

1995

Herschel West, Jr., as the Successor Trustee of the
Herschel J. West and Hazel L. West Trust, Herschel
J. West, Jr., Richard L. West, and Carole A. West
Edmunds individually as the beneficiaries under
the Herschel J. West and Hazel L. West Trust v.
Marilyn West, an individual : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH STATE COURT OF APPEALS

N THE MATTER OF THE ESTATE OF
HERSCHEL JOSEPH WEST,

Deceased.

HERSCHEL WEST, JR., as the Successor
Trustee of the Herschel J. West and
Hazel L. West Trust, HERSCHEL J.
WEST, JR., RICHARD L. WEST, and
CAROLE A. WEST EDMUNDS individually
as the beneficiaries under the
Herschel J. West and Hazel L. West
Trust,

Plaintiffs and Appellants,

vs.

MARILYN WEST, an individual,

Defendant and Appellee.

BRIEF OF APPELLEE

Case No. 950307-CA

Priority 15

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UTAH SUPREME COURT
BRIEF

950307CA

APPEAL FROM THE FINAL JUDGMENT OF THE
FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY
HONORABLE GUY R. BURNINGHAM, PRESIDING

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COURT OF APPEALS

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction over this matter pursuant to Sections 8-2-2(3)(j) & (4) and 78-2a-3(2)(k) of the Utah Code.

STATEMENT OF THE ISSUE

The sole issue for the Court to decide in this appeal is whether the trial court erred by ruling that as a matter of law the trust empowered Herschel J. West, Sr. to quitclaim the real property to himself and his wife, Marilyn West, as joint tenants with full rights of survivorship.

"Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Because entitlement to summary judgment is a question of law, no deference is due the trial court's determination of the issues presented." Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993) (citations omitted).

DETERMINATIVE LAW

"If two or more trustees are appointed to perform a trust, and if any of them is unable or refuses to accept the appointment, or, having accepted, ceases to be a trustee, the surviving or remaining trustees shall perform the trust and succeed to all the powers, duties, and discretionary authority given to the trustees jointly." Section 78-7-405(2) of the Utah Code.

STATEMENT OF THE CASE

A. Nature of the Case.

This case is a dispute between Appellee, the personal representative of the Estate of Herschel J. West, Sr., and Appellants, the remainder beneficiaries of a trust created by Herschel J. West, Sr. and his first wife Hazel L. West. Appellee is the second wife of Herschel J. West, Sr., and Appellants are the children of Herschel J. West, Sr. and Hazel L. West. The corpus of the trust consists of real property, a residence occupied by Appellee and Herschel J. West, Sr. until his death, and by Appellee thereafter.

Appellants mischaracterize the nature of this case and its central issue as whether or not as a matter of law a trust created by multiple trustors becomes irrevocable upon the death of one of the trustors in spite of the intent of the trustors as embodied in the language of the trust. Appellants thereby overlook the plain language of the trust and the ability of multiple trustors (as well as sole trustors) to define within the trust instrument the power to revoke the trust or otherwise control the disposition of trust property. Consequently, trusts must be examined on a case-by-case basis to determine what powers have been established by the trustor(s) regarding the trust property.

Therefore, this case centers on the powers set forth in the trust instrument and the ability of Herschel J. West, Sr. to dispose of the trust property by revocation, consumption or otherwise.

B. Course of Proceedings.

On February 8, 1993, Appellee, as Personal Representative (the trial court having previously ordered the removal of Appellant Herschel J. West, Jr. as Personal

Representative [R. at 270]), filed the Inventory for the Estate of Herschel J. West, Sr. Probate No. 91-3400471). On or about April 6, 1993, Appellants filed their Objection to Inventory asserting that a number of items listed in the Inventory were held in various trusts and therefore were not part of the estate. The subject real property was not listed in the Inventory because Appellee believed that the property passed by operation of law to her as the surviving joint tenant.

On November 1, 1993, Appellants filed a Complaint (Civil No. 930400583) against Appellee seeking a declaration that title to the real property was vested in themselves as beneficiaries under a Declaration of Trust made by Herschel J. West, Sr. and Hazel L. West, and claiming that the quit claim deed Herschel J. West, Sr. had executed in favor of himself and Appellee was in violation of this Declaration of Trust. [R. at 18.] On March 2, 1994, Appellee filed a Motion for Judgment on the Pleadings on the grounds that even if the alleged trust was valid (which Appellee contended it was not), it was properly revoked, or in the alternative, the real property was effectively disbursed to Herschel J. West, Sr. [R. at 44 & 73.]

On May 25, 1994, Civil No. 930400583 was consolidated with Probate No. 91-3400471 [R. at 89.], and Appellee's Motion for Judgment on the Pleadings regarding the subject trust was considered along with cross motions for Summary Judgment regarding the validity of the alleged trusts identified by Appellants in their Objection to Inventory. Appellee's Motion for Judgment on the Pleadings was substantively treated as a Motion for Summary Judgment pursuant to Rules 12(c) and 56 of the Utah Rules of Civil Procedure.

C. Disposition in the Trial Court.

On October 25, 1994, the trial court ruled that the subject trust was valid, but did not address the issue of whether or not Herschel J. West, Sr. had effectively transferred the real property out of the trust. [R. at 547.] (Appellants erroneously contend the court awarded the real property to themselves. Appellants Brief at 7.) On November 2, 1994, Appellee filed a Request for Clarification of Ruling and Enlargement clarifying the ultimate disposition of the real property. [R. at 550.] On or about December 15, 1994, Appellants filed a Request for Entry on Land and Inspection in an attempt to gain access to the real property. [R. at 556.] On January 17, 1995, the trial court clarified its earlier ruling by finding that the trust was valid, but had been effectively revoked by Herschel J. West, Sr. when he quit claimed the subject real property to himself and Appellee; accordingly, Appellants' Request for Entry on Land and Inspection was denied. [R. at 587.] A Final Judgment to this effect was issued on or about February 9, 1995. [R. at 590.]

D. Statement of the Facts.

1. Herschel J. West, Sr. and Hazel L. West executed a Declaration of Trust purporting to hold the real property in trust; the Declaration of Trust was notarized on August 5, 1986. (Appellants erroneously claim that the date of the creation of the trust was July 18, 1969. Appellants Brief at 6. July 18, 1969 was the date the real property was originally conveyed to Herschel J. West, Sr. and Hazel L. West. [R. at 41.]

2. Herschel J. West, Sr. and Hazel L. West were co-trustees of the subject trust, with the survivor to "continue as sole Trustee." [R. at 40.]

3. Appellants were named as remainder beneficiaries of the trust. [R. at 41.]

4. The Declaration of Trust empowers the successor trustee to disburse to, or for the benefit of, Herschel J. West, Sr. and Hazel L. West "such sums from income or principal as appear necessary or desirable for [their] comfort or welfare." [R. at 41.]

5. The Declaration of Trust empowers Herschel J. West, Sr. and Hazel L. West "(1) to place a mortgage or other lien upon the property, (2) to collect any rental or other income which may accrue from the trust property and to pay such income to [themselves] as individuals." [R. at 40.]

6. The Declaration of Trust "reserve[s] unto [Herschel J. West, Sr. and Hazel L. West] the power and right at any time during [their] lifetime to amend or revoke in whole or in part the trust The sale or other disposition by [them] of the whole or any part of the property held [thereunder] shall constitute as to such whole or part a revocation of this trust." [R. at 40.]

7. Hazel L. West died on June 19, 1988. [R. at 45.]

8. On November 18, 1989, Herschel J. West, Sr. married Appellee. [R. at 44.]

9. On January 16, 1991, Herschel J. West, Sr. quit claimed the real property to himself and Appellee, as joint tenants with full rights of survivorship; this deed was recorded the same day. [R. at 38.]

10. Herschel J. West, Sr. died on December 11, 1991. [R. at 17.]

SUMMARY OF THE ARGUMENT

I. The trial court properly granted summary judgment in favor of Appellee because reasonable minds could not differ regarding the power of Herschel J. West, Sr. to properly transfer the real property out of the trust pursuant to any one of various alternate theories.

II. The Declaration of Trust fully empowered Herschel J. West, Sr. to revoke the trust, and he properly did so by quit claiming the real property to himself and Appellee. This is particularly so when the intent of the trustors is examined as expressed in the various provisions of the trust instrument.

III. The Declaration of Trust fully empowered Herschel J. West to disburse to himself as much of the entire principal of the trust as was desirable for his comfort or welfare, and he properly did so by quit claiming the real property to himself and Appellee.

IV. Appellee detrimentally relied on Herschel J. West, Sr.'s promise to transfer the real property into the names of himself and Appellee as joint tenants with full rights of survivorship, sold the home she had lived in prior to her marriage to Herschel J. West, Sr., and maintained and made substantial improvements to the real property.

V. Appellants' remaining arguments are irrelevant and do not apply to this matter.

ARGUMENT

I. The Trial Court Properly Granted Summary Judgment in Favor of Appellee.

"A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ." West One Trust Co. v. Morrison, 861 P.2d 1058, 1060 (Utah Ct. App. 1993) (citations omitted). All of the relevant facts as set forth above, particularly the terms of the subject trust, were presented to the trial court. The trial court properly concluded that the terms of the trust empowered Herschel J. West, Sr. to revoke it. However, an appellate court "may affirm a grant of summary judgment on any ground available to the trial court, even if it is one not relied on below." Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993) (citations omitted).

This Court may affirm the trial court's grant of summary judgment based on Herschel J. West, Sr.'s power to revoke the trust or his power to transfer the real property out of the trust for his own comfort or welfare.

II. The Declaration of Trust Fully Empowered Herschel J. West, Sr. to Revoke the Trust After the Death of Hazel L. West.

A. The trust provisions provide for revocation.

Paragraph 5 of the trust plainly declares: "We reserve unto ourselves the power and right at any time during our lifetime to amend or revoke in whole or in part the trust hereby created without the necessity of obtaining the consent of any beneficiary and without giving notice to any beneficiary. The sale or other disposition by us of the whole or any part of the property held hereunder shall constitute as to such whole or part a revocation of this trust." As the survivor of the two trustors, Herschel J. West, Sr. was fully empowered by the trust to revoke it.

"[T]rust provisions are not to be construed in the abstract, but rather must be viewed against the background of the *entire document*." Brenneman v. Bennett, 420 F.2d 19, 23 (8th Cir. 1970) (applying Iowa law) (emphasis added); accord Rubinson v. Robinson, 620 N.E.2d 1271, 1276 (Ill. App. Ct. 1993). An examination of Paragraphs 1, 4, 6 and 7 of the subject trust reveals that these paragraphs are intended to be designations of trustee powers, not those reserved to the trustors. Thus, Paragraph 5, which is couched within the other trustee provisions, is logically interpreted as giving Herschel J. West, Sr. and Hazel L. West the power as trustees to revoke the trust (which would be the natural consequence of the exercise of their power to transfer trust property). As the surviving trustee, Herschel J. West, Sr. had the power to exercise any discretionary trustee powers that would have required the joint action by Herschel J. West, Sr. and Hazel L. West while she was still alive and acting as a trustee. See Declaration of Trust, Paragraph 7; Utah Code § 78-7-405(2).

It is entirely permissible for a trustor to provide in the terms of a trust that the trustee has the power to revoke it. See Kline v. Utah Dept. of Health, 776 P.2d 57, 61 (Utah Ct. App. 1989); Rubinson v. Robinson, 620 N.E.2d 1271, 1280 (Ill. App. Ct. 1993) (There is a "long-settled rule and [a] plethora of cases that have held where the settlor reserves the unrestricted power to amend a trust, or where the instrument vests such power in the trustees, that power may be used to terminate the trust or, as here, change the beneficiaries of the trust"); Landeau v. Landeau, 449 N.Y.S.2d 2, 2 (1982); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 1000, at 314 (2d ed. rev. 1983).

In Kline, the Department of Health asserted that the trustee of a trust had the power to revoke a trust, so the corpus of the trust should be attributed to the trustor in determining his eligibility for benefits. However, the court ruled that a trust is revocable only to the extent such a power is set forth in the trust, and the particular trust did not confer the power to revoke on the trustee. Kline, 776 P.2d at 61. It is noteworthy that the court did not rule that a trustee could not be vested with the power to revoke a trust.

In Rubinson, the trustees were able to use the power granted to them under the terms of the trust to cut off the interest of originally named beneficiaries (essentially the same complaint made by Appellants in this case). Rubinson, 620 N.E.2d at 1280.

The above analysis would not change if Paragraph 4 of the subject trust vests the power to revoke in the trustors rather than the trustees. Because Herschel J. West, Sr. and Hazel L. West were both the trustors and trustees, it just doesn't matter which hat Herschel J. West, Sr. was wearing when he revoked the trust--what is important is that the express provisions of the trust empowered him to do so.

B. The intent of the trustors as expressed in the Declaration of Trust is that the survivor may revoke the trust.

Appellants' *sole argument* at the trial court level regarding the propriety of Herschel J. West, Sr.'s conveyance of the real property to himself and Appellee was that a trust established by multiple trustors becomes irrevocable as a matter of law upon the death of one of the trustors. [R. at 59 & 516.] Now, for the first time on appeal, Appellants attempt to argue that the intent of the Herschel J. West, Sr. and Hazel L. West was to create a trust for their children that would only be revocable during the joint lifetime of the co-trustors. See Appellants Brief at 10-14.

An appellate court may "not consider arguments on appeal which were not raised before the trial court." Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1358 (Utah Ct. App. 1991).

Not only have Appellants raised the above issue for the first time on appeal, but they engage in pure speculation regarding the intent of Herschel J. West, Sr. and Hazel L. West. When a "trust is based on a written instrument, the intention of the settlor[s] must be ascertained from the language thereof, and the court may not go outside of the language in an effort to give effect to what it thinks the intent was." Makoff v. Makoff, 528 P.2d 797, 798 (Utah 1974).

The crux of Appellants' intent argument is that the phrase "our lifetime" speaks in the plural and requires that a particular power be exercised by both Herschel J. West, Sr. and Hazel L. West while both are still alive. However, when the phrase "our lifetime" is considered in isolation, as Appellants have viewed it, it is just as easily interpreted as meaning the period of time during which either Herschel J. West, Sr. or Hazel L. West are alive (particularly because no restrictive language such as "our joint lifetime" was used). In fact, this latter interpretation is mandated when the phrase "our lifetime" is considered in light of the manner in which it is repeatedly used in various provisions throughout the trust instrument because the former interpretation would yield absurd results.

The phrase "our lifetime" appears in four provisions of the subject trust.

Paragraph 1 of the trust states:

"If because of the physical or mental incapacity of both of us certified in writing by a physician, the Successor Trustee hereinafter named shall

assume active administration of this trust during **our lifetime**, such Successor Trustee shall be fully authorized to pay to us or disburse on our behalf such sums from income or principal as appear necessary or desirable for our comfort or welfare."

If Appellants' interpretation of the phrase "our lifetime" is applied to this provision, then the Successor Trustee could no longer actively administer the trust after the death of one of the trustors, and the trust would be effectively left without a trustee until the death of the surviving trustor. Even more incredible is the fact that as long as both trustors are alive but incapacitated, the income and principal of the trust may be used to care for the two of them, however, if one of them dies this means of support is inexplicably taken away from the surviving, but incapacitated, trustor. In fact, Herschel J. West, Sr. arguably would have been required to vacate the real property upon the death of Hazel L. West, in spite of the fact it was his only residence because no portion of the trust corpus (principal or income) could be used for his comfort or welfare any longer.

Paragraph 4 of the trust states:

"We reserve unto ourselves the power and right during **our lifetime** (1) to place a mortgage or other lien upon the property, (2) to collect any rental or other income which may accrue from the trust property and to pay such income to ourselves as individuals. We shall be exclusively entitled to all income accruing from the trust property during **our lifetime**, and no beneficiary named herein shall have any claim upon any such income and/or profits distributed to us."

If Appellants' interpretation of the phrase "our lifetime" is applied to this provision, then upon the death of one trustor, the surviving trustor is inexplicably no longer entitled to any of the income from the trust property in spite of the fact that the trust does not otherwise indicate that the remainder beneficiaries are entitled to receive any portion of the trust property (income or principal) until the death of the survivor of the trustors.

Paragraph 6 of the trust states:

"The death during **our lifetime**, or in a common accident or disaster with us, of all of the beneficiaries designated hereunder shall revoke such designation, and in the former event, we reserve the right to designate a new beneficiary. Should we for any reason fail to designate such new beneficiary, this trust shall terminate upon the death of the survivor of us and the trust property shall revert to the estate of such survivor."

If Appellants' interpretation of the phrase "our lifetime" is applied to this provision, in the event all of the beneficiaries died subsequent to the death of one of the trustors, the surviving trustor would be powerless to designate a new beneficiary during their lifetime, but inexplicably may effectively designate a new beneficiary in their will upon death because the trust property will revert to their estate. No rational explanation can be given for such a distinction between the survivor's ability to make an inter vivos vs. testamentary designation of a new beneficiary.

Paragraph 5 of the trust states:

"We reserve unto ourselves the power and right at any time during **our lifetime** to amend or revoke in whole or in part the trust hereby created without the necessity of obtaining the consent of any beneficiary and without giving notice to any beneficiary. The sale or other disposition by us of the whole or any part of the property held hereunder shall constitute as to such whole or part a revocation of this trust."

This is the only provision Appellants have referred to in arguing that the phrase "our lifetime" means the period of time during which both Herschel J. West, Sr. and Hazel L. West are still alive. However, when all of the trust provisions are viewed as a whole, Appellants' interpretation is ludicrous--upon the death of one of the trustors the surviving trustor would no longer derive any benefit whatsoever from the trust (income or principal), and the trust would effectively be left without a trustee, yet the trust would

not terminate and the remainder beneficiaries would not benefit from the trust until the surviving trustor died.

The only logical interpretation that can be consistently applied to the phrase "our lifetime" is that this phrase was intended to refer to the period of time during which any one of the trustors was alive and capable of acting as set forth in the various trust provisions.

C. Appellants' reliance on cases from other jurisdictions is misplaced.

The cases relied upon by Appellants for the proposition that a trust created by multiple trustors becomes irrevocable as a matter of law upon the death of one trustor (see Appellants' Brief at 21-22) do not stand for any such proposition. In virtually every single case cited by Appellants for this legal proposition, the court focused on the intent of the trustors rather than an abstract principle of law that any trust created by multiple trustors automatically becomes irrevocable as a matter of law upon the death of one of the trustors. Furthermore, each of these cases are factually distinguishable from the case at hand.

In Khan v. Khan, 214 Cal. Rptr. 109 (Ct. App. 1985), a husband and wife as trustors and trustees held real estate in trust for their children with the income to go to the husband and wife during their lifetime. However, the husband attempted to unilaterally revoke the trust while the wife was still alive, and the court ruled that he could not do so. Khan, 214 Cal. Rptr. at 112. In contrast, Herschel J. West, Sr. revoked the subject trust after Hazel L. West had died. In fact, Khan actually supports Appellee's position. The court in Khan recognized that multiple trustors can provide any

mode of revocation. Khan, 214 Cal. Rptr. at 112. The court in Khan further explained, "The subject declarations of trust did not provide that either trustee could act alone, **except upon death or incapacity of the other.**" Khan, 214 Cal. Rptr. at 111 n.4 (emphasis added).

In In re Race's Trust, 169 N.Y.S.2d 600 (1957) (referred to as In re Chemical Corn Exchange Bank, by Appellants), a husband and wife had created four separate trusts with different provisions regarding revocability. The issue was whether one of the four trusts was revocable by the survivor. The court in In re Race's Trust explained: "Whether an express trust may be revoked, altered or amended depends upon the wording of the trust instrument relating thereto." In re Race's Trust, 169 N.Y.S.2d at 602. The court ultimately found that the language contemplated action by both the husband and the wife in contrast to the provision in one of the other four trusts created by the husband and wife that clearly gave the power to revoke to the survivor. In re Race's Trust, 169 N.Y.S.2d at 601-02. Similarly, by looking at the wording of the subject trust, and construing its' provisions as a whole, it is clear that Herschel J. West, Sr. and Hazel L. West intended the survivor to have the ability to revoke the subject trust.

In Culver v. Title Guaranty & Trust Co., 58 N.Y.S.2d 116 (1945), a husband and wife and a third party created a trust, the income of which was to go to the husband for life, then to the wife for life if she survived the husband, and then the principal of the trust was to be distributed to a person designated by the third party, or, if no designation is made, to the issue of the third party. However, no power of revocation whatsoever was reserved in the trust instrument. Culver, 58 N.Y.S.2d at 117. The issue in Culver

as whether the husband and wife could terminate the trust, after the death of the third trustor, pursuant to a statute which required the consent of all grantors and beneficiaries--the court held that they could not. Culver, 58 N.Y.S.2d at 119. Unlike the above trust, the subject trust expressly sets forth a power of revocation, which is unaffected by any Utah statute.

In Noble v. Rogan, 49 F. Supp. 370 (S.D. Cal. 1943) (applying Pennsylvania law), husband and wife created a trust, the income of which was to go to their daughter for life--notably, the husband and wife would derive no benefit from the trust even while they were alive. Noble, 49 F. Supp. at 370. The focus of the court's inquiry was on the intent of the trustors. The court in Noble found that the survivor was not given any control over the trust, and that the trustors intended that any revocation be made by both the husband and wife jointly. Noble, 49 F. Supp. at 372. In contrast, the subject trust was specifically created for the sole benefit of the trustors, to the exclusion of the remainder beneficiaries, while the trustors were alive, and the survivor was given complete control over the subject trust.

In Croker v. Croker, 192 N.Y.S. 666 (1921), a husband and wife created a trust, the income of which was paid to the husband and wife, or the survivor of them, for life, and upon the death of the survivor the trust property was to pass to their children. However, at the time the trust was created, the husband and wife were living apart and considerable trust property had belonged to the wife. The court in Croker focused on the intent of the trustors, and based in part on the above facts found that the intent of the trustors was to provide for the wife during her life, and then to give the trust

property to their children. Croker, 192 N.Y.S. at 669. No such circumstances exist which indicate a similar intent in the creation of the subject trust.

III. The Declaration of Trust Fully Empowered Herschel J. West, Sr. to Disburse Any Portion of the Trust Income or Principal, Up to the Whole Thereof, For His Comfort and Welfare.

Paragraph 1 of the trust specifically empowers the successor trustee to "pay to [the trustors] or disburse on [their] behalf such sums from income or **principal** as appear necessary or **desirable for their comfort or welfare.**" Surely the successor trustee would not be given any broader powers than those given to Herschel J. West, Sr. and Hazel L. West as the original trustees. Thus, as the surviving trustee, Herschel J. West, Sr. had the full power and authority to transfer any principal out of the trust, namely the real property, that he desired for his comfort and welfare--and he properly did so.

Hazel L. West's death did not impair Herschel J. West, Sr.'s ability to transfer the real property out of the trust as the sole surviving trustee. Paragraph 7 of the trust states: "In the event of the . . . death of one of us, the survivor shall continue as sole Trustee." Furthermore, Section 78-7-405(2) of the Utah Code states: "If two . . . trustees are appointed to perform a trust, and if any of them . . . ceases to be a trustee, the surviving or remaining trustee[] shall perform the trust and **succeed to all the powers, duties, and discretionary authority given to the trustees jointly**" (emphasis added). In spite of Hazel L. West's death, Herschel J. West, Sr. still had the power to transfer any principal out of the trust that he desired for his comfort or welfare.

Appellants have completely failed to address (at both the trial court level and here on appeal) Herschel J. West, Sr.'s ability to transfer the real property out of the

ust for his comfort or welfare pursuant to Paragraph 1 of the trust. Consequently, this argument stands completely uncontroverted and provides sufficient grounds in and of self for affirming the trial court's grant of summary judgment in favor of Appellee.

V. Appellee Detrimentially Relied on Herschel J. West, Sr.'s Promise to Transfer the Real Property Into the Names of Himself and Appellee as Joint Tenants with Full Rights of Survivorship.

Prior to her marriage to Herschel J. West, Sr., Appellee owned a home in which he resided. In reliance upon Herschel J. West, Sr.'s promise to transfer their residence into the names of himself and Appellee as joint tenants with full rights of survivorship, he sold her former residence and used the proceeds to maintain, and make substantial improvements to the subject real property. [R. at 577.] If Appellants were awarded the real property outright, they would be unjustly enriched to the extent that Appellee has used the proceeds from her former home for the benefit of the real property.

The trial court did not reach this issue because it found that the trust had properly been revoked, and consequently Appellee owned the real property outright. If this court were to find that for some reason the real property remained in the trust and now belongs to Appellants, this matter should be remanded to the trial court for a determination of this particular issue.

VI. Appellants' Remaining Arguments are Irrelevant to the Issue Presented on Appeal.

Appellants' Brief contains many red herrings and arguments which are completely irrelevant to the issue presented on appeal. For example, Appellee has never contended that Herschel J. West, Sr. terminated the trust pursuant to the mutual agreement of the trustors and trustees as set forth in Clayton v. Behle, 565 P.2d 1132 (Utah 1977) and

Sundquist v. Sundquist, 639 P.2d 181 (Utah 1981). See Appellants' Brief, at 25-27.

Additionally, Appellee has never contended that Herschel J. West, Sr. exercised any revocation power on behalf of Hazel L. West as the executor of her estate. See Appellants' Brief, at 20-21.

Appellants also allege that the quit claim deed executed by Herschel J. West, Sr. conveying the real property to himself and Appellee as joint tenants with full rights of survivorship was not recorded until after his death, thereby nullifying this purported transfer completely. See Appellants' Brief, at 27. However, there is absolutely no factual basis for this contention whatsoever, and Appellants do not even attempt to cite to any portion of the record for support. This deed was recorded on January 16, 1991. [R. at 38.] Herschel J. West, Sr. did not die until nearly a year later on December 11, 1991. [R. at 17.]

Appellee urges this court to look past Appellants' irrelevant arguments, and focus on the issue presented on appeal—whether or not Herschel J. West, Sr. was empowered by the provisions of the trust to convey the real property to himself and Appellee as joint tenants with full rights of survivorship.

CONCLUSION

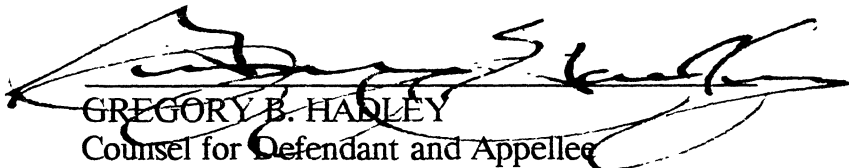
Herschel J. West, Sr. was fully empowered by the provisions of the trust to convey the real property to himself and Appellee as joint tenants with full rights of survivorship. This power derived from his ability to revoke the trust and/or his ability to disburse the entire trust corpus (the real property) to himself for his comfort and welfare.

Consequently, Appellee respectfully requests this court to affirm the trial court's grant of primary judgment in her favor. In the event that this court finds that for some reason, appellants are entitled to the real property, Appellee respectfully requests this court to remand this matter to the trial court for a determination of the detrimental reliance and unjust enrichment issue regarding Appellee's use of the proceeds from her former home for the benefit of the real property which is now her residence.

ADDENDUM

No addendum is necessary.

RESPECTFULLY submitted this 20th day of November, 1995.


GREGORY B. HADLEY
Counsel for Defendant and Appellee

CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that I personally hand delivered a true and correct copy of the foregoing on the 21st day of Nov, 1995, to the following:

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