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

IN THE SUPREME COURT OF THE STATE OF IDAHO

GREGORY PAUL BARRETT, Plaintiff/Appellant, v. ANN MARIE BARRETT, Defendant/Respondent.	)	Docket No. 35763

APPELLANT'S REPLY 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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ARGUMENT

1. The District Court erred when it held the Magistrate should consider parol evidence on the validity of the Quitclaim Deed from Ann to Ann and Greg.

a. Greg objected to the admission of parol evidence at trial; Ann did not raise this issue at trial or in the appeal to the District Court.

In Respondent's Brief on Appeal at Section V.1.a., Ann mistakenly argues that Greg failed to object to the admission of parol evidence at trial and thus waived his parol evidence objection. However, Greg's counsel did object to parol evidence regarding the question to Ann by her attorney about her intent in signing the Deed, but the Magistrate overruled that objection. (Tr., V.I., p.391, L. 10-24) When questions of intent were raised later in the trial, again Greg's counsel objected. (Tr., V.II., p. 693, L. 6-7 and p. 694, L. 25) The Magistrate originally sustained the objection but then overruled the objection and allowed such evidence stating:

> "Well, I don't suppose a question about intent by itself necessarily violates the parol evidence rule. In other words, maybe her intent was consistent with what the document says. So let me overrule the objection. Go ahead and answer." (Tr., V.II., p. 694, L. 8-12)

In the Magistrate's Findings of Fact and Conclusions of Law on Property and Debt Division and Attorney Fees, R. Vol. II, p. 169- 184, the Magistrate did not consider parol evidence in its decision.

> 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. Here, the deed is plain and unambiguous....Here, the deed shows no ambiguity and the Court finds that it transmuted the Etna real estate from separate property to community property. (Citations omitted). (R. Vol. II, p. 169-170).

Ann failed to raise the argument that Greg failed to object to parol evidence, either at the trial or in her post trial brief. (See Defendant's Proposed Findings of Fact and Conclusions of Law, R. Vol. I, p. 64-101.) Neither did Ann raise this argument in her appeal to the District Court. (See Defendant's Brief on Appeal, R. Vol. II, p. 194-223.) This Court should not consider arguments first made on appeal, which were not raised at trial, post trial or in the initial appeal to the District Court. Kraly v. Kraly, 2009 WL 1163408 _____ P.3d _____, (2009).

b. The rule in *Hoskinson v. Hoskinson* requires that parol evidence only be considered if there is an ambiguity in the written documents.

In Respondent's Brief on Appeal at V.1.b., Ann argues that the case of Hoskinson v. Hoskinson, 139 Idaho 448, 80 P.3d 1049 (2003) requires the consideration of parol evidence in the present case. That argument is a misstatement of the Idaho Supreme Court's decision in Hoskinson.

The critical facts in Hoskinson are that there were two conflicting and contradictory deeds exchanged between the parties regarding the characterization of the real property of the husband and wife. Both deeds were signed and notarized on January 23, 1998. The deed from wife to husband was recorded on that same day. The deed from husband to himself and wife was recorded on February 9, 1998. The trial court found that the evidence did not establish which deed was signed first. There could have been a different result depending on which deed was signed first. That created an obvious ambiguity and therefore the trial court properly considered other parol evidence. Based on the parol evidence and the credibility of

the parties the trial court chose to accept and rely on the testimony of the husband regarding the parties' intent in signing the deeds.

Since the trial judge in Hoskinson was the same judge as in the present case, the trial judge's interpretation of its decision in Hoskinson is especially enlightening. The trial judge in the present case noted in the Findings and Conclusions on Property, Debts and Fees his own analysis of the Hoskinson case as follows:

> Ann notes that in Hoskinson v. Hoskinson, 139 Idaho 448, 80 P.3d 1049 (2003), the Idaho Supreme Court affirmed the trial court's conclusion that the wife had not proven transmutation by clear and convincing evidence even though the husband signed a quitclaim deed conveying his interest in the property to himself and his wife. Hoskinson, however, is distinguishable from the present case. In Hoskinson, two deeds were signed on the same day: the husband signed one deed purporting to convey the property to himself and the wife; the wife signed the second deed conveying the property to the husband. The evidence did not establish which deed was signed first. The deeds contradicted each other. Because the language of the deeds was not "plain and unambiguous," the court could not "determine the intention of the parties...from the deed itself." Hall v. Hall, 116 Idaho 483, 484, 777 P.2d 255, 256 (1989). The ambiguity created by the dual deeds justified the court's considering parol evidence of the parties' intent. See Hall v. Hall, supra. That parol evidence led the Court to find that the parties' intended no transmutation. R. Vol. II, p. 169-170.

The trial judge in Hoskinson applied the parol evidence rule correctly by first determining if there was an ambiguity in the transfer documents and after finding there was an ambiguity between the two deeds, then the trial judge considered other parol evidence.

In its appellate decision in Hoskinson v. Hoskinson, 139 Idaho 448, 460, 80 P.3d 1049, 1061, (2003), the Idaho Supreme Court noted the trial judge's findings and upheld the trial judge's decision as supported by substantial competent evidence as follows:

> A trial court's decision will be upheld despite conflicting evidence so long as its findings are supported by substantial competent evidence and are not clearly erroneous. Golder v. Golder, 110 Idaho 57, 61, 714 P.2d 26, 30 (1986). The magistrate found Elizabeth failed to sustain her burden of proving a transmutation. These findings are supported by substantial competent evidence.

At page 18 of Respondent's Brief on Appeal Ann argues that the important legal issue from Hoskinson is that parol evidence was considered by the Magistrate to determine whether a transmutation of husband's separate property occurred. That is a misrepresentation of the rule from Hoskinson, as the correct rule is that if there is an ambiguity in the transfer documents, then the Court can consider other parol evidence to determine the intent of the parties regarding such documents.

In the present case, the Magistrate made findings of fact that there was no ambiguity in the Quitclaim Deed and therefore the Deed controlled and Ann transmuted her property to community property. As in Hoskinson, the appellate court in the present Barrett case should uphold the trial judge's decision, as it is based on substantial competent evidence and is not clearly erroneous.

In Respondent's Brief on Appeal at page 18 Ann mistakenly argues that "Greg offered no evidence in support of his claim that Ann's separate property was transmuted, other than the quitclaim deed, itself." Greg presented evidence to support the validity of the deed from Ann to Ann and Greg. Greg testified that both he and Ann met with her cousin, Rod, at the Bank of Star Valley to discuss and apply for the new loan. (Appellant's Opening Brief, p.9) Both Greg and Ann testified that the deed was explained to both of them at the closing by the title closing agent and that Ann had no questions about the deed at that time. (Appellant's

Opening Brief, p. 10 and 12) Greg provided further testimony through Ann's admissions at trial that she knew the purpose and effect of a deed, that it transferred ownership of property, as she had previously done in several other real property transactions. (Appellant's Opening Brief, p. 11 and 12) Greg became personally liable for the debt to the Bank of Star Valley, by signing the promissory note for the loan transaction. (Appellant's Opening Brief, p. 12) The bank required that Greg be a co-signer on the loan and mortgage and an owner of the property in order to issue the loan. (Appellant's Opening Brief, p. 10) Ann received the benefit of the new loan which Greg signed. (Appellant's Opening Brief, p. 10) Greg further testified that Ann seemed happy about the transaction after it was concluded (Tr., Vol. I, p.232, L. 13-14) and that she never raised an objection or concern about the transfer until the divorce was filed. (Appellant's Opening Brief, p. 10 and 12) This evidence further supports the transmutation of property by Ann.

c. A refinancing situation during a marriage does not create a new exception to the parol evidence rule.

In Respondent's Brief on Appeal at V.1.c., Ann argues that this Court should adopt a new exception to the parol evidence rule in divorce cases which involve refinancing of property. Adopting such a rule would require the Court to overturn long established precedent in the State of Idaho regarding the parol evidence rule. (See Weiser River Fruit Assoc. v. Feltham, 31 Idaho 633, 175 P. 583 (1918) and cases cited therein.)

Black's Law Dictionary, Fifth Edition, West Publishing Co., 1979, page 1006, provides the following definition of the parol evidence rule.

> **Parol evidence rule.** This evidence rule seeks to preserve integrity of written agreements by refusing to permit contracting parties to attempt to alter import of their contract through use of contemporaneous oral declarations. Under this rule, when parties put their agreement in writing, all previous oral agreements merge in the writing and a contract as written cannot be modified or changed by parol evidence, in the absence of a plea of mistake or fraud in the preparation of the writing. But rule does not forbid a resort to parol evidence not inconsistent with the matters stated in the writing. (Citations omitted.)

Idaho case law contains numerous cases involving a husband and wife in divorce situations in which the parol evidence rule has been applied to exclude evidence when no ambiguity exists in the written documents or to consider parol evidence when an ambiguity does exist. Hoskinson v. Hoskinson, 139 Idaho 448, 80 P.3d 1049 (2003) (ambiguity in contradictory deeds allowed parol evidence); Bliss v. Bliss, 127 Idaho 170, 898 P.2d 1081 (1995) (clear deed by spouse to avoid IRS lien held enforceable transmutation and parol evidence not considered); Hartley v. Stibor, 96 Idaho 157, 525 P.2d 352 (1974) (wife's clear deed to daughter that was recorded at wife's request, was valid, and later husband's claim that it was only to be valid at wife's death was excluded as violative of parol evidence rule); Hall v. Hall, 116 Idaho 483, 777 P.2d 255 (1989) (grandmother's claim that deed for value to grandson and his wife was partly a gift to grandson violated parol evidence rule); Griffin v. Griffin, 102 Idaho 858, 642 P.2d 949 (Ct. App. 1982) (no oral transmutation and parol evidence not considered when husband refinanced separate loan in marriage, and there was no deed to wife even though she signed loan and deed of trust); Simons v. Simons, 134 Idaho 824, 828, 11 P.3d 20, 24 (2000) (there was ambiguity between a deed and a written memo so statue of frauds did not apply and evidence of part performance was considered); Stockdale v. Stockdale, 102 Idaho 870, 643 P.2d 82 (1982) (oral parol evidence of transmutation of

separate property not considered); Dunagan v. Dunagan, 2009 WL 1587787 _____ P.3d _____, (2009) (evidence of partial performance of an alleged oral prenuptial agreement not considered).

These established legal principals inherent in the parol evidence rule are just as applicable in a refinancing situation when it arises in a divorce as in all other cases. It is too easy for a party in a transaction to later raise a claim in a divorce that he or she did not intend to actually transfer property by the written document. (See Appellant's Brief, p. 26) The purpose of the parol evidence rule mandates that such contrary evidence should not be considered when there is a written unambiguous transfer document.

Ann argues that a refinancing situation in a marriage justifies a new rule and a new exception to the parol evidence rule. Although that result may have been applied by another state in the case of Berry v. Breslin, 352 N.W.2d. 516, (1984), which was cited in Ann's Brief, there is no support for such an exception under Idaho law. In response to a similar argument in the recent case of Dunagan v. Dunagan, 2009 WL 1587787, _____ P.3d _____, (2009), the Idaho Supreme Court declined to create a new rule in divorce cases.

> Although California and Washington courts have recognized and applied the doctrine of partial performance to oral prenuptial agreements, there is no controlling Idaho authority that authorizes this Court to do the same. Idaho has not waivered in requiring that marriage agreements that purport to characterize community property as separate property must meet strict statutory formalities; Kircher has failed to persuade us to change course now.

Married parties in a refinancing situation have the same options to adjust the characterization of their separate or community property when a third party lender requires both husband and wife to be on a deed to secure refinancing. The parties can execute a

separate transmutation agreement or sign an appropriate reverse quitclaim deed, as appears to have been done in Hoskinson v. Hoskinson, to reverse an ownership transfer in property required by a lender. In the present case there was no separate transmutation agreement or a reverse quitclaim deed to transfer the community property by quitclaim deed back to Ann. Therefore, Idaho case law on the parol evidence rule dictates that the Magistrate's decision in the present case should be upheld.

d. Ann's compliance with Idaho statutory rules regarding transfers of property between spouses constituted a valid and enforceable conveyance to Greg of community property.

i. Idaho Code §55-601, in conjunction with the parol evidence rule, is dispositive of the issue before this Court.

In spite of her compliance with all statutory rules for transfers of an interest in real property between spouses, Ann argues at Section V.1.d.i. that she should not be bound by such statutory rules. Contrary to Ann's argument the Hoskinson case does not create a new exception to Idaho Code §55-601, in marriage refinance cases; but rather integrates the parol evidence rule, that being that an ambiguity in the written transfer document must exist **before** parol evidence will be considered to avoid the conclusiveness of the transfer under Idaho Code §55-601. Ann further argues that "there is a great injustice done to the clear and convincing evidence standard" for transmutations between spouses in a refinancing situation unless parol evidence is considered. The premise in Ann's argument is that it may not be "fair" when the result is that a transfer is upheld in a refinancing case. However, the contrary argument is more compelling, and more consistent with the underlying reasons for the parol evidence rule to apply in transmutation cases, which is that parties should not be able to

disclaim their agreements which are documented by a written contract, even if the result would seem inequitable. The reliability, enforceability and dependability of deeds transferring ownership of real property is more compelling to ensure stability and enforceability of written contracts in all situations (See Idaho Code §9-503), than to opt for a system which would allow challenges to real estate transactions merely based on a verbal claim of a contrary subjective intent.

Ann also argues that the case of Barmore v. Perrone, 145 Idaho 340, 179 P.3d 303 (2008) mandates that Ann's intent in signing the deed would be controlling. However, in the case of Barmore v. Perrone the issue in dispute was whether the grantor had the "intent to convey immediately". In order to be effective a deed must be "delivered" to the grantee. Bowers v. Cottrell, 15 Idaho 221, 228, 968 P. 936, 938 (1968). In Barmore the husband presented testimony that the deed was signed only with the intent to be effective or delivered upon his death, as a means of avoiding probate, something the parties had previously done on a prior house. That issue had to be decided by considering parol evidence, because it could not be determined based on the deed itself. However, in the present case, Ann has not claimed, nor could she claim, that the quitclaim deed signed by her was only intended to be "delivered" and therefore effective at some later time, such as at her death. As noted in Plaintiff's Brief on Appeal at page 40, since the deed was required to be signed by Ann and recorded by the bank at the time of the closing on the loan, and the bank relied on the effectiveness of the quitclaim deed by Ann to support its new loan, and Ann accepted the

benefits of that refinancing, Ann is precluded from claiming that the deed was not intended to be "delivered" and effective at the time of the refinancing.

The case of Barmore does not stand for the position that the intent to deliver the deed is an automatic exception to the parol evidence rule in every case, but rather only when there is a valid claim that the deed was not "delivered", to be effective immediately. For example, proper interpretation of the question of intent to deliver the deed was raised and recognized in the case of Hartley v. Stibor, 96 Idaho 157, 525 P.2d 352 (1974). In Hartley wife delivered a deed to her daughter and requested that the daughter record the deed. A later husband claimed that the deed transferring ownership to the daughter was only intended to be delivered and effective upon the wife's death. The Idaho Supreme Court held there was sufficient evidence of "delivery" by the recording of the deed. The Court cited the following rule in its analysis.

> Although recordation is not essential to the validity of a deed (absent intervening rights), the recording of the deed by appellant at the decedent's request is prima facie evidence of appellant's acceptance of title to the property. 8 Thompson on Real Property, §4240 (1963). In this case a presumption of delivery arises form the appellant's possession of the deed, and recordation of the deed at the grantor's knowledge and direction evidences a valid delivery of the deed to the grantee which encompasses the requisite intent of the grantor to pass title....Under I.C. §55-604 a fee simple title is presumed to be intended to pass; and under I.C. §55-606 such conveyance is conclusive against the grantor and all claiming under the grantor. (Citations omitted) *Id.* at p. 160.

In the present case Ann's deed was recorded along with the mortgage when the loan closed, and Ann knew the deed would be recorded. This constitutes knowledge of the

delivery. Ann's claim of no intent to deliver the deed to be effective immediately is incorrect and not supported by the evidence.

ii. Ann failed to rebut the presumption from Idaho Code §32-906(2) in favor of Greg regarding the validity of the Deed from Ann.

At page 25 of her Respondent's Brief, Ann acknowledged that Greg met his burden through Ann's Quitclaim Deed to receive the presumption of validity of the Deed under Idaho Code §32-906(2), and that the burden then shifts to Ann to overcome that presumption.

Ann failed to provide any other written agreement between her and Greg to overcome the validity of her Quitclaim Deed. Any other evidence regarding the circumstances surrounding the signing of the Deed or her claimed subjective intent should not be considered, as it would violate the parol evidence rule. Ann's claimed lack of knowledge about what she was signing or that she did not intend to do what she did, are not only contrary to the parol evidence rule, but also self serving and insufficient to overcome a clear written document, even if, in fact, she did not know what she was signing. See Cristo Viene Pentecostal Church v. Paz, 144 Idaho 304, 160 P.3d 743 (2007) cited in Appellant's Opening Brief at pages 36 and 40.

Ann argues that the Idaho Supreme Court should adopt a different rule of law adopted by the State of Oklahoma in the case of Larman v. Larman, 91 P.2d 536 (1999). For the reasons noted herein, the Court should not create a new exception to the parol evidence rule just for spousal refinancing cases, rather the Idaho precedent should be followed requiring parties to be bound by their interspousal transactions which are unambiguous, unless they

contemporaneously or subsequently execute a separate transmutation agreement reversing the effect of their interspousal transfers.

Ann failed to provide sufficient evidence to rebut Greg's presumption of validity of the Deed from Ann.

iii. The quitclaim deed from Ann to Ann and Greg satisfied all of the requirements of a transmutation agreement and marital settlement agreement.

At pages 28-30 of Respondent's Brief on Appeal Ann argues that compliance with the requirements for a transmutation agreement found at Idaho Code §32-917 should not be sufficient in a refinancing situation. However, the Idaho statute which defines a marriage settlement agreement has no such exception. Idaho Code §32-917 and 32-918 provide that a marriage settlement agreement between spouses which transmutes property will be considered valid if it is in writing, acknowledged before a notary as is done in a conveyance of land, adequately describes the transmuted property and is recorded in the county where the property is located. Ann's argument that a transmutation agreement normally should be lengthy, perhaps prepared by an attorney, formal and complex, is simply wrong. No such requirements exist in Idaho Code §32-917 nor should such requirements be imposed above and beyond what the legislature has required.

Ann further argues that a quitclaim deed is "often not read during the closing and it contains standard, boilerplate language". However, Ann admitted during her testimony at trial that she knew exactly what a quitclaim deed did and the effect it has to transfer ownership and title to property. (See Appellant's Brief, p. 11) Thus, even Ann did not claim she did not recognize the effect of a quitclaim deed. Furthermore the quitclaim deed was

explained to her by the title closing agent at the time of closing, and Ann signed the quitclaim deed, knowing the effect of such quitclaim deed, and did not object at the time or later until the divorce was filed.

The basic premise of Ann's argument is that the parol evidence rule should not be applied in refinancing cases. As noted previously herein and in Appellant's Brief on Appeal, there has been no such exception recognized under Idaho law in the past nor should it be adopted as a new rule of law for the present case.

e. Idaho case law supports the Magistrate's decision regarding parol evidence in the case at hand.

In Section V.1.e. of Respondent's Brief on Appeal Ann attempts to distinguish the case of Hall v. Hall, 116 Idaho 483, 777 P.2d 255 (1989) which was cited by the trial court in support of its decision and cited in Appellant's Brief on Appeal. The basis for Ann's argument is that Hall involved a purchase by the husband and wife, and the present case involved refinancing by husband and wife. In Hall the husband's claim was that he should be entitled to claim a greater interest in the property because he claimed his donor grandmother intended to make a gift of a portion of the property to him, contrary to the language of the deed. The argument of Mr. Hall is comparable to Ann's claim that she did not intend to transfer an interest in the Etna property to Greg, which was contrary to the language of the Deed she signed. In Hall there was no separate side deal in writing between the grandmother/donor and the grandson/husband to support the husband's claim. Based on the parol evidence rule the evidence of the grandmother's intent to make a gift to the grandson was not considered by the court. Likewise in this case there was no separate written

agreement between Ann and Greg changing the effect or terms of the transfer. The Hall case stands for the correct application of the parol evidence rule and does not support a different rule specifically for refinancing cases.

Ann argues that the rule established in Bliss v. Bliss, 127 Idaho 170, 898 P.2d 1081 (1995) does not support the trial judge's reliance on that case. In Bliss the husband admitted that he signed a quitclaim deed transferring ownership of real property to his spouse, but claimed it had a different purpose, which was to avoid an IRS lien. The court in Bliss ruled that evidence of his alternative purpose would not be considered in determining whether he had made a transmutation of his property to the separate property of his spouse. Likewise in the present case, Ann admits that she signed a quitclaim deed transferring ownership of real property to her and Greg as community property but claims she had a different purpose which was just to obtain refinancing. As in Bliss, the Magistrate in this case found that Ann's claimed purpose was not to be considered in determining if her quitclaim deed transmuted an interest in her separate property to Ann and Greg as community property. Bliss supports the Magistrate's decision in this case.

f. Ann's argument fails that she did not intend to convey immediately the title to property to Greg by her quitclaim deed.

Ann argues that Barmore v. Perrone, 145 Idaho 340, 179 P.3d 303 (2008) allows her to avoid the deed to Greg because she did not intend to convey an interest to him. As noted previously herein at p. 13-14, Barmore stands for the proposition that in order for a deed to be effective there must also be a "delivery" of the deed, or an "intent to convey immediately." That issue arises when a deed has been signed but is not intended to be

effective until a later date, such as the death of the grantor. That was the case in Barmore in which the grantor husband claimed the deed was only intended to be effective at his death, in order to avoid probate. Barmore does not stand for the position that intent in all cases can be shown by parol evidence, or it would violate the long list of case precedent regarding the parol evidence rule. (See pages 10-11 herein). As noted by the Court in Barmore, "delivery" and "intent to convey immediately" are synonymous terms. However, it does not say "delivery" and "intent" are synonymous, absent the question of whether the deed was to be effective at a later date. Otherwise it contradicts the plain language of the deed, which was not accepted in the case of Bliss nor authorized in Barmore.

Ann did not raise the issue at trial or in her appeal to the District Court that her deed to Greg at the time of refinancing was only intended to be effective at some later date and therefore not "delivered" at the time of refinancing. She acknowledged that such deed had been recorded at the time of refinancing, that the bank had required it as part of the loan transaction, and that Greg was required to sign the promissory note and the deed of trust required for the refinancing by the bank. Ann knew that the bank relied upon and required that Greg would be on the title to the property and that his signature was required on the note and deed of trust for the loan to be issued. Therefore, she cannot claim that the deed was not effective or "delivered" as to Greg, when it was effective as to the bank and to all persons on notice due to the recording of that deed.

2. An unequal division of the community property cannot be considered because the parties stipulated that the property should be divided equally.

At page 36-38 of Respondent's Brief Ann argues that the recent decision of Dunagan v. Dunagan, 2009 WL 1587787, _____ P.3d _____, (2009), justifies remanding this case for a further hearing based on an unequal division of the property. The case of Dunagan v. Dunagan is helpful guidance for cases such as the present Barrett case. In that case and similar to the Barrett case, during the marriage the wife signed a quitclaim deed transferring ownership of her separate real property to herself and her husband as required during bank refinancing. The trial court determined that the property in question was community property, "based on Kircher's legal quitclaim transfer of the house from herself to the marital community." *Id.* at p.2. Although the wife argued at trial that she did not realize she was giving up any interest in her home to her husband when she signed the quitclaim and that she would not have signed the quitclaim deed if she understood she was giving up an interest in her property to her husband, she did not raise the validity of the deed to her husband as an issue on appeal. Instead she argued on appeal that partial performance of an oral prenuptial agreement should be recognized in Idaho as an exception to the statute of frauds. The Idaho Supreme Court noted the applicable rule governing a transmutation as follows:

> "[A]lthough a husband and wife may transmutate property at any time during marriage, they must conform with statutory formalities." Reed v. Reed, 137 Idaho 53, 59, 44 P.3d 1108, 1114 (2003) (citing Wolford v. Wolford, 117 Idaho 61, 66, 785 P.2d 625, 630 (1990)). I.C §32-917 requires that "All contracts for marriage settlements must be *in writing,* and executed and acknowledged or proved in like manner as conveyances of land are required to be executed and acknowledged or proved." (Emphasis added). *Id.* at p. 4.

The Idaho Supreme Court in Dunagan v. Dunagan, 2009 WL 1587787, _____ P.3d _____, (2009), further affirmed the very rule which is applicable in the Barrett case.

> To be clear, courts do not have discretion under I.C. §32-712(1) to consider compelling reasons to alter the terms of a deed that is plain on its face. Here the deed is unambiguous and transmuted Kircher's separate property to community property, but oral evidence which is not admissible to vary the terms of the deed is nevertheless admissible to show compelling reasons to justify an unequal division of that community property under I.C. §32-712(1). *Id.* at p. 6.

In the present case Ann and Greg complied with Idaho case law and statutory law at Idaho Code §32-917 in transmuting Ann's separate property to community property. Such a transfer was upheld by the trial court and the Idaho Supreme Court in the Dunagan case and should be upheld in the present case.

In Dunagan the wife requested that the court create a new rule which would apply in refinancing arrangements between spouses by allowing an exception to the statute of frauds for part performance. The Idaho Supreme Court declined to make a new exception to Idaho divorce laws and reasoned as follows:

> Although California and Washington courts have recognized and applied the doctrine of partial performance to oral prenuptial agreements, there is no controlling Idaho authority that authorizes this court to do the same. Idaho has not waivered in requiring that marriage agreements that purport to characterize community property as separate property must meet strict statutory formalities; Kircher has failed to persuade us to change course now. Accordingly, we hold as a matter of law that the District Court properly affirmed the Magistrate Court's refusal to consider evidence of the parties' partial performance of their alleged oral prenuptial agreement to keep their property separate. *Id.* at p. 4.

Similarly the Idaho Supreme Court should not adopt a new rule of law in this case regarding transmutation of property between spouses when there is no controlling Idaho authority which authorizes the court to do so.

In Dunagan the wife argued that the court should have granted an unequal division of the community property, due to her transfer of an interest in her separate property to her spouse. Ann now makes that same argument as was raised in Dunagan. However, in the present case Ann and Greg stipulated that the court should only consider an equal division of the property. (Tr. Vol. I, p. 455, L.12 – p. 456, L16; Defendant's Proposed Findings of Facts and Conclusions of Law, R. p. 66, ("At trial, Ann stipulated that she was no longer seeking an unequal division of community property and debts nor an award of spousal support.")) After stipulating to an equal division Ann cannot now raise the question of an unequal division of property due to her transfer of an interest to Greg in the Etna property.

3. Ann is not entitled to an award of attorney fees and costs.

Ann claims an entitlement to an award of attorney fees under Idaho Code §12-121 and IAR Rule 40 and 41. In order to justify an award under such section 12-121 and IAR 41 the adverse party must be found to have pursued the appeal frivolously, unreasonably and without foundation. As noted in Appellant's Brief and this Reply Brief, Appellant's arguments are supported by Idaho precedent and statutory law. There is no basis for a claim that it was pursued frivolously, unreasonably or without foundation. Ann should not be the prevailing party so costs under IAR 40 should not be allowed and Ann's request should be denied.

Greg requests an award of costs pursuant to IAR Rule 40.

CONCLUSION

Greg requests that this Court uphold the Magistrate's decision and reverse the District Court's decision on appeal. The Magistrate's decision should be upheld based on substantial

and competent evidence, which was determined by the Magistrate to support its decision that Ann's quitclaim deed to her and Greg transmuted her separate property to community property. Greg also requests an award of costs pursuant to IAR 40.

RESPECTFULLY submitted this 30th day of July, 2009.

Royce B. Lee
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following person this 30th day of July, 2009, as follows:

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