is a contract and is construed according to the general rules of contract construction. Therefore, "we examine the language of the contract itself first, 'and unless there is some ambiguity or uncertainty, there is no justification for attempting to vary it by extrinsic or parol evidence.'" Stevenson v. First Colony Life Ins. Co., 827 P.2d 973, 979 (Utah App. 1992) (quoting Williams v. First Colony Life Ins. Co., 593 P.2d 534, 536 (Utah 1979)). In this case, plaintiffs argue that the phrase "cohabit therein with any other person" is ambiguous, and seek to offer extrinsic evidence regarding Gordon Hamilton's intent with respect to that phrase.

Relying on Haddow v. Haddow, 707 P.2d 669 (Utah 1985), the trial court found the disputed phrase to be unambiguous and therefore not subject to further interpretation through parol evidence. We agree. The Haddow court, while noting that the term is generally defined as "[t]o live together as husband and wife," held that "cohabitation" consists of two elements, "common residency and sexual contact evidencing a conjugal association." Id. at 671-72.

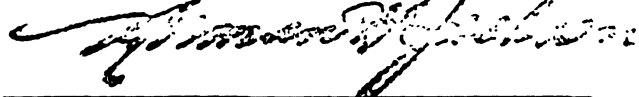
We note that the antenuptial agreement was prepared by an attorney in 1986, after the Haddow case was issued. If Mr. Hamilton had intended that Mary Hamilton's life estate terminate under the circumstances of this case, he could and should have used a term other than "cohabit," which has been defined by the supreme court of this state to mean something other than that asserted by plaintiffs to have been Gordon Hamilton's intent.<sup>2</sup>

We conclude that the contract is unambiguous and does not terminate Mary Hamilton's life estate under the undisputed facts

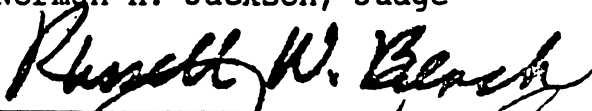
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2. The will, although not relied upon by the parties, also appears to support the Haddow definition of cohabitation, by specifying that the life estate created by the antenuptial agreement continues "unless [Mary Hamilton] remarries."

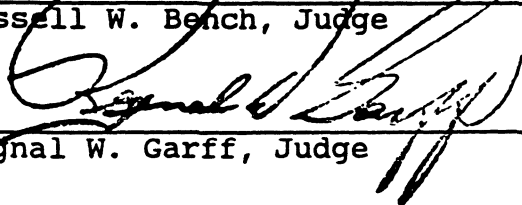
of this case. The trial court's grant of summary judgment in defendants' favor is affirmed.



Norman H. Jackson, Judge



Russell W. Bench, Judge



Regnal W. Garff, Judge