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# Barrett v. Barrett Appellant's Brief Dckt. 35763

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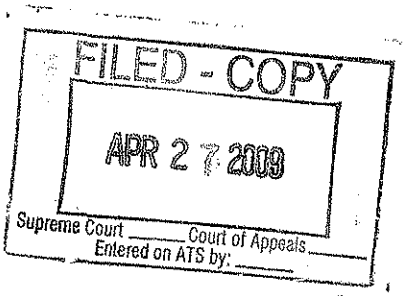
IN THE SUPREME COURT OF THE STATE OF IDAHO

| | |
|---|---|
| GREGORY PAUL BARRETT,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>ANN MARIE BARRETT,<br><br>Defendant/Respondent. | Docket No. 35763<br><br>APPELLANT'S BRIEF |




Appeal from the District Court of the Seventh Judicial District for Bonneville County.

Honorable Jon J. Schindurling, District Judge, presiding.

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## I. STATEMENT OF THE CASE

This case involves the distribution of real property in a divorce matter between the Plaintiff/Appellant, Gregory Paul Barrett (hereinafter "Greg") and the Defendant/Respondent, Ann Marie Barrett (hereinafter "Ann"). They were married on November 1, 1997. The divorce trial was held June 18, 2007 through June 22, 2007. A Rule 54(b) Decree of Divorce was entered on July 3, 2007, which divorced the parties, effective June 22, 2007. R. Vol. I, p. 61-63.

On September 11, 2007, the Honorable Judge Earl Blower entered his Findings of Fact and Conclusions of Law on Property and Debt Division and Attorneys Fees. R. Vol. II, p. 163-184, along with his Judgment and Order on All Remaining Issues (property and debt division and attorneys fees). R. Vol. II, p. 185-190. His decision declared Greg had a one-half community interest in the Etna real property.

Ann filed her Notice of Appeal on September 14, 2007, to the District Court. R. Vol. II, p. 191-194. The appeal brought by Ann was in regard to the Magistrate's September 11, 2007, Findings of Fact and Conclusions of Law and Judgment and Order. On August 29, 2008, the Honorable Judge Jon J. Shindurling issued his Opinion and Decision on Appeal. R. Vol. II, p. 257-266. His decision remanded the case for further proceedings with instructions that the magistrate should consider parol evidence.

On October 8, 2008, Greg filed his Notice of Appeal, R. Vol. II, p. 274-277, from the Opinion and Decision on Appeal issued by the Honorable Judge Jon J. Shindurling on August 29, 2008. An Amended Notice of Appeal was filed by Greg on November 14,

2008, which identified requested exhibits for the appeal. R. Vol. II, p. 284-288. On February 11, 2009, an Order was issued by Stipulation to supplement the exhibits for the appeal.

There were numerous Orders entered by the Magistrate after his September 11, 2007, Findings of Fact and Conclusions of Law and Judgment and Order, but none of these Orders are relevant to the pending appeal.

This appeal is from the decision of District Judge Shindurling which directed Magistrate Judge Earl Blower to consider parol evidence regarding the characterization of real property referred to as the "Etna property".

## II. STATEMENT OF THE FACTS

Ann and Greg were married on November 1, 1997. Tr. V.I, p. 475, L.8-10. They were divorced on June 22, 2007, on the grounds of irreconcilable differences.

The issues presented on this appeal pertain to real property located in Etna, Wyoming (hereinafter "Etna property"). Tr., V.I, p. 377, L. 20-23. The property is located just inside the Wyoming border near the town of Afton. Ann purchased the Etna property with her first husband, Kevin Spencer, during their marriage. Tr., V.I, p. 378, L. 17-21.

Ann and Kevin Spencer received a deed to the property. Tr., V.I, p. 378, L. 22-24; Tr., V.I, p. 213, L. 12, and Plaintiff's exhibit 18 (Warranty Deed to Ann and Kevin Spencer). Ann and Kevin Spencer were divorced on April 24, 1996. Tr., V.I, p. 378, L. 25; p. 379, L. 1-6. Plaintiff's exhibit 19 is the Decree of Divorce which was entered

between Ann and her former husband, Kevin Spencer. Tr., V.I, p. 213, L. 12. In the Decree of Divorce Ann was awarded the Etna property. Tr., V.I, p. 379, L. 7-10. At the time of Ann's divorce from Kevin Spencer, the Etna property consisted of approximately fifteen acres, a marital residence, a mobile home, a hay shed, and a storage shed, located thereon. Tr., V.I, p. 383, L. 13-16; Plaintiff's exhibit 19; Tr., V.I, p. 382, L. 15-22. After the Divorce was entered, Kevin Spencer signed two quitclaim deeds giving Ann the sole interest in the Etna property. Tr., V.I, p.379, L. 11-14; Plaintiff's exhibit 20; and Tr., V.I, p. 214, L. 13. The first Quitclaim Deed was signed on March 31, 1997, and the second Quitclaim Deed was signed on April 28, 1998. Plaintiff's exhibit 20. The second quitclaim deed was signed because the first quitclaim deed contained an incorrect legal description. Tr., V.I, p. 379, L. 15-20.

During the marriage with Greg, Ann sold part of the Etna property to Eric and Dawn Loveland in August, 1999. Tr., V.I, p. 383, L. 21-25; p. 384, L. 1-3. Ann sold to the Loveland's two and one-half acres, including her marital residence, for $88,500.00. Plaintiff's exhibit 22; Tr., V.I, p. 384, L. 10-20. Ann transferred the two and one-half acres sold to Lovelands through a Warranty Deed signed on August 12, 1999, by Ann and Greg. Tr., V.I, p. 385, L. 5-22; Defendant's exhibit B (Warranty Deed); and Tr., V.I, p. 385, L. 22.

At the time of Ann's divorce from Kevin Spencer in April, 1996, the Etna property was valued at $160,000.00 and there was a debt due and owing on the Etna property, to Countrywide of $126,000.00 resulting in equity awarded to Ann of $34,000.00.

Plaintiff's exhibit 19 and 21; Tr., V.I, p. 386, L. 2-15. When Ann sold the two and one-half acres to the Lovelands, Countrywide was owed $122,355.54. Plaintiff's exhibit 22. The sale price to Lovelands was $88,500.00 so after closing costs and application of the proceeds from the sale to the Countrywide debt there was still a remaining balance owing to Countrywide in the amount of $34,512.00. Tr., V.I, p. 386, L. 8-20; Plaintiff's exhibit 22 (Settlement Statement for the sale of the property to the Lovelands).

In order to pay off the balance of the Countrywide loan during the closing of the sale to the Lovelands, Ann and Greg obtained a loan through the Bank of Star Valley, in the amount of $35,881.55. Tr., V.I, p. 386, L 16-20; Plaintiff's exhibit 24 (Promissory Note for the loan at the Bank of Star Valley). The Countrywide loan was paid in full at the closing with the loan proceeds received from the Bank of Star Valley. Defendant's exhibit D (check to Countrywide).

Both Greg and Ann participated in negotiating the terms of the loan with the Bank of Star Valley which was used to refinance the Countrywide loan on the Etna property. Ann and Greg met together at the Bank of Star Valley with a cousin of Ann's named Rod to apply for and establish the terms of the loan. Tr., V.I, p. 226, L. 16 to p. 228, L. 7. Ann was not working at the time of the Etna loan application and had no income other than her child support, rental income from a single wide trailer on the Etna property and sharing in the community property income of Greg Barrett from his employment. Tr., V.I, p. 220, L. 1 to 2; and Tr., V.I, p. 394, L. 18 to p. 395, L. 18. The

Bank of Star Valley required that both Ann and Greg sign on the loan. Tr. V.I, p. 221, L. 20 to p. 223, L.15; Plaintiff's Exhibit 24.

Ann and Greg met together with the title company closing agent on August 12, 1999, at the Bank of Star Valley to close the sale to Lovelands and the new Bank of Star Valley loan on the Etna property. Tr., V.I, p. 388, L. 19-20. During the closing the title agent carefully went over each document separately and explained each document to Ann and Greg. Tr., V.I, p. 229, L. 8 to p. 230, L. 15; Tr., V.I, p. 390, L. 8 to 11; and Tr., V.II, p. 628, L. 22 to p. 629, L.3. Greg asked questions on the closing documents if he did not understand them and the title agent answered all questions asked. Tr., V.I, p. 229, L. 22 to p. 230, L. 4.

Although at trial Ann claimed no memory about signing specific documents at closing, Tr., V.I, p. 390, L. 4-23, by her presence she participated in the discussion with Greg and the title closing agent and had each document explained to her by the title closing agent at the time of closing. Ann had the opportunity to ask any questions about the documents and what they meant if she did not understand them. Ann heard the questions by Greg and the answers given by the closing agent at the time of closing. Tr., V.I, p. 229, L. 8 to p. 230, L. 15. Ann did not raise any questions or objections at the time of closing about any of the documents.

During the closing Ann signed a Quitclaim Deed which transferred the Etna property to Ann and Greg as Tenants by the Entireties, (Plaintiff's exhibit 23), and they both signed the promissory note, (Plaintiff's exhibit 24), and the mortgage, (Plaintiff's

exhibit 25), on the Etna property for the new loan with the Bank of Star Valley. Tr., V.I, p. 230, L. 5 to 8. Ann admitted that she did sign the Etna Quitclaim Deed to her and Greg at the closing. Exhibit 23. Tr., V.I, p. 390, L. 14 to 17 and Tr., V.I, p. 226, L. 6 to 7.

Ann clearly knew what she was signing when she signed the Quitclaim Deed. Ann admitted that she knew at the time of the closing on the Bank of Star Valley loan that the purpose and effect of a Deed was to transfer title and ownership to real property. Tr., V.II, p. 629, L. 25 to p. 630, L. 24; Tr, V.II, p. 635, L. 19 to p. 636, L. 9.

Notably Ann had previous experience in real estate transactions in which she bought, sold and transferred property through a Deed. Ann acquired ownership of the Etna property in 1989 through a Warranty Deed from the seller to Kevin and Ann Spencer. Plaintiff's Exhibit 18. Tr., V.II, p. 632, L. 13 to p. 633, L. 4; and Tr., V.I, p. 378, L. 17-24. Ann received a transfer of ownership for the Etna property through the Decree of Divorce dated April 24, 1996. Tr., V.I, p. 379, L. 3 to 9; Plaintiff's Exhibit 19. Ann also received a transfer of Kevin Spencer's ownership to her pursuant to two Quitclaim Deeds dated March 31, 1997, and April 28, 1998, the original having an error in the legal description. Plaintiff's Exhibit 20 and Tr., V.I, p. 214, L. 1-13. Ann knew and understood the effect of these three Deeds prior to her signing the Quitclaim Deed to her and Greg on the Etna property on August 12, 1999. Tr., V.I, p. 379, L. 11 to p. 380, L. 1 and Tr., V.II, p. 633, L. 5-25.

Ann and Greg jointly signed on August 12, 1999, a Warranty Deed for the transfer of the two and a half acres of the Etna property to the Lovelands, Defendant's exhibit B, at the same time Ann signed the Quitclaim Deed to Greg and Ann, Plaintiff's exhibit 23, at the closing of the new loan from the Bank of Star Valley on the Etna property. Tr., V.II, p. 630, L. 5-24; Tr., V.I, p. 384, L. 2 -19; and Tr., V.I, p. 216, L. 6-17. Ann admitted that the Quitclaim Deeds from Kevin Spencer to her at Plaintiff's exhibit 20 were the same as, and accomplished the same thing as, the Quitclaim Deed from Ann, to Greg and Ann on the Etna property. Plaintiff's exhibit 23 and Tr., V.II, p. 635, L. 10 to p. 636, L. 9.

Ann raised no objection during the closing of the Etna loan to any documents, including the Quitclaim Deed. Tr., V.I, p. 230, L. 7-8; p. 232, L. 15-17. Ann made no objection to the Quitclaim Deed after the closing until after the divorce was filed six years later. Tr., V.II, p. 637, L. 7-22.

Greg testified at the trial that he understood at the time of closing that the Quitclaim Deed signed by Ann was a valid transfer of a one-half interest to him in the Etna property. Tr., V.I, p. 230, L. 16 to p. 231, L. 24; and Tr., V.II, p. 719, L. 3 to p. 720, L. 9. Greg further understood that he was a co-signer on the Bank of Star Valley loan and as a result he had a legal responsibility to pay that loan. Tr., V.I, p. 230, L. 16 to p. 231, L. 24. Plaintiff's exhibit 24.

At the time of Greg and Ann's marriage they established a budget and assigned various bills to each person for payment. Originally they maintained separate bank

accounts. Each account was commingled with community property funds. Ann's account received deposits from her child support, the rental income from the rent for her singlewide mobile home on the Etna property, Tr., V.I, p. 394, L. 18-24 (net rental income from separate property is community property) and an amount from Greg's community income which was budgeted for Ann to pay bills, Tr., V.I, p. 395, L. 4-13. Notably Ann did not maintain a separate property account for payment of the Etna loan after marriage or after the refinancing in 1999 with the Bank of Star Valley. The mortgage was paid down to $121,819.00 at the time of refinancing on August 12, 1999.

In 2006 before Ann and Greg separated, they were approached to sell two acres to a developer, Wyoming 100, LLC, to provide access to the developer's adjoining property. The first offer from the developer was for $10,000.00. Greg was primarily responsible for negotiating a better sale price for the two acres of the Etna property. Ann was willing to accept the first offer of $10,000.00 (Tr. V.I p. 242, L. 3 to 6) but Greg recommended making a higher counteroffer. Such negotiations resulted in the first offer to purchase going from $10,000.00 to a final agreement of $50,000.00 plus the development of five lots for Greg and Ann with a potential net profit of $250,000.00. Tr., V.I, p. 234, L. 21 to p. 250, L. 12; and Plaintiff's Exhibit 28 and 29. The sale resulted in net cash proceeds of $49,322.19 paid to Greg and Ann, which was placed in Aaron Woolf's trust account during the proceedings by stipulation of the parties. Plaintiff's exhibit 31; Defendant's exhibit F. In addition the developer is contractually

obligated to develop five lots for Ann and Greg on the Etna property. Plaintiff's exhibits 27, 29 and 30.

Ann and Greg stipulated that the sale to the developer and the deposit of the cash proceeds into the trust account would not have any effect on the classification of the Etna property or the sale proceeds as separate or community property. Defendant's exhibit F.

The Etna property value on the remaining ten and one-half acres appreciated in value by the time of the divorce of Ann and Greg in July, 2007 to $350,000.00. Plaintiff's exhibit 32; Tr., Vol. I, p. 335, L. 16-21. However, according to Tom Ogle, a Wyoming licensed appraiser with a general certified permit to appraise both residential and commercial type property, who appraised the Etna property for the divorce, most of that appreciation occurred after 2002 when there was a boom in property values arising from the pressure from high land prices in nearby Jackson, Wyoming. Tr., V.I, p. 344, L. 15 to p. 345, L. 6. However, the value of the Etna property at the time of the refinancing in August, 1999, was probably not significantly more than at the date of divorce in April, 1996, based on the testimony of Tom Ogle. Therefore, the one-half of the equity transferred to Greg Barrett by the Quitclaim Deed in August, 1999, would have been in the range of $17,000.00, ($160,000 fair market value less loan of $126,000 yields $34,000 equity on date of Ann's divorce), Plaintiff's exhibit 19, or slightly higher for any appreciation between April, 1996, and August, 1999. As consideration for Greg receiving one-half of the equity in the Etna property, Greg

assumed responsibility for the new loan of $35,881.55 and made his separate and community property now liable as a resource for payment on such loan. Tr., V.I, p. 230, L. 16 to p. 231, L. 24.

Greg participated in ownership and management of the Etna property after title was transferred to him by Ann's Quitclaim Deed. That involvement included general upkeep, repair and maintenance of the property fences and buildings, Tr., V.I, p. 382, L. 4 to 8, applying for and obtaining a permit to increase the highway access from a narrow farming access on Highway 89 to a wider residential access and installing a new gate access for the wider residential access, Tr., V.I, p. 415, L. 10 to p. 416, L. 11; Tr., V.I, p. 338, L. 13 to p. 339, L. 11; Tr., V.I, p. 346, L. 10 to 15; Tr., V.I, p. 367, L. 24 to p. 372, L. 12; and Plaintiff's Exhibits 33 and 34. This new access gate was considered as adding value to the property by Tom Ogle because it would allow development of residential lots in the future. Tr., V.I, p. 338, L. 6 to 11.

The Magistrate found that the Quitclaim Deed from Ann to Greg and Ann was unambiguous and was clear and convincing evidence of a transmutation of Ann's separate property to community property of Greg and Ann. R. Vol. II, p. 8. Ann appealed the Magistrate's decision to the District Court. R. Vol. II, p. 191. District Judge Shindurling remanded the case to the Magistrate with directions to consider parol evidence on intent. From this decision Greg filed his Notice of Appeal. R. Vol. II, p. 264.

## III. ISSUES PRESENTED ON APPEAL

Greg's issues on appeal are as follows:

1. Whether the quitclaim deed from Ann to Ann and Greg constituted a valid conveyance of a one-half community interest in the real property to Greg.
2. Whether parol evidence regarding intent should have been considered regarding the validity of the transfer to Greg.
3. Whether Greg met his burden of proof to show a transmutation of Ann's separate property to community property.
4. Whether District Judge Shindurling erred in ruling on appeal that the Magistrate Judge should consider parol evidence on intent to transmute property.

## IV. STANDARD OF REVIEW

When there has been an appeal from the Magistrate Court to the District Court, on further appeal the Supreme Court bases its review upon the record of the magistrate proceedings with due regard to the District Court's decision. *Ireland v. Ireland, 123 Idaho 955, 957-58, 855 P.2d 40, 42-43 (1993); Silva v. Silva, 142 Idaho 900, 904, 136 P.3d 371, 375 (Ct. App. 2006).* The trial court decision will not be disturbed on appeal if it appears the decision is based on substantial, albeit conflicting evidence. *Huerta v. Huerta, 127 Idaho 77, 896 P.2d 985 (Ct. App. 1995).* The appellate court should uphold the trial judge's findings of fact if supported by substantial and competent evidence. *Bliss v. Bliss, 127 Idaho 170, 848 P.2d 1081; McKoon v. Hathaway, 08.14 ICAR 767, 190 P.3d 925 (Ct. App. 2008).*

The trial court's characterization of property as community or separate is a finding of fact that will not be disturbed on appeal if based on substantial and competent evidence. Reed v. Reed, *137 Idaho 53, 56, 44 P.3d 1108, 1111 (2002);* Worzala v. Worzala, *134 Idaho 615, 617, 7 P.3d 1092, 1094 (2000);* Matter of Estate of Eliasen, *105 Idaho 238, 668 P.2d 110 (1983);* Griffin v. Griffin, *102 Idaho 858, 642 P.2d 949 (Ct. App. 1982).* The credibility and weight to be given evidence is within the province of the trial court. The appellate court should liberally construe the trial court's findings of facts in favor of the judgment. Weilmunster v. Weilmunster, *124 Idaho 227, 232, 858 P.2d 766,771 (Ct. App. 1993).* If the issue is one of law, the appellate court exercises free review of the trial court's decision. Reed, *137 Idaho 53, 56, 44 P.3d 1108, 1111 (2002).* Whether terms of a contract are ambiguous is a question of law. If a document is ambiguous, resolution of the ambiguity is a question of fact. Weilmunster v. Weilmunster, *124 Idaho 227, 858 P.3d 766 (Ct. App. 1983).* If the language of a document is unambiguous, determination of its meaning and legal effect is a question of law over which free review is exercised and matters outside the record should not be used to construe it. McKoon v. Hathaway, *08.14 ICAR 767, 190 P.3d 925 (Ct. App. 2008).*

## ARGUMENT

### 1. WHETHER THE QUITCLAIM DEED FROM ANN TO ANN AND GREG CONSTITUTED A VALID CONVEYANCE OF A ONE-HALF COMMUNITY INTEREST IN THE REAL PROPERTY TO GREG.

### A. The transfer by quitclaim deed from Ann to Ann and Greg complied with all statutory requirements for the conveyance of real property.

The requirements for a valid conveyance of real property are noted in I.C. §9-503 and §9-505, which are statutory declarations of the common law rule based on the statute of frauds.

> **9-503. Transfers of real property to be in writing.** – No estate or interest in real property, other than for leases for a term not exceeding one (1) year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

> **9-505. Certain agreements to be in writing** – In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:...4. An agreement...for the sale of real property, or of an interest therein....

A similar requirement is found at I.C. §55-601 which provides how a conveyance of real property is to be made.

> **55-601. Conveyance – How made.** – A conveyance of an estate in real property may be made by an instrument in writing, subscribed by the party disposing of the same....

Ann satisfied these requirements by signing a written Quitclaim Deed to Greg.

As noted in I.C. §55-604 the effect of a written conveyance of real property is that it is presumed that the Grantor intended to grant a fee simple title unless a lesser grant is noted in the transfer document.

> **55-604. Fee presumed to pass. –** A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended.

This section creates a presumption that Ann intended to convey a fee simple title to Greg of a one-half interest in the Etna property.

Further, as noted in I.C. §55-606 the validity of such a grant is declared to be conclusive against the Grantor, except for a bona fide purchaser or judgment lien holder who has previously recorded a transfer or lien on the property.

> **55-606. Conclusiveness of conveyance – Bona fide purchasers. –** Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument or valid judgment lien that is first duly recorded.

This section makes the transfer conclusive against Ann because there was no restriction or limitation in the deed. This section operates as more than a presumption and binds Ann conclusively to the deed which she transferred to Greg.

The recording of a conveyance of real property is constructive notice to subsequent purchasers and mortgagees.

> **55-811. Record as notice –** Every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgage(e)es....

This section provides constructive notice to everyone that Ann transferred a one-half interest to Greg by signing and recording the Quitclaim Deed.

Other requirements are provided by statute in situations involving property transfers between husbands and wives. I.C. §32-906 defines community property and provides that property conveyed by one spouse to the other is presumed to be the sole and separate property of the receiving spouse.

> **32-906. Community property – ...Conveyances Between Spouses....** (1) All other property acquired after marriage by either Husband or Wife is community property. (2) Property conveyed by one spouse to the other shall be presumed to be the sole and separate estate of the grantee and only the grantor spouse need execute and acknowledge the deed....

The transfer by Quitclaim Deed from Ann to Greg and Ann as tenants by the entirety created a community property interest in Greg and Ann, as it would be "all other property acquired after marriage by husband or wife..." (I.C. §32-906). In addition, the one-half interest which was conveyed by Ann to Greg is presumed to be his sole and separate estate.

**B. The transfer by quitclaim deed from Ann to Ann and Greg complied with all requirements for a marriage settlement agreement between spouses.**

Additional rules are established by statute regarding property rights between spouses by marriage settlement agreements. I.C. §32-916 provides that property rights between a husband and wife are controlled by provisions in that chapter unless there is an enforceable marriage settlement agreement to the contrary.

> **32-916. Property rights governed by chapter.** The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement agreement entered into during marriage containing stipulations contrary thereto.

Section 32-906 is within the chapter controlling property rights between husband and wife and it requires the Etna property to be characterized as community property and creates a presumption that the one-half interest conveyed to Greg is his separate estate.

The requirements for a valid marriage settlement agreement are provided at I.C. §32-917 as follows:

> **32-917. Formalities required of marriage settlements.** All contracts for marriage settlement agreements must be in writing, and executed and acknowledged or approved in like manner as conveyances of land are required to be executed and acknowledged or proved.

In the present case the financial and property transactions between Greg and Ann satisfied the requirements for a marriage settlement agreement set forth in I.C. §32-917. The agreement was that Greg would accept responsibility together with Ann, to pay the promissory note as a community debt, (Plaintiff's exhibit 24), in exchange for a transfer to him of a one-half interest in the Etna property. (Plaintiff's exhibit 23). The Promissory Note, Mortgage and Quitclaim Deed were in writing, and were executed and acknowledged in the same manner as a conveyance of land, which was noted above in I.C. §9-503 and 55-601.

A marriage settlement agreement must be recorded in the county recorder's office where the real estate is located.

> **32-918. Marriage settlements – record.** (1) When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract....
> (2)(b) A summary of the contract shall be signed and acknowledged by all parties to the original contract. The summary of the contract shall clearly state:
>
> (i) The name of the parties to the original contract;
> (ii) The complete mailing address of all parties;
> (iii) The title and date of the contract;
> (iv) A description of the interest or interests in real property created by the contract; and
> (v) The legal description of the property.

In the present case the Quitclaim Deed and Mortgage were properly recorded in the Lincoln County Recorder's Office by the closing agent on August 13, 1999, (Plaintiff's exhibits 23 and 25), which gave public notice of the marriage settlement agreement between Ann and Greg as to the Etna property.

It is important to note the effect of I.C. §32-916, which provides that property rights of a husband and wife are controlled by that chapter unless there is a marriage settlement agreement contrary thereto. In this case the transfer from Ann to Greg and Ann constituted a valid marriage settlement agreement. The only way Ann could claim that was not the case is if she had a written, signed, acknowledged and recorded agreement between her and Greg which reversed the transfer to Greg; there was no such reverse agreement.

**C. The transfer by Ann to Ann and Greg constituted a valid and enforceable conveyance to Greg of a one-half community interest in the Etna property.**

As discussed in greater detail above, a review of these Idaho statutes regarding transfers of real property, conveyances between spouses, and marriage settlement agreements, indicates the following conclusions:

1. Ann satisfied all statutory requirements for the conveyance of real property to Greg. I.C. §9-503 and 9-505; 55-601.

2. It is presumed that Ann conveyed a fee simple title to Greg of his one-half interest. I.C. §55-604.

3. The transfer by Ann to Greg is conclusive against her and binding on any person or entity subsequently acquiring an interest in the same property. I.C. §55-606.

4. The property interest conveyed by Ann during marriage to Greg and Ann is community property. I.C. §32-906(1).

5. The transfer by Ann to Greg of a one-half interest in the property is presumed to convey to him a separate interest in the property. I.C. §32-906(2).

6. The transfer by Ann to Greg satisfied all the requirements of a marriage settlement agreement because it was written, signed by Ann, acknowledged by a notary and recorded in the county where the real property is located. I.C. §32-917, 918.

7. The deed by Ann to Greg and the assumption of liability on the promissory note constituted a marriage settlement agreement between them in which a one-half interest in the property was transferred to Greg and he accepted responsibility with Ann for payment of the loan. I.C. §32-917, 32-918.

8. There was no other marriage settlement agreement to the contrary which reversed, limited, or restricted the transfer to Greg. I.C. §32-916 and §32-917.

9. There must be a counter marriage settlement agreement, or a reverse Quitclaim Deed signed, acknowledged and recorded by Ann and Greg in order to reverse or void the transfer to Greg. There is no such agreement. I.C. §32-916.

The conclusion from this review of the controlling statutes for the present case is that the transfer from Ann to Greg and Ann by Quitclaim Deed constituted a valid and enforceable transfer to Greg of a one-half interest in the Etna property. Such transfer is "presumed" to be valid and is "conclusive" against Ann.

## 2. WHETHER PAROL EVIDENCE REGARDING INTENT MAY BE CONSIDERED REGARDING THE VALIDITY OF THE DEED TO GREG.

### A. Parol evidence should not be considered because the quitclaim deed is unambiguous.

The parol evidence rule was explained in *Simons v. Simons, 134 Idaho 824, 828, 11 P.3d 20, 24 (2000)* as follows:

> The parol evidence rule provides that when a contract has been reduced to a writing that the parties intend to be a final statement of their agreement, evidence of any prior or contemporaneous agreements or understandings which relate to the same subject matter is not admissible to vary, contradict, or enlarge the terms of the written contract.

The issue and facts in the case of *Bliss v. Bliss, 127 Idaho 170, 898 P.2d 1081 (1995)* are similar to the present case and applied the parol evidence rule in it's decision. In that case the husband had signed a deed to his wife on forty-eight acres of

real property they had jointly purchased with separate funds and the deed was recorded. At the divorce trial, husband claimed that he had signed the deed in order to avoid an IRS lien against him on the forty-eight acres. The husband argued the deed was void for lack of consideration and that he had not intended to actually convey his interest in the community property to his wife as separate property. The wife gave conflicting testimony as to the parties' intent regarding the deed. The Idaho Supreme Court noted that the deed was in writing, signed by the grantor, and included the name and address of the grantee, so it constituted a valid conveyance of legal title to real property according to Idaho Code §55-601. Id. at 174. The Court then noted the presumption from Idaho Code §32-906(2) that "property conveyed to one spouse by the other shall be presumed to be the sole and separate estate of the grantee". Id. at 174, 898 P.2d 1081, 1085 (1995).

In *Bliss,* the Idaho Supreme Court ruled that the husband's statements to show his intent or that there was no consideration were inadmissible under the parol evidence rule since the deed was plain and unambiguous. The Court held:

> However, Gordon's statements regarding intent and consideration were inadmissible to contradict the deed's clear language. In *Hall v. Hall* we reiterated that where a deed is plain and unambiguous, the intention of the parties must be determined from the deed itself. "Oral and written statements are generally inadmissible to contradict or vary unambiguous terms contained in a deed." Here, not only did Gordon "convey" the property to Althea, thereby raising the presumption of separateness under I.C. §32-906(2), the deed expressly states the land is conveyed "as her separate property." Further, the deed unambiguously declares that it is "in consideration of ONE DOLLAR and OTHER GOOD AND VALUABLE CONSIDERATION." Gordon's extrinsic evidence is inadmissible to contradict these clear statements. Thus, the evidence offered to rebut the

statutory presumption of I.C. §32-906(2) was legally insufficient. (Citations omitted). Id. at 174-5, 898 P.2d 1081, 1085-1086 (1995).

The Court further explained the policy considerations underlying the parol evidence rule as well as the statute of frauds.

> As we understand the statute [of frauds] above quoted, it was intended to prevent just such a class of proof and to preclude the possibility of titles becoming subject to the capricious memories of interested witnesses. The statute was enacted to guard against the frailties of human memory and the temptations to litigants and their friendly witnesses to testify to facts and circumstances which never happened. Experience had convinced both jurists and lawmakers that the only safe way to preserve and pass title to real property is by a written conveyance subscribed by the grantor. The beneficial effects of this statute would be destroyed if a grantor could come in years afterwards and submit oral testimony to show that the conveyance was not intended as an absolute grant but was only intended to create a trusteeship in the grantee. Id. at 175, 898 P.2d 1081, 1086 (1995).

The applicable facts in *Bliss* are identical to the facts in the present case. Ann conveyed by Quitclaim Deed an interest in her separate real property to herself and Greg as Tenants by the Entirety[1]. The deed was in writing, signed by the grantor and included the name and address of the grantee as required by I.C. §55-601. Plaintiff's Exhibit 23.

A close review of the Quitclaim Deed reveals a clear and unambiguous statement of intent to convey a one-half interest in the property to Greg:

[1]During the trial both parties treated the Quitclaim to Ann and Greg as Tenants by the Entireties under Wyoming law to be the same as a deed to Ann and Greg, husband and wife, under the community property laws of Idaho. Neither party gave notice under IRCP Rule 44(d) that a foreign law would apply. Therefore the community property laws of Idaho law have been utilized throughout this case regarding the effect and rights of the Quitclaim Deed for Ann and Greg. *Huerta v. Huerta, 127 Idaho 77, 896 P.2d 985 (Ct. App. 1995).*

## QUITCLAIM DEED

> KNOWN ALL MEN THESE PRESENTS, That ANN BARRETT FKA ANN SPENCER, a "Married Person" in consideration of $10.00 and other good and valuable consideration to them in hand paid by Ann Barrett and Gregory Barrett, whose address is 775 Tennis Court Drive, Idaho Falls, Idaho 83406, the receipt whereof is hereby confessed and acknowledged, have (has) remised, released, convey and forever quitclaimed and by these presents do for my heirs, executors and administrators, remis, release and forever quitclaim unto the said ANN BARRETT AND GREGORY BARRETT, Wife and Husband as Tenants by the Entireties, heirs and assigns, forever, all such right, title, interest, property, possession, claim and demand as I have...to all the following described premises, to wit: (legal description)
>
> ...TO HAVE AND TO HOLD the said premises unto the said Ann Barrett and Gregory Barrett...forever so that neither I nor any other person in my name...shall or will hereafter claim or demand any right to title to the premises...but they...shall by these presents be excluded and forever barred. (Plaintiff's exhibit 23.)

This deed recites that the conveyance was for good and valuable consideration, so it is not a gift. *Hall v. Hall, 116 Idaho 483, 777 P.2d 255 (1989).* The deed conveys all of the rights of Ann as grantor in the property to Ann Barrett and Gregory Barrett as grantees to all of the property forever. Ann then affirms that she will be excluded and barred forever from making a claim as grantor to any right to title to the property.

This document succinctly states exactly what this quitclaim deed did – it conveyed title of the grantor to the grantees as tenants by the entireties. The deed has no ambiguity in its traditional and careful language, developed over centuries of legal history and experience, to accomplish real property transfers with established certainty.

The same presumption in I.C. §32-906(2) which was cited in *Bliss,* applies in the present case to show that Greg received a separate one-half interest in the property.

Ann's "extrinsic evidence" is inadmissible to contradict these "clear statements". Ann's "evidence offered to rebut the statutory presumption of I.C. §32-906(2) was legally insufficient."

The Idaho Supreme Court's explanation of the policies and considerations underlying this rule in *Bliss* are also applicable in the present case. The beneficial effects of the statute of frauds which requires transfers to be in writing would be destroyed if the grantor, in this case Ann, "could come in years afterwards and submit oral testimony to show that a conveyance was not intended." Certainty in real estate transactions has been historically determined to require compliance with the formalities required by statute in the State of Idaho. Therefore, Ann should not be permitted to violate the statute of frauds and introduce extrinsic evidence years later in opposition to the unambiguous deed she signed to Greg.

The case of *Hall v. Hall, 116 Idaho 483, 777 P.2d 255 (1985)*, also provides a helpful comparison for the present case. In *Hall*, grandparents had sold property to a grandson and his wife. The deed was recorded and the required payment of $60,000.00 was made. Later when the grandson and wife were divorcing the grandmother claimed that the property was worth $100,000.00 at the time of the transfer and $40,000.00 was intended as a gift to the grandson only. The deed said that the property was transferred "for value received." Based on these facts the Idaho Supreme Court held that parol evidence of the grandmother's intent was not admissible to contradict the plain language of the deed.

> Where the language of a deed is plain and unambiguous the intention of the parties must be determined from the deed itself, and parol evidence is not admissible to show intent. Oral and written statements are generally inadmissible to contradict or vary unambiguous terms contained in a deed. If the language in the deed is ambiguous, then evidence of all surrounding facts and circumstances is admissible to prove the parties' intent. The parol evidence rule does not preclude the use of extrinsic evidence to explain the parties' intent when the provisions of a writing are ambiguous. Where, as here, the consideration clause clearly recites that the transfer was made "For Value Received," parol evidence is not admissible to contradict the deed by attempting to show the transfer was in part a "gift" rather than "for value." Hall, *116 Idaho 484, 485, 777 P.2d 255, 256 (1985)*

The Idaho Supreme Court's decision in the Hall case supports the trial judge's decision in the present case. As in Hall, Ann conveyed title by a clear and unambiguous Deed to herself and Greg as tenants by the entirety (community property under Idaho law). Because there was no ambiguity in the deed, the deed controls, and extrinsic evidence about the parties' intent is not admissible.

Another case which is instructive for the present case is Hoskinson v. Hoskinson, *139 Idaho 448, 80 P.3d 1049 (2003).* In the Hoskinson case, the husband obtained financing which utilized his separate real property as security. At the time of the financing the wife signed a quitclaim deed to the husband, and the husband signed a quitclaim deed to himself and his wife as husband and wife. Both deeds were dated January 23, 1998. The wife's deed to husband was recorded on the same day and husband's deed to husband and wife was recorded on February 9, 1998. There was a conflict in the testimony about the purpose and effect of these two conflicting deeds. The wife claimed she had refused to sign a quitclaim deed to allow the financing to occur unless the husband signed a deed conveying the property to her and him. The husband

denied the wife's allegations and claimed that he had signed the quitclaim deed adding the wife only because the lender gave it to him to sign at closing. He claimed he had no intention to transmute ownership of his separate property to community property. It is important to note that only the husband signed the promissory note on his new loan and the wife did not become personally obligated on the new loan. The trial judge found there was an ambiguity from the two inconsistent deeds and that it was unclear which deed had been signed first, and therefore, considered parol evidence on the intent of the parties. The trial judge noted that the wife had not been truthful in her testimony on other matters. Based thereon the trial judge concluded that the wife had not met her burden of proof to show a transmutation or gift of the separate property interest of the husband in his real property to a community property interest for husband and wife. The Idaho Supreme Court noted "the burden of proof on the party asserting transmutation is a high one...by clear and convincing evidence," citing *Ustick v. Ustick, 104 Idaho 215, 222, 657 P.2d 1083, 1090 (Ct. App. 1983).* The Idaho Supreme Court held there was sufficient evidence to support the trial judge's findings that a transmutation of husband's separate property to community property did not occur.

In the *Hoskinson* case there are important factual differences to consider when comparing it to the present case. First, Greg signed the promissory note and mortgage at the time of the refinancing and became personally obligated on the new loan thereby giving consideration for the transfer to him of an interest in the property. Plaintiff's

exhibits 24 and 25.This obligated his community property and his separate property as a source for repayment. In the *Hoskinson* case a transfer from the husband to the wife would have been a gift because the wife did not assume any personal liability and therefore no consideration was given for the change to a community property interest.

Second, in the present case there was no quitclaim deed back to Ann from Greg to create an ambiguity. In the *Hoskinson* case the two conflicting deeds created an ambiguity which allowed parol evidence to be considered on the intention of the parties.

Third, it is important to note that the Idaho Supreme Court upheld the decision of the trial judge as the finder of fact based on substantial competent evidence which was not clearly erroneous. *Hoskinson at 1061*. The Court did not rule whether as a matter of law the transfer from husband to wife or wife to husband in *Hoskinson* was or was not a valid transfer. The Court merely upheld the trial judge's findings and conclusions as being sufficiently supported by substantial competent evidence. In the present case the trial judge found no ambiguity and such finding should be upheld on appeal as based on substantial competent evidence.

Fourth, in the present case there was not a question about Greg testifying honestly and correctly as existed in the *Hoskinson* case. In *Hoskinson,* the trial judge adopted husband's testimony because wife had not been truthful in other matters. In fact, there was really no conflict between the testimony by both Greg and Ann about the circumstances relating to the signing of the new loan documents and the quitclaim deed.

Interestingly, Judge Blower was the trial judge in both the *Hoskinson* case and the present Barrett case, and presumably knew well the facts and the ruling in *Hoskinson,* as he rendered his decision on the facts in the present case.

The case of *Griffin v. Griffin, 102 Idaho 858, 642 P.2d 949 (Ct. App. 982)* is instructive on when a refinance of separate property during marriage will not result in a transmutation. In that case husband refinanced his separate property during marriage. Both husband and wife signed the promissory note and the Deed of Trust for the new loan. However, the husband did not sign a deed to wife to place her on the title as part of the refinancing. Based on those facts the Court of Appeals held there was no transmutation, noting that since there was no deed to the wife, there could be no transmutation. In the present case there is a clear and unambiguous deed from Ann to Ann and Greg, so the opposite conclusion from *Griffin* should be reached that there was a transmutation during refinancing.

These cases support the trial judge's decision in the present case that a clear and unambiguous deed between spouses mandates the exclusion of parol evidence and constitutes clear and convincing evidence of a transmutation between spouses.

## 3. WHETHER GREG MET HIS BURDEN OF PROOF TO SHOW A TRANSMUTATION OF ANN'S SEPARATE PROPERTY TO COMMUNITY PROPERTY.

### A. Greg met his burden of proof of clear and convincing evidence to show a transmutation occurred.

Greg claims there was a transmutation of Ann's separate property to community property in the Etna property as a result of her quitclaim deed to Ann and Greg. Transmutation has been defined as follows:

> Transmutation is a broad term used to describe arrangements between spouses which change the character of property from separate to community and vice versa. W. Reppy and W. DeFuniak, Community Property in the United States, page 421 (1975); Griffin v. Griffin, 102 Idaho 858, 861, 642 P.2d 949, 952 (1976).

The burden of proof to show a transmutation was defined in Ustick v. Ustick, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1985), as follows:

> ...the burden is on the party urging the assertion to prove the intent in question by clear and convincing evidence....concomitantly, because the question of whether a "clear and convincing" burden of proof has been met is a question for the trier of facts to decide in the first instance, the determination of the trial judge – that a claim was not shown by clear and convincing evidence is entitled to great weight on appeal. (Citations omitted.) Id at 222, 657 P. 2d 1083 (Ct. App. 1985).

A determination of whether Greg met this burden of proof requires the analysis of several factors and the application of presumptions and statutory rules and case law.

First, the Court should consider whether the decision of the trier of fact was based on substantial and competent evidence to support its conclusion that the evidence was clear and convincing. This analysis requires consideration of whether the transaction satisfied all statutory requirements for the transfer of an interest in real property. As noted previously at pages 17 to 20, all statutory requirements were met. The loan closing documents were prepared by a title company in the form and with the terms required by the bank issuing the loan. They were accepted, signed by both parties and

acknowledged in the normal course of a closing. The documents were properly recorded in the county recorder's office. The bank gave the requested loan to Ann and Greg in reliance on the signed documents. There was no ambiguity in the documents, including the quitclaim deed.

Ann accepted the benefit of the bank loan. Greg accepted the new detriment to be personally liable for that loan and in exchange received a one-half interest in the Etna property. Everything was done properly and correctly to satisfy the bank and the closing agent and the parties. These facts must be considered clear and convincing, or else no real property transaction will ever have reliability. To find otherwise means that every ordinary and customary real estate transaction handled with proper documents and with a proper closing is somehow not "clear" or not "convincing" and would be subject to challenge. This compliance with Idaho statutes for the transfer of real property further verifies that there was clear and convincing evidence of the transmutation of the Etna property.

In addition, this transaction satisfied all statutory requirements for a marriage settlement agreement. As noted previously at pages 20 to 22 this transaction also complied with all requirements for a husband and wife to enter into a marriage settlement agreement to change the ownership of property rights between them. The quitclaim deed conveyed a joint interest to Greg and Ann as tenants by the entirety (as community property under Idaho law), and the promissory note obligated Greg, together with Ann, on the new bank loan. All statutory requirements for a marriage

settlement agreement were satisfied with a writing, signed by the parties and acknowledged before a notary and recorded, with a correct legal description. (I.C. §32-917 and §32-918.) This compliance with Idaho statutes for a marriage settlement agreement further verifies that there was clear and convincing evidence of the transmutation of the Etna property.

**B. Ann failed to meet her burden of persuasion to counter the evidence of the validity of the Quitclaim Deed.**

Once Greg has met his burden of proof on transmutation, then the burden of persuasion shifted to Ann to show sufficient evidence to the contrary. *Bliss v. Bliss, 127 Idaho 170, 898 P.2d 1081 (1995).* According to Rule 301 of the Idaho Rules of Evidence this burden also shifts in response to various presumptions that apply to the facts of the case, including:

1. Property acquired during marriage is presumed to be community property. (I.C. §32-906(1)). The Etna property was "acquired" by Ann and Greg as Tenants by the Entirety during marriage (as community property under Idaho law).
2. The burden of persuasion is on the person claiming separate property to prove by a reasonable certainty. *Stanger v. Stanger, 98 Idaho 725, 571 P.2d 1126 (1977); Reed v. Reed, 137 Idaho 53, 44 P.3d 1108 (2002); Worzala v. Worzala, 128 Idaho 408, 913 P.2d 1178 (2000).*

3. If a deed complies with the requirements in I.C. §55-601, then I.C. §32-906(2) creates a presumption that the property conveyed is the separate property of the grantor. *Bliss v. Bliss, 127 Idaho 170, 898 P.2d 1081 (1995).*

4. Fee simple title is presumed to pass by a grant of real property unless it appears on the deed that a lesser grant was intended. (I.C. §55-604.)

5. A grant of real property is conclusive against the grantor. (I.C. §55-606.)

Whether Ann has met this burden of persuasion requires an analysis similar to that done for Greg's burden of proof. The following demonstrates that Ann did not meet her burden of persuation.

1. There is no oral transmutation allowed in Idaho. *Griffin v. Griffin, 102 Idaho 858, 642 P.2d 949 (Idaho Ct. App. 1982); Stockdale v. Stockdale, 102 Idaho 870, 643 P.2d 82.* Therefore, Ann cannot claim there was a reversal of the transfer to Greg by some oral agreement, or that the parties had an oral agreement that they did not really intend the transfer to be effective.

2. Ann claims that she did not understand the quitclaim deed. Ann's failure to understand the quitclaim deed she approved and signed is not a valid defense. A similar argument was made in the case of *Cristo Viene Pentecostal Church v. Paz, 144 Idaho 304, 160 P.3d 743 (2007),* but rejected by the Idaho Supreme Court. In that case the agent for the Plaintiff Church could not read English and thought he was signing a purchase contract for real property. In fact the contract, which was written in English, was only a lease with an option to purchase. The option date passed since the Plaintiff

Church was not aware of the option. The Court held that the agent's failure to read or understand the contract when signing it was not an excuse and the Plaintiff Church was bound by the contract it signed. That is another way of stating the legal maxim that "ignorance of the law is not a defense." See Tr. V. II, p. 636, L. 20 to 24.

3. Ann's claim that she did not intend to transfer an interest in the property to Greg when she signed the quitclaim deed should not even be considered based on the parol evidence rule. (*Bliss v. Bliss, 127 Idaho 170, 898 P.2d 1081 (1995)*. Deed to spouse was unambiguous so Husband denied right to give evidence of his intent only to avoid IRS lien.) (*Hall v. Hall, 116 Idaho 483, 777 P.2d 255 (1989)* Grandma's deed to son and daughter-in-law stated "for value" so it was unambiguous and testimony of intent for gift not allowed.) See also Argument, pages 24 to 32 herein.

4. Even if considered, Ann's oral testimony on intent bears minimal weight as evidence. This type of testimony in which a grantor has a self serving interest and orally claims a different intent to alter or vary what is written in a document, has been called the weakest kind of evidence. *Claunch v. Whyte, 73 Idaho 243, 249 P.2d 915 (1952); Hall v. Hall, 116 Idaho 483, 777 P.2d 255 (1989), Justice Bistline's concurring opinion at p. 259.* When Ann's oral testimony about her subjective intent is disallowed, there is no evidence in the record to support Ann's burden of persuasion. If it were allowed such a self-serving oral statement should not prevail over all of the written documentation proving to the contrary.

5. Ann cannot argue that the deed was never delivered to Greg and therefore it was invalid. In the recent case of Barmore v. Perrone, *145 Idaho 340, 179 P.3d 303 (2008)*, the husband signed a Quitclaim Deed to his wife on community property they owned in Idaho. He claimed the purpose of the quitclaim deed was to avoid probate due to his hazardous occupation so that the deed could transfer ownership to his wife at the time of his death. He claimed there was no intent to "deliver" the deed at that time and make it presently effective rather than at his death. The Affidavit of the husband further stated that the husband and wife had previously prepared a similar deed from husband to wife on other property they had owned in California, which was also done with the intent to be effective at his death to avoid probate. After the deed to wife was signed on the California property the parties sold the California property and used the proceeds to buy the Idaho community property. The case was originally decided at the trial court level on a Motion for Summary Judgment. The magistrate had refused to consider an Affidavit of husband reciting these facts which he submitted on his Motion to Reconsider the Summary Judgment. The reason given by the magistrate was that the Affidavit had been filed late and would not be considered on a Motion for Reconsideration. The Idaho Supreme Court held that the magistrate erred in not considering the Affidavit on the Motion for Reconsideration pursuant to IRCP 11(a)(2)(B). The Court explained that delivery of the deed is necessary for the deed to be valid and therefore the factual issue was properly raised by the husband's Affidavit

on the Motion for Summary Judgment. As a result the summary judgment was incorrect and the case was remanded for further consideration by the trial court.

In *Barmore v. Perrone, supra,* the Idaho Supreme Court ruled that the husband's claim that he did not "deliver" or "intend to deliver" the deed when signed was a factual issue that had to be determined from evidence outside of the document so parol evidence was admissible on that issue. Ann never raised this issue in the five day trial about whether the Quitclaim Deed was "delivered" to Greg. Ann only testified that she did not "intend" to give Greg a one-half interest in the Etna property. As previously noted, Greg provided consideration by accepting responsibility for the debt owing on the property so it was clearly not a gift.

In the present case Ann's Quitclaim Deed to Greg was recorded in the county recorder's office. Plaintiff's exhibit 23. The recording of a deed creates a presumption of delivery. *Hartely v. Stibor, 96 Idaho 157, 525 P.2d 352 (1974); Hiddleson v. Cahoon, 37 Idaho 142, 214 P. 1042 (1923); Idaho Trust Co., v. Eastman, 43 Idaho 142, 294 P. 890 (1926).* In *Hartley,* the Idaho Supreme Court also applied the presumptions in I.C. §55-604 that a fee simple title is presumed to be intended to pass in a deed, and in I.C. §55-604 that a deed of conveyance is conclusive against the grantor. The Court then reversed the trial court which had found the grantor did not intend a delivery of the deed, even though it was recorded and in the possession of the grantee.

In the present case, the title company returned the recorded Quitclaim Deed to Ann and Greg and it was in their possession as indicated by the recording certification

on the deed introduced as Plaintiff's Exhibit 23. Possession of a deed by the grantee also creates a presumption of delivery. *Hartley v. Stibor, supra.* Since both recording and possession of the deed occurred, delivery of the deed should be undisputed.

Ann did not claim at trial that there was no "delivery" of the deed. She did claim that she did not "intend" to give Greg a one-half interest in the property. Her claim was based on her alleged misunderstanding of the effect of the deed. This is the same argument made in *Cristo Viene Pentecostal Church v. Paz, supra.*, which was denied as a ground to avoid a contract. Ann's claim is that she did not intend to transfer what the deed said. It was not that she did not intend to "deliver" the deed to Greg. Therefore, the argument from *Barmore supra,* does not apply in this case.

6. The Bank of Star Valley required a valid and effective deed in the name of Ann and Greg to be recorded in order for a loan to be granted. Ann accepted the benefit of that loan. Greg accepted the detriment or duty to pay the loan, in reliance on a valid deed conveying a one-half interest in the property to him. The world and creditors were on notice that Ann had conveyed a valid one-half interest to Greg in the Etna property. It would be incongruous and inconceivable for Ann to now claim that she really did not "deliver" the deed to Greg, when everyone but her must rely on the deed being validly delivered. Ann should be estopped from claiming non-delivery of the deed based on her acceptance of the benefits and the detriment to Greg from signing the new loan. *Mohr v. Schultz, 86 Idaho 531, 388 P.2d 1002 (1964); Vanoski v. Thomson, 114 Idaho 381, 757 P.2d 244 (1988).*

## 4. WHETHER DISTRICT JUDGE SHINDURLING ERRED IN RULING ON APPEAL THAT THE MAGISTRATE JUDGE SHOULD CONSIDER PAROL EVIDENCE ON INTENT TO TRANSMUTE PROPERTY.

Magistrate Judge Blower made specific findings that there was no ambiguity in the quitclaim deed between the parties and therefore parol evidence was not admissible. He further found that there was clear and convincing evidence that a transmutation of the property occurred based on that evidence. R. Vol. II, p. 169-170.

On appeal District Judge Schindurling failed to apply a proper standard of review even though his opinion at R. Vol. II, p. 259-260 recited a correct standard of review.

The appellate court failed to comply with that standard by not accepting the findings of the magistrate judge when there was substantial and competent evidence in support thereof. The appellate court failed to accept the trial court's analysis of the weight given evidence unless it is clearly erroneous. The appellate court failed to acknowledge the sound discretion of the trial court in determining the characterization of property absent a clear showing of an abuse of discretion. The appellate court failed to review the evidence in the light most favorable to the prevailing party. R. Vol. II, p. 259-260.

The primary error of the appellate court is in its application of the parol evidence rule. First, the court should review the deed, second, determine if there is an ambiguity, and third consider parol evidence only if there is an ambiguity. The appellate court has reversed step two and three by looking outside the deed to parol evidence about the

surrounding circumstances and then finding that if there is an ambiguity in the outside circumstances, then parol evidence should be considered. R. Vol. II, p. 264. The trial court correctly followed the proper steps by reviewing the deed, determining there was no ambiguity in the deed, and therefore refusing to consider parol evidence of outside circumstances. R. Vol. II, p. 169-170.

The appellate court tries to distinguish the *Hoskinson* case from the present case but does so inappropriately. The appellate decision notes "The *Hoskinson* case did not involve ambiguity in the document itself; the ambiguity arose from the circumstances surrounding the separate quitclaim deeds, including the existence of two deeds." R. Vol. II, p. 262. That is not correct. In the *Hoskinson* case the ambiguity was the two deeds which purportedly made opposing transfers, signed on the same day and both recorded. The court could not determine which deed was signed first. Therefore, the two deeds were the ambiguity. Since the documents involved were ambiguous the court in *Hoskinson* went to step three to use parol evidence to resolve the ambiguity. In the present case there was only one deed and it was unambiguous. Therefore, the third step of using parol evidence should not be considered.

The appellate court also misstates the ruling in *Griffin v. Griffin, 102 Idaho 858, 642 P.2d 949 (Ct. App. 1982)*. The appellate court first states that the parties in *Griffin* "had signed a loan agreement stating that the title to the property would vest in both parties." R. Vol. II, p. 262. In fact the parties only signed a loan application, preliminary to obtaining the loan, in which they wrote on the application that the title would be

"joint". *Griffin v. Griffin, 102 Idaho 858, 861, 642 P.2d 949, 952 (Ct. App. 1982)*. The appellate court then states that "the finding in *Griffin* is not based on the existence or non existence of a deed, but rather in the lack of clear and convincing evidence that a transmutation took place." R. Vol. II, p. 263. This statement misses the point. There cannot be a transfer and there cannot be a transmutation unless there is a transfer document. *Griffin* declared there is no oral transmutation in Idaho. There was no deed conveyed from husband to wife in *Griffin, supra*. Therefore, there was no transmutation and obviously no clear and convincing evidence. The controlling fact was that there was *no deed from the husband to wife. The corollary rule of the Griffin case is that if there is* a clear and unambiguous deed from husband to wife then that could be the clear and convincing evidence to justify a transmutation.

The appellate court next attempts to distinguish the *Bliss* case from the present case on the basis that *Bliss* was a transmutation of husband's community property interest to the wife as her separate property. In the present case the transfer is from Ann's separate property to Ann and Greg as community property. This is a distinction without any significance. I.C. §32-906(2), which was applied in the *Bliss* case and in the present case creates a presumption that if one spouse conveys property to the other spouse, then the grantee spouse receives it as a separate estate. The code section does not say "separate property". When Greg received a one-half interest in the Etna property as community property, he received a "separate estate" in that one-half interest and the presumption applies. The appellate court says the presumption of I.C. §32-

906(2) is "wildly different" from the *Ustick* standard of clear and convincing evidence. However, in *Bliss* the quitclaim deed from husband to wife was the only significant fact which the trial judge used to determine that there was clear and convincing evidence of transmutation under the *Ustick* standard. This analysis was upheld by the Idaho Supreme Court. The appellate court further tries to distinguish *Bliss* because it did not involve refinancing but cites no authority for that position.

The appellate court tries to distinguish *Hall v. Hall, 116 Idaho 483,777 P.2d 255 (1985)* but again misses the point. The appellate court cites the facts in *Hall* as "the parties had received a home and the deed had been unambiguous. The husband's grandparents had given the parties a home, accompanied by a deed that read 'for value received.'" R. Vol. II, p. 263. The important factor in the *Hall* case was that Halls had purchased the home from the grandparents for $60,000.00. The deed in fact recited "for value received." Since the deed was unambiguous, the grandmother's oral claim of a gift could not be considered due to the parol evidence rule. Thus, in *Hall* the grandmother's attempt to alter the terms of the unambiguous deed was denied because parol evidence was not allowed. Similarly in the present case, Ann's attempt to alter the terms of an unambiguous deed through parol evidence should not be allowed.

The appellate court rejects Ann's request to interpret the law to allow parol evidence on a conveyance of property between spouses in any refinancing situation. The appellate court states it could not "find in the case law any hint of a mandate requiring courts to always consider parol evidence". R. Vol. II, p. 264. Nevertheless the

appellate court then applies that very rule where there was no "hint of a mandate", by stating that courts are "granted much broader leeway in considering parol evidence in situations where an otherwise unambiguous document is part of a refinancing situation." R. Vol. II, p. 264. No authority is cited for such a statement. Furthermore, counsel for Appellant Barrett has found no such authority.

The appellate court's analysis then reverses steps two and three as noted above. The appellate court notes that Ann gave parol evidence that she did not intend to transmute the property. The appellate court then says the magistrate court should have considered parol evidence before determining if there was clear and convincing evidence of transmutation. The correct order of the parol evidence rule states differently, that the court can only consider parol evidence if the deed is ambiguous on its face.

The appellate decision seems to say that if the circumstances of a transaction appear to be ambiguous then the parol evidence rule does not apply, but such a rule is exactly opposite of the parol evidence rule. The parol evidence rule only applies when the deed is ambiguous, and not just because factors outside of the record show an ambiguity. *Simons v. Simons, 134 Idaho 824, 828, 11 P.3d 20, 24 (2000).*

Based on this analysis of Judge Schindurling's appellate decision, this Court should reverse Judge Schindurling's decision and reinstate the magistrate judge's decision.

## CONCLUSION

Greg requests that this Court uphold the decision of the trial judge, made after a five day trial with full opportunity to consider the witnesses' testimony. This Court should uphold the trial court's decision that the Quitclaim Deed from Ann to Ann and Greg was unambiguous, so parol evidence should not be considered to vary the terms of the Deed. Secondly, this Court should uphold the trial court's decision that Greg met his burden of proof by clear and convincing evidence through compliance with all statutory requirements for the transfer of property, all requirements for a marriage settlement agreement between spouses and compliance with rules established by Idaho case law. The Court should further uphold the trial court's decision that Ann did not meet her burden of persuasion to counter that evidence.

Respectfully submitted this 24 day of April, 2009.

Royde B. Lee

## CERTIFICATE OF SERVICE

I do hereby certify that on this 24th day of April, 2009, a true and correct copy of the foregoing was served upon the following party as indicated:

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