

1994

# In the Matter of the Estate of: Kenneth Dale Ashton : Brief of Appellee

Utah Court of Appeals

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## APPEALS

COURT OF APPEALS

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940696

**IN THE UTAH COURT OF APPEALS**

**KENNETH DALE ASHTON**

**Civil No. 940696 CA**

### Priority Classification 15

## BRIEF OF RESPONDENTS

Appeal from the Third Judicial District Court  
Salt Lake County, State of Utah  
Honorable Leslie A. Lewis, District Judge, presiding

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**IN THE UTAH COURT OF APPEALS**

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**IN THE MATTER OF THE ESTATE  
OF:**

**KENNETH DALE ASHTON**

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## **LIST OF ALL PARTIES TO THE PROCEEDING**

1. Appellant- Personal Representative & Widow of Decedent, (Mr. Ashton):

RUTH ELIZABETH ASHTON

2. Respondents- Heirs and Children of the Decedent, (Mr. Ashton):

STEVEN ASHTON

KIM ASHTON

MARK ASHTON

LINDA ASHTON MANIS

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## **STATEMENT OF JURISDICTION**

This is an appeal by Appellant, Ruth Elizabeth Ashton, (hereafter referred to as "Mrs. Ashton"), from the Judgment of the Third District Court for Salt Lake County, State of Utah, Civil No. 89-3900184 & 89-0904564, entered on the 11th day of July, 1994. The appeal was originally filed with the Supreme Court for the State of Utah pursuant to Utah Code Anno. §78-2-2(3)(j) (1953), as amended. On November 14th, 1994, the appeal was poured-over to the Court of Appeals for disposition. Jurisdiction is proper in the Court of Appeals pursuant to Utah Code Anno. §78-2a-3(k), (1953), as amended.

## **STATEMENT OF THE STANDARD OF APPELLATE REVIEW**

All issues identified by Mrs. Ashton are issues of law. She is not contesting the findings of fact made by the trial court or the sufficiency of the evidence. Brief of Appellant, p.2.

When findings of fact are not challenged, or a transcript of the trial is not provided, the appellate court takes judicial notice of the findings of fact and conclusions of law reached by the trial court. Low v. Bonnacci, 788 P.2d 512, 512 (Utah 1990). However, the appellate court grants no deference to the trial court's legal conclusions and reviews them for correctness. McMahan v. Dees, 873 P.2d 1172, 1175 (Utah App. 1994).

With respect to the issue of whether the trial court erroneously placed the

burden of proof on Mrs. Ashton, the appropriate standard of review provides that, notwithstanding the application of burden of proof upon the wrong party, the appellate court looks to the evidence to determine whether respondents, (hereafter referred to as "the Ashton children") met the burden of proof that should have been theirs and, if so, the lower court decision is affirmed.<sup>1</sup> Pilcher v. Pilcher, 197 P.2d 143, 147 (Utah 1948); City Electric v. Industrial Indemnity Corp., 683 P.2d 1053, 1059-1060 (Utah 1984).

With respect to the issue or whether the findings of fact are sufficient to support the trial court's judgment, the appropriate standard of review provides that the appellate court review the findings as to whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for the judgment. Kunzler v. O'Dell, 855 P.2d 270, 275 (Utah App. 1993); Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987).

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<sup>1</sup>Appellant identifies only two issues in her statement of issues; 1) whether the lower court erred, as a matter of law, by determining that Mr. Ashton's estate includes property that was clearly titled and held by Mr. and Mrs. Ashton as a joint tenant with full rights of survivorship; and, 2) whether the lower court erred, as a matter of law, in denying Mrs. Ashton's claim for expenses incurred in the administration of Mr. Ashton's estate while Mrs. Ashton was acting in her capacity as decedent's personal representative. Brief of Appellant, pp. 1-2.

With respect to the first issue, Mrs. Ashton added several additional collateral issues, or sub-issues, in her argument which consist of the following: 1) whether the trial court erred by considering whether or not she contributed to any part of the purchase price of the joint tenancy property, Id. at pp. 9-10; 2) whether the trial court erred by erroneously placing the burden of proof on Mrs. Ashton instead of placing the burden of proof on the Ashton children, Id. at pp. 14-16; 3) whether the trial court erred by failing to ascertain the decedent's intent at the time he caused title to be taken in joint tenancy, Id. at pp. 16-18; and, 4) whether the findings of fact are sufficient to support the trial court's judgment that the Ashton children proved clearly and convincingly that the decedent did not intend to create valid joint tenancies with Mrs. Ashton, Id. at pp. 18-20.

## **DETERMINATIVE STATUTORY PROVISIONS**

The following statutes are determinative or are of central importance to the issues on appeal:

Utah Code Anno. § 75-3-104(1) - (2) (1953), as amended:

(1) Sums remaining on deposit at the death of a party to joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. If there are two or more surviving parties their respective ownerships during lifetime shall be in proportion to their previous ownership interests under Section 75-6-103 augmented by an equal share for each survivor of an interest the decedent may have owned in the account immediate before his death; and the right of survivorship continues between the surviving parties.

(2) If the account is a P.O.D. account:

(a) On death of one of two or more original payees the rights to any sums remaining on deposit are governed by Subsection (1);

(b) On death of the sole original payee or of the survivor of two or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the original payee; if two or more P.O.D. payees survive, there is no right of survivorship in event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

Utah Code Anno. § 75-3-703(1) (1953), as amended:

A personal representative is a fiduciary who shall observe the standard of care applicable to trustees as described by Section 75-7-302. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

Utah Code Anno. § 75-3-719 (1953), as amended:

If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorneys' fees incurred.

## **STATEMENT OF THE CASE**

### **I. Nature of the Case.**

This is an appeal filed by Mrs. Ashton from the judgment of the Honorable Judge Leslie A. Lewis in the Third District Court for Salt Lake County, State of Utah. The pertinent provisions of the judgment hold as follows:

1. That the decedent's (hereafter referred to as "Mr. Ashton") and Mrs. Ashton's March 12th, 1986 wills are not joint and reciprocal wills;
2. That under Mr. Ashton's will, he devised 91% of his entire estate to his surviving children to be divided between them equally per capita, and devised the remaining 9% to Mrs. Ashton's children to be divided between them equally per capita, subject to his devise of a simple life estate, without any power of consumption, to Mrs. Ashton;
3. That the property that was titled in the names of Mr. and Mrs. Ashton at the time of Mr. Ashton's death shall be included in Mr. Ashton's estate;
4. That Mrs. Ashton and the Ashton children are responsible to pay their own fees and costs incurred in the litigation which shall not be an expense of Mr. Ashton's estate.

Mrs. Ashton's appeal is taken only from those portions of the judgment identified as numbers 3 and 4 above.

II. Course of the Proceedings and Disposition Below.

On February 22nd, 1989, one of the Ashton children, Kim Dale Ashton, filed his application for informal probate of Mr. Ashton's will and for informal appointment as personal representative, probate no. 893900184. Mrs. Ashton objected to Kim Ashton's application and further requested that the court make its determination that she was the sole heir to the estate of Mr. Ashton. Thereafter, the court converted the matter to formal probate and assigned Judge Uno to hear the case. Judge Uno appointed Mrs. Ashton personal representative and deferred the issue of determination of heirs for trial. In approximately June 1989, the Ashton children filed their complaint against Mrs. Ashton personally, and as personal representative, case no. 890904564, which was assigned to the Honorable Judge Rigtrup. The Ashton children sought, among other matters, a declaratory judgment that Mr. and Mrs. Ashton's wills were joint and reciprocal and a declaratory judgment as to Mrs. Ashton's life estate and the Ashton children's remainder interest

Trial was held before Judge Uno in the probate case concerning the determination of heirs. On December 1st, 1989, Judge Uno entered his order declaring that Mrs. Ashton inherited a fee simple interest rather than a life estate. The Ashton children appealed. This Court reversed and remanded for further proceedings to determine Mr. Ashton's intent. In the matter of the Estate of Ashton, 804 P.2d 540

(Utah App. 1990).

Thereafter, the civil case, no. 890904564 was consolidated with the probate case, no. 893900184. Judge Uno retired and Judge Lewis replaced him. A trial was held before Judge Lewis, on all pending issues, November 1st, 1993.

Pursuant to the stipulation of the parties, transcripts of the previous trial and hearings, and the depositions of Mrs. Ashton and Carolyn Driscoll<sup>2</sup>, were published and received as evidence at the trial. In addition evidence was taken from witnesses during the course of the trial.

At the conclusion of the trial, Judge Lewis rendered oral findings and ruled, among other matters, that Mrs. Ashton's interest in the estate was that of a life tenant, without any power of consumption, and that Mrs. Ashton and the Ashton children shall be responsible to pay their own litigation costs and expenses. Judge Lewis took under advisement the issue of whether joint tenancy and tenancy in common properties, titled in Mr. and Mrs. Ashton's joint names, should be part of the estate or whether Mr. Ashton intended to transfer a present interest to Mrs. Ashton.

After receiving memoranda from the parties respective attorneys, Judge Lewis issued her Memorandum Decision on June 7th, 1994, ruling that Mr. Ashton did not intend to transfer a present interest to Mrs. Ashton at the time he created the various tenancies with her and that property held in the joint names of Mr. and Mrs. Ashton as

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<sup>2</sup>Carolyn Driscoll is the attorney who met with Mr. and Mrs. Ashton and prepared their March 12th, 1986 wills.

joint tenants or tenants in common must be included in Mr. Ashton's probate estate.

The trial court's findings of fact, conclusions of law and judgment were then entered July 11th, 1994.

### III. Statement of Facts.

Rules 24(b) and 24(a)(7), Utah R. App. P., require that the Ashton children set forth a statement of facts relevant to the issues presented for review.<sup>3</sup> However, these rules further require that the statement of facts be supported by citations to the record in accordance with paragraph (e) of Rule 24. Mrs. Ashton has failed to provide a trial transcript or any other record of the facts in support of her appeal, other than the trial court's findings of fact and conclusions of law. As a result, the trial court's findings of fact are taken as true and valid and the appellate court takes judicial notice of these facts. Low v. Bonnacci, 788 P.2d 512, 512; See also Oneida/SLIC v. Oneida, 872 P.2d 1051, 1053 (Utah App. 1994).<sup>4</sup>

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<sup>3</sup>Rule 24(a)(7), Utah R. App. P., governing the form and content of the brief of appellant, provides as follows: " A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule." Rule 24(b), Utah R. App. P., incorporates the foregoing as a requirement for the appellees brief also.

<sup>4</sup>Mrs. Ashton's statement of facts, Brief of Appellant, pp. 5-6, are not supported by any reference to a record, or to the trial court's findings of fact. In fact, her statement of facts is not supported by the trial court's findings of fact and contains facts that the trial court either rejected, or were not presented at trial. For example, Mrs.

Based upon the foregoing, the trial court's findings of fact constitute the only valid facts relevant to the issues presented for review. The Ashton children therefore incorporate the findings of fact of the trial court herein by reference, as if originally set forth, . See Brief of Appellant, add., Findings of Fact and Conclusions of Law.

### **SUMMARY OF THE ARGUMENT**

I. The Trial Court Did Not Err, as a Matter of Law, in Determining Whether Mr. Ashton Intended to Give Mrs. Ashton a Present Interest in Property When he Titled Property in their Joint Names.

A recital of joint tenancy on deeds, contracts, accounts, or other instruments is not an absolute. It gives rise to a presumption that the parties intended a valid joint tenancy with full rights of survivorship at the time the tenancy was created. The presumption can be overcome by establishing fraud, mistake, incapacity or other infirmity, undue influence, or by establishing through clear and convincing evidence that the parties intended otherwise. The dispositive issue in overcoming the presumption is intent, particularly the intent of the grantor, as shown by the totality of the facts and circumstances. The trial court correctly applied the foregoing principles,

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Ashton's statement includes facts to the effect that assets were acquired both prior to and after the execution of their wills, that they exercised joint dominion and control over the property titled in both their names, and that Mr. Ashton knew that upon his or Mrs. Ashton's death property held in joint tenancy would pass to the survivor outside of probate and not be subject to the directives of their wills. These facts contradict the specific findings of the trial court, are not part of the findings, and thus are not part of the record before this Court. Consequently, Mrs. Ashton's statement of facts should be entirely disregarded.



and did not err, in determining that the requisite intent to transfer a present interest to Mrs. Ashton was not present at the time the various tenancies in property were created.

II. The Trial Court's Judgment Was Not Based Upon a Determination as to Whether Mrs. Ashton Contributed to Any Part of the Purchase Price of Joint Tenancy Property. Therefore, the Trial Court Did Not Commit Any Error.

While Mrs Ashton argues that her rights of survivorship are not precluded by the fact that she may or may not have contributed to the purchase price of the joint tenancy properties, the findings of fact, conclusions of law, judgment and memorandum decision conclusively show that the trial court's judgment was not based, one way or the other, on this issue. Thus, the trial court did not commit any error on this point.

III. The Trial Court Did Not Erroneously Place the Burden of Proof on Mrs. Ashton. Even If True, the Ashton Children Sustained Their Burden of Proof.

A. The Trial Court's Memorandum Decision Shows That The Trial Court Did Not Erroneously Place the Burden of Proof on Mrs. Ashton.

The trial court's memorandum decision shows that the trial court decided that the determinative issue was intent, that the trial court must consider the totality of the facts and circumstances in deciding the issue of intent and that the presumption that attaches to joint tenancy must be overcome by clear and convincing evidence. The trial court did not decide that Mrs. Ashton had the burden of proving the validity of the joint tenancies by clear and convincing evidence.

Also, in considering the context of the decision, the only logical reading

establishes that the trial court appropriately placed the burden of proof on the Ashton children, not Mrs. Ashton.

B. Even If The Burden of Proof Was Erroneously Shifted To Mrs. Ashton, The Findings Of Fact Show That The Ashton Children Met The Appropriate Burden Of Proof Anyway.

Even if the trial court erroneously applied the burden of proof to Mrs. Ashton, the trial court's decision must be affirmed if the evidence adduced at trial shows that the Ashton children sustained their burden when the appropriate standard is applied. The findings of fact and conclusions of law in this case show that the Ashton children sustained their burden of proof when the appropriate standard is applied.

IV. The Trial Court Appropriately Determined the Issue of Intent at the Time the Various Joint Tenancies and Tenancies in Common Were Created.

The trial court's memorandum decision and findings of fact contain specific references by the trial court showing that it was deciding the issue of intent when the various tenancies were created. This clearly and unambiguously shows that the trial court determined the issue of intent as of the time title was taken as joint tenants and not at the time Mr. Ashton executed his will.

V. The Evidence Supports the Trial Court's Decision Invalidating the Joint Tenancies and Tenancies in Common.

Mrs. Ashton's claim that the trial court's findings do not rise to the level of clear and convincing evidence violates the standards of appellate review. The appellate court has not had the opportunity to hear, consider, weigh and assess the evidence at trial and retrying the facts is not its function. So long as the findings of the trial court

adequately support its conclusions, its judgment must be affirmed.

Mrs. Ashton grossly misrepresents the trial court's finding with respect to this issue and claims that the trial court's findings are based upon inferences. However, the actual findings, together with the memorandum decision, clearly demonstrate that the trial court applied the clear and convincing standard, considered the total facts and circumstances, and found that the evidence was clear and convincing. Thus the actual findings are not clearly erroneous.

VI. The Trial Court Did Not Err in Denying Mrs. Ashton's Request for Litigation Expenses.

Mrs. Ashton has not shown that any evidence was presented to the trial court with respect to the factors necessary in determining the reasonableness of her attorney fees requested. She only states that she moved at the close of trial to recover her litigation costs and attorney's fees against Mr. Ashton's estate. If she failed to present or proffer such evidence concerning her fees, then the trial court's judgment denying her request is proper. Thus, Mrs. Ashton has not shown that this issue was properly preserved for appeal or shown any record establishing that the denial was otherwise inappropriate.

The trial court's denial was also appropriate because the litigation expenses involved the competing claims of heirs of the estate. Mrs. Ashton's capacity in the litigation was not that of a personal representative. If she was not prosecuting or defending the action pursuant to her fiduciary responsibilities as a personal

representative to use her authority for the best interests of the successors to the estate, namely, the Ashton children. The aim of Mrs. Ashton's claims in the litigation was the enhancement of her own prospects as an heir of the estate. Thus, the denial of attorney fees was proper because Mrs. Ashton was not functioning in her capacity as personal representative and, was not acting in good faith.

## **ARGUMENT**

### **I. THE TRIAL COURT DID NOT ERR, AS A MATTER OF LAW, IN DETERMINING WHETHER MR. ASHTON INTENDED TO GIVE MRS. ASHTON A PRESENT INTEREST IN PROPERTY WHEN HE TITLED PROPERTY IN THEIR JOINT NAMES.**

Mrs. Ashton first argues that property titled in Mr. and Mrs. Ashton's names, as joint tenants with rights of survivorship, is not includable in Mr. Ashton's estate. Brief of Appellant, Point I, p. 8-9. She also argues that, by virtue of the law pertaining to joint tenancies, she takes the entire property free and clear from the claims of Mr. Ashton's children. Id. However, the law pertaining to joint tenancies is not absolute.

In the case Culley v. Culley, 404 P.2d 657, 658 (Utah 1965) the Utah Supreme Court held: "We recognize that from a recital of joint ownership with the right of survivorship there arises a presumption that such is the fact. But it is, of course, not absolute and invulnerable to attack. This is true even of deeds and other written instruments." In fact, the law is well established in this state that the presumption of joint ownership with the right of survivorship may be successfully attacked by establishing fraud, mistake, incapacity or other infirmity, undue influence, or by

establishing through clear and convincing evidence that the parties intended otherwise.

For example, in the case West One Trust Co. v. Morrison, 861 P.2d 1058 (Utah App. 1993), a father and son purchased three pieces of real property. Each of the three were conveyed by warranty deed to the father and son as joint tenants with full rights of survivorship, and not as tenants in common. After the father's death, the son conveyed the properties to himself and his father's widow as joint tenants. West One, the personal representative of the father's estate filed suit against the son and widow requesting that they be required to convey the properties to the estate. West one argued that the properties were actually owned by a partnership, consisting of the deceased father and the son, as equal partners, and that upon the father's death, the dissolution of the partnership necessarily occurred. Therefor each owned an undivided one-half interest in the properties, rather than vesting entirely in the son as the surviving joint tenant.

The son and widow filed a motion for partial summary judgment, asserting that because the deeds specified joint tenancy ownership, the properties passed to the son by operation of law upon his father's death. After a hearing, the court concluded that the three deeds were clear and unambiguous on their face and, therefore, that the father and the son held title to the properties as joint tenants with full rights of survivorship. West One appealed.

On Appeal West One contended that the trial court erred as a matter of law by precluding evidence that the parties intended the properties to be partnership property

and in concluding that the deeds established title by joint tenancy. West One argued that the deeds did not demonstrate the parties' true intent and that the joint tenancy designation on the deeds was a mistake. This Court reversed the trial court's summary judgment and remanded for further proceedings consistent with its opinion. Quoting from Haslem v. Ottosen, 689 P.2d 27, 30 (Utah 1984), this Court stated: "It is well settled that mistakes as to the legal effect of words used in a contract or deed, . . . are subject to reformation by the courts." West One Trust Co. v. Morrison, 861 P.2d at 1061. This Court further held: "The presumption that an unambiguous written document is accurate and binding requires a party to provide clear and convincing evidence of mistake to invoke the equitable remedy of reformation, (citations omitted)." Id. (citations omitted) . This Court then reversed the summary judgment explaining:

Therefore, in this case the trial court should have considered extrinsic evidence that may have demonstrated that the parties intended the subject properties to be held as partnership asserts, rather than as joint tenancies with rights of survivorship. We further conclude after examining the record before us, that there is an issue of material fact as to Jr.'s (the son's) and Sr.'s (the father's) intent regarding the properties' title."

Id. (parenthetical designations added).

In the case Anderson v. Brinkerhoff, 756 P.2d 95 (Utah App. 1988), this Court also addressed the issue of intent with respect to deeds. Elsie Brinkerhoff was the owner of property in Kane County. In 1966, Elsie entered into an agreement to sell her property to two of her sons, Cloyd and Mark. The contract required specified payments and provided for an escrow account to hold the deeds and process the payments. In

June 1979, Elsie purportedly executed and recorded a joint tenancy deed granting title in the property to herself, Cloyd and Mark. In October, 1979, Cloyd died, vesting record title to the property in Elsie and Mark, each with an undivided one-half interest. Then in August, 1980, Elsie signed an affidavit severing the joint tenancy, and signed a deed from herself to five of her children, giving each child an undivided one-fifth interest of the one-half record interest Elsie maintained in the land. In 1982, Cloyd's personal representative and his widow, filed suit seeking to enforce the 1966 contract and to quiet title in the property.

The trial court ruled that as of 1970, Elsie was not legally competent and that the 1979 and 1980 deeds were invalid. Alternatively, the trial court found that the 1979 joint tenancy deed and 1980 conveyance were not the result of Elsie's free will, but were brought about by the undue influence of family members.

On appeal, this Court affirmed the trial court's ruling that the 1979 joint tenancy deed and 1980 conveyance were not the result of Elsie's free will, holding as follows:

When a deed is executed with no intent to transfer a present interest in property, it is invalid. Courts have consistently held that a conveyance is valid only upon delivery of a deed with the present intent to transfer. Intention is the essence of delivery and is of primary and controlling importance. The grantor's present intent must be to pass his or her title interest to the grantee and divest himself of the same; otherwise the purported deed is not valid or effective. . . . The facts clearly support the trial court's findings that Elsie did not have the necessary intent to transfer her property when she executed the 1979 and 1980 conveyances.

Id. at 100, (citations omitted)

In Tangren v. Ingalls, 367 P.2d 179, 184 (Utah 1961), a case involving a bank account in joint tenancy, the Utah Supreme Court held:

We have discussed the foregoing cases to show that in most instances, where controversy has existed over the ownership of a bank account in joint tenancy, the court has considered the intent with which the account was created to be the basic and controlling fact. However, there is no necessity for us to quarrel with the interpretation that may be based on prior cases. Notwithstanding what may have been said therein, we are of the opinion that the rule which is sound in principal and practical in application is that applied in the cases of Neill v. Royce and Greener V. Greener, supra: that where there is a written agreement of joint tenancy with right of survivorship, there is a presumption of validity and it will be given effect unless it is successfully attacked for fraud, mistake, incapacity, or other infirmity, or unless it is shown by clear and convincing evidence that the parties intended otherwise; and further, that such rule is applicable whether the parties are living or where death has intervened. Nor would the fact that the original owner may have changed his mind after creation of the account alter the applicability of that rule.

Since the decision in Tangren v. Ingralls, Id., the legislature, in 1975, enacted Section 75-3-104, Utah Code Anno., which governs the right of survivorship with respect to specific joint accounts. Subparagraph one of this section specifically states: "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created."

The above authority clearly sets forth the rule of law in this state with respect to joint tenant deeds and joint tenant accounts. There is a presumption of validity with respect to such deeds and accounts that may be overcome by clear and convincing evidence of a different intention, mistake, fraud, incapacity or other infirmity, or undue



influence. If the presumption is rebutted, then the court may make such orders as are necessary in equity to carry out the actual intentions. In any event, the above authority makes absolutely clear that the intent of the parties, particularly the grantor, is the dispositive issue and that the trial court must consider the totality of the facts and circumstances in making its determination as to intent.

The trial court in this case correctly applied the foregoing principles. Mr. Ashton's four children alleged that Mr. Ashton did not intend to transfer a present interest in his property to Mrs. Ashton at the time he placed title to his property in joint tenancy or as tenants in common with her. The children further alleged that Mr. Ashton mistakenly believed that, by doing so, he would avoid probate, but that his children would nevertheless benefit from his property after Mrs. Ashton's death in accordance with the percentage interest set forth in his estate plan, (93% of Mr. and Mrs. Ashton's total combined estate). Consequently Mr. and Mrs. Ashton's true intent was to avoid probate, and not to transfer a present interest in Mr. Ashton's property to Mrs. Ashton.

This issue was fully tried by the trial court. As shown in the trial court's memorandum decision and the findings of fact and conclusions of law, Brief of Appellant, add., the trial court properly determined that the dispositive issue was Mr. Ashton's intent in creating the various joint tenancies and that the trial court must look to the totality of the facts and circumstances in making that determination. Inasmuch as the trial court properly applied the correct rule of law, its decision must be affirmed.

**II. THE TRIAL COURT'S JUDGMENT WAS NOT BASED UPON A DETERMINATION AS TO WHETHER MRS. ASHTON CONTRIBUTED TO ANY PART OF THE PURCHASE PRICE OF JOINT TENANCY PROPERTY. THEREFORE, THE TRIAL COURT DID NOT COMMIT ANY ERROR**

Mrs. Ashton also argues that her rights of survivorship are not precluded by the fact that she may or may not have contributed to the purchase price of the joint tenancy properties. Brief of Appellant, Point I (A), pp. 9-10. However, the trial court's judgment was not based, one way or the other, on this issue. Thus, the trial court did not commit any error on this point.

After making a determination that the question of intent was the dispositive issue and that a clear and convincing standard must be applied, the trial court, in its memorandum decision, then outlined the facts on which it relied in ruling that Mr. Ashton did not intend to give Mrs. Ashton a present interest in his property at the time the tenancies were created. See Brief of Appellant, add., Memorandum Decision.. The fact that Mrs. Ashton may or may not have contributed to the purchase price is not mentioned.

Likewise, the findings of fact and conclusions of law set forth the facts found by the trial court in accordance with Rule 52, Utah R.Civ. P. See Brief of Appellant, add., Findings of Fact and Conclusions of Law. Whether Mrs. Ashton may or may not have contributed to the purchase price is not a fact found by the trial court. The trial court simply did not address this specific issue or make any finding thereon. Consequently, the trial court did not commit any error in this regard.

**III. THE TRIAL COURT DID NOT ERRONEOUSLY PLACE THE BURDEN OF PROOF ON MRS. ASHTON. EVEN IF TRUE, THE ASHTON CHILDREN SUSTAINED THEIR BURDEN OF PROOF.**

Mrs Ashton alleges that the trial court committed error by erroneously placing the burden of proof on her instead of the Ashton children. Brief of Appellant, Point III (A), pp. 14 - 16. The trial court's memorandum decision does not support this contention. Moreover, as shown hereafter, even if the burden of proof was erroneously shifted to Mrs. Ashton, the findings of facts show that Ashton children met the appropriate burden of proof anyway.

**A. The Trial Court's Memorandum Decision Shows That The Trial Court Did Not Erroneously Place the Burden of Proof on Mrs. Ashton.**

Mrs. Ashton's assertion of error is that "the trial court erroneously relied on the Idaho Supreme Court case of Parker v. Kokot, 793 P.2d 195 (Idaho 1990) and placed the burden of proving the validity of the various joint tenancies on Mrs. Ashton instead of placing the burden of proof on appellees." Brief of Appellant, Point I (A), p. 14. The memorandum decision shows, however, that the trial court simply relied on this case to determine the dispositive issue of intent and to determine the evidence required to rebut the presumption of validity that attaches to joint tenancies.

The trial court cited two cases in its memorandum decision; Edstrom v. Kuder, 351 A.2d 506 (D.C. 1976), and the Parker case, 793 P.2d 195. After reviewing the facts in the Edstrom case, the Court concluded that, with respect to the issue of

whether joint tenancies or tenancies in common are created for mere business or personal convenience, "(t)he dispositive issue is the decedent's intent." Brief of Appellant, add., Memorandum Decision, p. 2. The trial court then went on to review the facts in the Parker case. Of particular significance is the trial court's emphasis on certain language quoted from the Idaho Supreme Court's ruling. This emphasis was noted by the trial court by underlining specific language within the quote itself. See, Id., at p.3. This language consists of the following:

1. ". . . merely placing names of other persons on a joint account does not preclude a showing that the account was set up for business or personal convenience reasons. . . .";

2. "Whether a bank account is held in joint tenancy with rights of survivorship depends on the intention of the parties, determined in the light of all the circumstances; . . . ."

3. ". . . clear and convincing evidence. . . ."

The trial concluded its review of the above cases by stating: "In applying the above authority to this case, it is necessary to consider the totality of facts and circumstances of this case in accordance with the ruling in Parker, infra, and a clear and convincing standard must be applied. Id., at p. 4.

This shows that the trial court relied on the Edstrom and Parker cases as authority only in deciding that the determinative issue was intent, that the trial court must consider the totality of the facts and circumstances in deciding the issue of intent,

and the burden of proof was by clear and convincing evidence. The trial court did not state that Mrs. Ashton had the burden of proving the validity of the joint tenancies by clear and convincing evidence. Mrs. Ashton's argument in this regard is simply not logical or consistent with the context of the trial Court's memorandum decision.

In considering the context of the memorandum decision, it is clear that the trial court decided that the clear and convincing standard must be applied to the issue of the decedent's intent at the time he created the various joint tenancies with Mrs. Ashton. After making this decision, the trial court then went on and set forth the facts which it found met this burden, ultimately concluding, in favor of the Ashton children, that Mr. Ashton did not intend to give Mrs. Ashton a present interest or ownership in his property and that the joint tenancies were created for convenience. These facts pertain to the Ashton children's position that the tenancies were not valid, not Mrs. Ashton's claim. Consequently, it is clear from the memorandum decision that the trial court did not erroneously place the burden upon Mrs. Ashton to prove the validity of the various joint tenancies by clear and convincing evidence. Instead, the memorandum decision, when considered in its totality, logically shows that the burden of proof was placed upon the Ashton Children.

**B. Even If the Burden of Proof Was Erroneously Shifted to Mrs. Ashton, the Findings of Fact Show that the Ashton Children Met the Appropriate Burden of Proof Anyway.**

The Utah Supreme Court has set forth the standard for appellate review when the allegation of error is that the burden of proof was erroneously placed upon the

wrong party. In Pilcher v. Pilcher, 197 P.2d 143 (Utah 1948), the appellant claimed that the burden of proof was erroneously placed upon her. However, the respondent contended that even if this was true, the respondent sustained the burden of proof anyway. The Utah Supreme Court held: "If this is so, then the error of the lower court in misconceiving the burden of proof is not prejudicial. We look then to the evidence adduced to determine whether the respondent has in fact sustained the burden which properly should have been hers." Id. at 197. This standard was affirmed in City Electric v. Industrial Indemnity Corp., 683 P.2d 1053, 1059-1060 (Utah 1984) where the Court held:

Under familiar rules of appellate procedure, we are constrained to review the evidence in a light most favorable to the judgment of the trial court. Furthermore, notwithstanding the trial court's application of an erroneous burden, we will affirm its decision if by applying the appropriate burden we arrive at the same result.

Consequently, even if the trial court erroneously applied the burden of proof on Mrs. Ashton, the trial court's decision must be affirmed if the evidence adduced at trial shows that the Ashton children sustained their burden when the appropriate standard is applied. However, Mrs. Ashton failed to file a trial transcript. Under these circumstances the appellate court takes judicial notice of the findings of fact and conclusions of law reached by the trial court. They are taken as true. Low v. Bonnacci, 788 p.2d 512, 512 (Utah 1990).

In this case, the findings of fact and conclusions of law show that the Ashton children sustained their burden of proof when the appropriate standard is applied.

Each of the findings of fact establishes clearly and convincingly that Mr. Ashton did not intend to give Mrs. Ashton a present interest in his property when he created the various joint tenancies and tenancies in common with her. Of particular significance are the Court's following findings:

1. That both Mr. and Mrs. Ashton were concerned about a fair distribution of their combined total estate to their respective children; Brief of Appellant, add., Findings of Fact and Conclusions of Law, ¶ 6;

2. That Mrs. Ashton raised her concern with Mr. Ashton about providing for her children's inheritance with respect to the assets she brought into the marriage; Id., at ¶ 7;

3. That Mr. Ashton did not want to disinherit his children and wanted to take care of his children from his estate; Id., at ¶ 8;

4. That Mr. Ashton prepared two financial work sheets, one conservative and one optimistic, to determine a percentage division of the combined total estate between Mr. Ashton's children and Mrs. Ashton's children, which included property that was transferred into joint tenancy and tenancy in common with Mrs. Ashton; Id., at ¶ 9;

5. That Mr. Ashton was clearly concerned about the property that would constitute the remainder interest in his children; Id., at ¶ 10;

6. That while Mrs. Ashton did not agree with the percentages calculated by Mr. Ashton to divide their combined total estate between their respective children, including the property that was transferred into joint tenancy and tenancy in common with Mrs.

Ashton, she was aware of the percentage division and executed identical wills with Mr. Ashton providing for a division of their combined total estate for the benefit of their respective children based upon the percentages that Mr. Ashton derived, including the property that was transferred into joint tenancy and tenancy in common with Mrs. Ashton; Id., at ¶¶ 12, 14, 24, 25, 26, 27, 28, 29, 30 & 31.

7. That Mrs. Ashton's understanding of the final will is that when she dies his children will receive a portion of the estate and that when they are both dead, the step children and Mr. Ashton's children were to receive their inheritance; Id., at ¶ 26;

8. That based upon the Carolyn Driscoll's discussions with Mr. Ashton, she understood that Mr. Ashton intended that upon his death, assets attributable to him, would pass to his children; Id., at ¶ 28;

9. That after executing identical wills with Mr. Ashton, Mrs. Ashton was still concerned about her children receiving their fair share upon Mr. Ashton's death; Id., at ¶ 33;

10. That after further discussion between Mr. and Mrs. Ashton, their original identical wills were amended to change the percentages of their combined estates to be divided between their respective children over time; Id., at ¶ 34;

11. That Mr. Ashton clearly articulated his concern for his children and his intent to ultimately divide his and Mrs. Ashton's total estate between their respective children; Id., at ¶ 35;

12. That Mr. Ashton's efforts to itemize his and Mrs. Ashton's combined total



estate, including properties that were transferred into joint tenancies and tenancies in common with Mrs. Ashton, indicates Mr. Ashton's intent to provide Mrs. Ashton with only a life estate; Id., at ¶ 36;

13. That the vast majority of Mr. Ashton's property was transferred into joint tenancies and tenancies in common with Mrs. Ashton. However, Mr. Ashton expressed a desire to preserve property for his children's benefit and there is nothing to suggest that he had any intent to disinherit them, which is inconsistent with giving Mrs. Ashton a present ownership in any property that was transferred to Mrs. Ashton as a joint tenant or tenant in common; Id., at ¶¶ 37 - 38;

14. That the totality of the facts and circumstances establish that both Mr. and Mrs. Ashton intended to provide each other with a simple life estate without any power of consumption subject to the estate being preserved for the benefit of each other's children in the percentage amount set forth in the addendum to their identical wills; Id., at ¶ 39;

15. That, in addition to providing Mrs. Ashton with a life estate, Mr. Ashton provided additional substantial non-probate benefits for Mrs. Ashton by naming her as the beneficiary thereto; Id., at ¶ 40;

16. That the total facts and circumstances further establish that Mr. Ashton did not intend to give Mrs. Ashton a present interest or ownership in his property and that the joint tenancies and tenancies in common were created for convenience; Id., at ¶ 41.

After applying the appropriate burden of proof on Mr. Ashton's children, the foregoing findings of fact, together with the trial court's memorandum decision, demonstrate that Mr. Ashton's children rebutted the presumption that attaches to the validity of joint tenancies by showing a contrary intent, clearly and convincingly.<sup>5</sup> Consequently, even if the trial court erred in shifting the burden of proof to Mrs. Ashton, the findings of fact show that Mr. Ashton's children met their burden of proof by the evidence adduced at trial, even when the appropriate burden is applied to them.

**IV. THE TRIAL COURT APPROPRIATELY DETERMINED THE ISSUE OF INTENT AT THE TIME THE VARIOUS JOINT TENANCIES AND TENANCIES IN COMMON WERE CREATED.**

Mrs. Ashton argues that the trial court erred by failing to ascertain the intent of the parties as of the time title was taken as joint tenants. Brief of Appellant, Point III (B), p. 16. She further asserts that the trial court's factual findings relate to Mr. Ashton's intent as of the time he executed his will and that the trial court made no factual finding that addressed his intentions at the time he took title in joint tenancy with Mrs. Ashton. *Id.*, at 17. The trial court was obligated to determine intent as of the time title was taken as joint tenants. However, the trial court's memorandum decision and findings of fact clearly and unambiguously show that the trial court did determine intent

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<sup>5</sup>When considering the findings of the trial court, it is obvious that the evidence supporting the findings was adduced by the Ashton children, not Mrs. Ashton, inasmuch as the evidence and findings are contrary to the arguments of Mrs. Ashton at trial. This further demonstrates that the Ashton children met their burden of proof.

as of the time title was taken as joint tenants.

In the opening paragraphs to the trial court's memorandum decision, the trial court stated:

This ruling addresses the issue of whether the decedent (Mr. Ashton) intended to transfer a valid present interest and/or right of survivorship, in his property to the defendant, Mrs. Ruth Ashton, **when he created various joint tenancies and tenancies in common before his death**, or whether the property is part of the decedent's estate and therefore subject to probate.

Brief of Appellant, add., Memorandum Decision, p.1. (emphasis added).

In response to Mrs. Ashton's argument that the joint property should not be included in the probate estate because it was under the direction and control of both parties before the will was created, the trial court stated: "This assertion does not address the dispositive issue of Mr. Ashton's **intent in creating the various joint tenancies.**" Id., at p. 7.

The trial court further stated in conclusion:

This Court therefore finds, based on the totality of facts and circumstances of this case alluded to herein, that **Mr. Ashton did not intend to give the Defendant a present interest or ownership in his property, that the joint tenancies were created for convenience**, and that said property must be included in the decedent's estate.

Id., (emphasis added).

These statements show that the trial court properly focused on intent at the time of creation of the various tenancies, contrary to Mrs. Ashton's assertion that trial court's findings only address Mr. Ashton's intent at the time he executed his will.

The findings of fact also demonstrate that the trial properly focused on intent at the time of creation of the various tenancies. Finding of Fact number 38 states:

Plaintiff's trial exhibit #17, a summary of the Decedent's property, shows that the vast majority of the Decedent's property was transferred into joint tenancies or tenancies in common with the Defendant. The Decedent expressed a desire to preserve property for his children's benefit. **This is inconsistent with giving the Defendant a present ownership interest in any property that was transferred from the Decedent to her as a joint tenant or as a tenant in common.**

Brief of Appellant, add., Findings of Facts, p. 8. (emphasis added).

Finding of fact number 41 further states:

**The total facts and circumstances** further establish that the **Decedent did not intend to give the Defendant a present interest or ownership in his property, that the joint tenancies and tenancies in common were created for convenience**, and that any such property held as joint tenants or as tenants in common with the Defendant must be included in the Decedent's estate.

Id., (emphasis added).

The findings of fact and memorandum decision, taken together, also show that the trial court analyzed the total facts and circumstances, including, but not limited to, the parties' joint estate plan which provided a division of the entire combined estate between their respective children including the property that was transferred into joint tenancies and tenancies in common, Mrs. Ashton's understanding that when she and Mrs. Ashton were both dead their respective children were to receive their inheritance of the total combined estate in accordance with the percentage division set forth in the identical wills, Mr. Ashton's intent to create a life estate in Mrs. Ashton with a remainder

interest in his children, Mr. Ashton's concern with preserving his estate for his children's inheritance, the language of Mr. Ashton's will and the dispositive provisions contained therein, Mr. Ashton's desire to preserve his property for his children's benefit, and Mr. Ashton's method of otherwise providing for Mrs. Ashton by naming her as the beneficiary on non-probate benefits in excess of \$122,000. See Brief of Appellant, Add., Findings of Fact, Memorandum Decision. All of the foregoing show the trial court's proper analysis of intent at the time the various tenancies were created by taking into consideration the total facts and circumstances.

The trial court clearly addressed the issue of intent at the time the various joint tenancies and tenancies in common were created by analyzing the total facts and circumstances. Mrs. Ashton's argument that the trial court's findings relate only to Mr. Ashton's intent at the time he executed his will is not supported by either the memorandum decision or the findings of fact. In addition, her argument that the trial court made no findings concerning the intent at the time the tenancies were created is contrary to the clear language contained in the memorandum decision and the findings of fact. Consequently the trial court did not err in deciding intent.

**V. THE EVIDENCE SUPPORTS THE TRIAL COURT'S DECISION  
INVALIDATING THE JOINT TENANCIES AND TENANCIES IN  
COMMON.**

Mrs. Ashton further argues that the evidence relied upon by the trial court does not rise to the level of clear and convincing evidence. Brief of Appellant, p. 18-20. In

the case In the Matter of the Estate of Gordon, 869 P.2d 971, 975 (Utah App.

1994)(citations omitted), this Court held as follows:

The factual issue of the decedent's intent is one we review with deference to the trial court's findings, if adequate, and we reverse only upon a finding of clear error. In order to show clear error, the appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous.

As stated previously, Mrs. Ashton failed to file a trial transcript. Under these circumstances the appellate court takes judicial notice of the findings of fact and conclusions of law reached by the trial court. Low v. Bonnacci, 788 p.2d 512, 512. In fact, Mrs. Ashton does not question the veracity of the factual findings but argues the findings do not "constitute clear and convincing evidence of an intention, on Mr. Ashton's part, not to create valid joint tenancies." Brief of Appellant, Point III (C), p. 19.

In the case Oneida/SLIC v. Oneida, 872 P.2d 1051, 1053 (Utah App.

1994)(citations omitted) this Court explained:

The deference we afford to trial courts' findings is based on and fosters the principle that traditional fact finders, whether judges or juries, are better equipped to consider, weigh, and assess the evidence that litigants bring before the courts. Efficient resolution of disputes demands that, unless the facts found by the trial court are clearly erroneous, they will be upheld on appeal. In short, we do not sit to retry the facts. Successful challenges to findings of fact thus must demonstrate to appellate courts first how the trial court found the facts from the evidence and second why such findings contradict the weight of the evidence. These demonstrations in appellants' briefs not only avoid retrying the facts but also assist us in our decision-making and opinion-writing, thus increasing our efficiency.

The trial court clearly considered, weighed and assessed the evidence at trial. The trial court was obviously applying a standard of clear and convincing evidence at the time it made its determination as to intent. See Point III (A) hereinabove. The trial court also clearly considered the total facts and circumstances in deciding intent when the various tenancies were created. See Point III (B) above. The trial court did find clear and convincing evidence of an intention on Mr. Ashton's part not to create valid tenancies with Mrs. Ashton and the trial court's judgment should be affirmed.

Mrs. Ashton claims that the findings do not rise to the level of clear and convincing evidence. This claim violates the standards of appellate review. See Oneida/SLIC, Id., This Court has not had the opportunity to hear, consider, weigh and assess the evidence at trial and this Court is not in a position to retry the facts. The trial court clearly found clear and convincing evidence of intent sufficient to rebut the presumption of validity that attaches to joint tenancies. Insofar as the findings are adequate to support the trial court's conclusion, its judgment must be affirmed.

Mrs. Ashton inappropriately bolsters her claim that the findings do not rise to the level of clear and convincing evidence by grossly misrepresenting the trial court's findings. She claims that the evidence relied upon by the trial court consists solely of findings that 1) Mr. Ashton loved his children; 2) Mr. Ashton did not want to disinherit his children at the time he executed his will; 3) Mr. Ashton wanted to provide for his children through his will; 4) Mrs. Ashton was a beneficiary of a life insurance policy; 5) Mr. Ashton spent considerable time and energy into developing a plan for distributing

his property upon his death; and, 6) when developing this plan, he considered the entire scope and nature of his holdings. She contends that the trial court's judgment was based on inference, unsupported by evidence.

The trial court's findings of fact on this issue do not consist solely of the foregoing. Notably absent from Mrs. Ashton's characterization of the trial court's findings are those findings that articulate 1) the joint concern of both Mr. and Mrs. Ashton to fairly distribute their combined total estate to their respective children, Brief of Appellant, Add. Findings of Fact and Conclusions of Law, ¶ 6; 2) Mrs. Ashton's concern with Mr. Ashton about providing for her children's inheritance from the assets she brought into the marriage; Id., at ¶ 7; 3) Mr. Ashton's preparation of two work sheets containing all of the assets of Mr. and Mrs. Ashton's combined estate, including the property that was transferred into joint tenancy and tenancy in common before and after execution of their wills which was used to determine a percentage division between their respective children of the entire combined estate, including the joint tenancy and tenancy in common property, Id., at ¶ 9; 4) Mr. Ashton's clear concern about the property that would constitute the remainder interest in his children, Id., at ¶ 10; 5) the fact that the percentages were to divide the entire combined estate between their respective children after Mr. and Mrs. Ashton were both dead, Id., at ¶ 12; 6) the fact that Mrs. Ashton was aware of the percentage division and signed identical wills with Mr. Ashton based upon the foregoing, which wills were executed in connection with one another so that Mr. and Mrs. Ashton's respective children would get their



proportionate share of the total combined estate, Id., at ¶¶ 14-21, 29-31; 7) Mrs. Ashton's understanding of the final will that when both she and Mr. Ashton are dead, the step children and children were to receive their inheritance, Id., at ¶ 26; 8) Mr. Ashton's statement to Mrs. Ashton that she would enjoy what he had as long as she live and that when she dies, she wouldn't, and the fact that Mr. Ashton never stated that he wanted Mrs. Ashton to have his entire estate, that he simply wanted her to be taken care of Id., at ¶ 24 - 25; 9) Carolyn Driscoll's understanding from Mr. Ashton that he intended that upon his death, assets attributable to him would pass to his children, Id., at ¶ 28; 10) Mr. Ashton's clear articulation of his concern for his children and his intent to ultimately divide his and Mrs. Ashton's total estate between their respective children, Id., at ¶ 35; 11) Mr. Ashton's intent to provide Mrs. Ashton with a life estate without any power of consumption with a remainder interest in his children, Id., at ¶ 36; 12) the vast majority of Mr. Ashton's property being transferred into joint tenancies or tenancies in common with Mrs. Ashton which is inconsistent with Mr. Ashton's express desire to preserve his property for his children's benefit, Id., at ¶ 38; 13) the totality of the facts and circumstances establishing that Mr. and Mrs. Ashton's intent was to provide each other with a simple life estate without any power of consumption, subject to their estate being preserved for the benefit of each other's children in accordance with the percentages set forth in the wills, Id., at ¶ 39; 14) Mr. Ashton's contemplation of providing for Mrs. Ashton by naming her as beneficiary to over \$122,000 in non-probate interests consisting of life insurance, a savings and investment plan and an IRA, Id., at

¶ 40; and, 15) the total facts and circumstances establishing Mr. Ashton's intent not to give Mrs. Ashton a present interest or ownership in his property and that the joint tenancies and tenancies in common were created for convenience, Id., at ¶ 41. The above list is not meant to be complete. However these findings, together with the memorandum decision clearly demonstrate that the trial court applied the clear and convincing standard in its analysis of the issue of intent pertaining to the creation of the various tenancies, considered the total facts and circumstances, and found that the evidence was clear and convincing. Clearly the trial court's judgment was not based solely on the six findings itemized by Mrs. Ashton. The actual findings are not clearly erroneous, they rise to the level of clear and convincing evidence, and the trial court clearly considered the relevant factors in determining intent. Its judgment should be affirmed.

**VI. THE TRIAL COURT DID NOT ERR IN DENYING MRS. ASHTON'S REQUEST FOR LITIGATION EXPENSES.**

At the conclusion of the trial in this matter, Mrs. Ashton's attorney requested that Mr. Ashton's estate be ordered to pay Mrs. Ashton's litigation costs and attorney's fees. The trial Court denied this request. The trial court's judgment should be sustained because Mrs. Ashton has failed to marshall any evidence, or show from the record, that the Court's judgment was in error or that Mrs. Ashton preserved this issue at trial.

Utah Code Anno. §75-3-719 (1953), as amended, provides: "If any personal representative or person nominated as personal representative defends or prosecutes

any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorneys' fees incurred." In Dixie State Bank v. Bracken, 764 P. 2d 985 (Utah 1988), the Utah Supreme Court delineated the factors necessary for a determination of an award of attorney fees holding that proof of these factors is necessary in order to establish the reasonableness of any fees awarded.. Those factors are set forth in the Brief of Appellant at page 22.

In this case, Mrs. Ashton has not shown that any evidence was presented to the trial court with respect to the factors necessary in determining the reasonableness of her attorney fees. She only states that she moved to recover her litigation costs and attorney's fees against Mr. Ashton's estate at the close of trial. If she failed to present or proffer such evidence, then the trial court's judgment denying her request is proper.

In the Oneida/SLIC v. Oneida case, 872 P.2d 1051 1053-54, this Court stated:

Additionally, the deference we afford to trial courts' factual findings is based on and fosters the principle that appellants rather than appellees bear the greater burden on appeal. When appellants do not marshal the evidence in support of disputed findings, they place appellees or respondents in a precarious position. Prudent appellees likely will not rely solely on an assertion that the appellant has failed to marshal the evidence; rather, appellees are compelled to perform the marshaling process to protect their position. In short, appellees are constrained to do the appellant's work, usually at considerable time and expense. When appellants challenge findings of fact, fairness requires that they bear the costs of demonstrating how the trial court found those facts from the evidence and why those findings contradict the weight of the evidence. The marshaling requirement, therefore, enhances both fairness and efficiency as appellate courts hear appeals of trial court rulings.

The same principles should apply to Mrs. Ashton's claim that the trial court erred in denying her request for payment of her litigation expenses from Mr. Ashton's estate. Mrs. Ashton should have the burden on appeal to show that she presented or proffered evidence at trial, or pursuant to a post-trial motion, sufficient to establishing the factors set forth in the Dixie v. Bracken case. Mrs. Ashton has failed to do so. She simply has not shown that this issue was preserved for appeal before the trial court. Consequently she has not shown that the trial court's order denying her request for payment of attorney fees was in error.

Moreover, the trial court's denial was appropriate because the litigation expenses involved the competing claims of heirs of the estate. Mrs. Ashton's capacity in the litigation was not that of a personal representative. Section 75-3-703, Utah Code Anno., (1953), as amended sets forth the general duties of a personal representative.

This statute states at subparagraph (1), in pertinent part:

A personal representative is a fiduciary who shall observe the standard of care applicable to trustees as described by Section 75-7-302. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

As set forth therein, a personal representative is not only a fiduciary, but is obligated to use her authority **for the best interests of successors to the estate.**

The litigation in this case involved the competing claims of successors to the

estate. Mrs. Ashton was claiming that she was the sole heir of the estate, not a life tenant, and that the estate did not include the property that Mr. Ashton transferred to her as joint tenants or tenants in common. On the other hand, the Ashton children were claiming that Mrs. Ashton was not the sole heir of the estate, rather she was a life tenant, and that the estate should include Mr. Ashton's property that was transferred into various tenancies with Mrs. Ashton. Mrs. Ashton, by virtue of her claims, was not using her authority in this litigation for the best interests of successors to the estate. Consequently, it cannot be said that her true capacity through the litigation was that of a personal representative. She claimed to be an heir, competing against the claims of the Ashton children.

Section 75-3-719 applies to a personal representative who prosecutes or defends actions in good faith. This Section must be construed together with Section 75-3-703. When construed together, it is clear that a personal representative must be acting within her statutory authority with respect to the action she is prosecuting or defending. Mrs. Ashton was not acting within her statutory authority pertaining to a personal representative in this litigation. She was not using her authority in this litigation for the best interest of the successors to the estate. Again, she was acting to establish her sole claim as heir and, to defeat the other successors' claims. Consequently, the trial court's judgment should be affirmed.

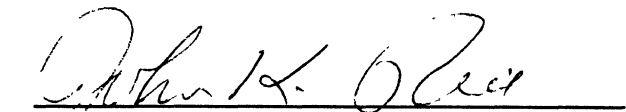
The editorial board comment to Section 75-3-719 states: "Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for

compensation would not be in good faith." While this comment appears to pertain to individuals' competing claims to letters of administration, the principle expressed therein applies to Mrs. Ashton's claim for attorney fees in this case as well. Mrs. Ashton's claims in the litigation were for the self serving purpose of establishing herself as the sole heir, thereby enhancing her own prospect of inheritance as a successor to the estate.. This is akin to the purpose of enhancing a personal representative's prospects for compensation, which would not be in good faith. Inasmuch as the aim of Mrs. Ashton's claims in the litigation was the enhancement of her own prospects as an heir of the estate, her attorney's fees and expenses in this litigation were not incurred in good faith and the trial court's judgment should be affirmed.

### **CONCLUSION**

The Ashton children respectfully pray that the trial court's judgment be affirmed, and that they be awarded their costs and fees on appeal as may be appropriate in the premises.

DATED this 6th day of January, 1995

  
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John K. Rice  
Attorney for Respondents

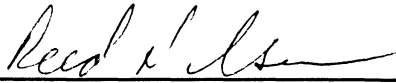
**CERTIFICATE OF HAND DELIVERY**

I hereby certify that I hand delivered two true and correct copies of the foregoing

Brief of Respondents to the following:

John J. Borsos  
Gary L. Bell  
370 East South Temple, Suite 500  
Salt Lake City, Utah 84111

Dated this 6 day of January, 1995

  
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