5-19-2008

Barrett v. Barrett Clerk's Record v. 2 Dckt. 35763

Vol. 2 of 2

IN THE SUPREME COURT

OF THE

STATE OF IDAHO

Volume 2 of 2

LAW CLERK

COPY

GREGORY PAUL BARRETT

Plaintiff/Appellant

vs.

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MAR 19 2009

Supreme Court ____ Court of Appeals ____

Entered on ATS by: ____

ANN MARIE BARRETT

Defendant/Respondent

Appealed from the District Court of the Seventh *Judicial*

District of the State of Idaho, in and for Bonneville *County*

Hon. Jon J. Shindurling, *District Judge*

Royce B. Lee

Attorney for Appellant

Aaron J. Woolf

Attorney for Respondent

Filed this ____ *day of* ____, *20*____.

Clerk

By ____ *Deputy*

35763

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY

GREGORY PAUL BARRETT, Plaintiff, vs. ANN MARIE BARRETT, Defendant.	Case No. CV-05-4852 **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PROPERTY AND DEBT DIVISION AND ATTORNEYS FEES**

BACKGROUND

1. On July 3, 2007, the court issued its "Decree of Divorce;" on August 30, 2007, the court issued its "Findings of Fact and Conclusions of Law on Grounds for Divorce, Child Custody and Child Support" and its "Order on Grounds for Divorce, Child Custody and Child Support and Rule 54(b) Certificate." On September 10, 2007, the court and counsel met informally in chambers for a conference on a few property

issues. In this document, the court makes its findings of fact and conclusions of law on the remaining issues in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ISSUES OF PROPERTY AND DEBT

2. Idaho Code § 32-903 states:

> All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward by either by [sic] gift, bequest, devise, or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, by way of moneys or other property, shall remain his or her separate property.

3. The court finds that the party shown below owned the following property before marriage or acquired it afterward directly by—or using the proceeds of—gift, bequest, devise, or descent:

Gregory's Separate Property	
Description	**Comments**
Greg's recliner	Stipulation
Church related books Gregory owned before marriage	Stipulation
Real property at 3580 Mobile Drive (Singlewide)	Stipulation
Property identified as Gregory's separate property in the parties' written Stipulation (Defendant's Exhibit M)	Stipulation
Debt owing to Bonneville County for property taxes on 3580 E. Mobile	See Plaintiff's Exhibit 26.
$6,296 reimbursement claim against community estate for separate property contribution to purchase of 681 Katie Court	See explanation below.

Ann's Separate Property	
Description	**Comments**
Four horses (Stormy, Cherokee, Misty, Shadow, Tiger)	Stipulation
Piano	Stipulation
Trampoline	Stipulation
Extra long log chain	Stipulation
Movies: Air Bud, Beethoven I & II, Lion King I & II	Stipulation
Church related books Ann owned before marriage	Stipulation
Property identified as Ann's separate property in the parties' written Stipulation (Defendant's Exhibit M)	Stipulation
6/13 interest in mobile home located in Thayne, WY	Stipulation
Bandsaw	Gift

4. Idaho Code § 32-906 states:

> All other property acquired after marriage by either husband or wife is community property.

5. At trial, both parties stipulated that the court should make an equal division of their community property and debts.

6. The court finds that the parties acquired the following property during the marriage by means other than gift, bequest, devise, or descent, and that none of the listed property represents proceeds from separate property. The court also finds that the parties incurred the following debts during the marriage. The court finds that the following property is community property, that the following values are the fair market values of each listed item, that the following debts are community debts, and that the division

indicated below is substantially equal. The court will divide the community property and the responsibility for paying the community debts as follows:

Description	To Ann	To Gregory	Comments
Real property in Etna, Wyoming[1]	One-half (as tenant in common with Gregory)	One-half (as tenant in common with Ann)	When Ann and Kevin Spencer divorced in April 1996, the Lincoln County Wyoming divorce court awarded to Ann this real estate in Star Valley, Wyoming that the parties call the "Etna property." When Ann and Gregory married, Ann owed $123,961 on a debt to Countrywide Home Loans secured by the Etna property. During the marriage of Ann and Gregory, the parties made payments on that debt, and by August 12, 1999, they had reduced the balance by $2,141 to $121,820. Ann made the monthly payments on the debt to Countrywide Mortgage from her checking account. Into that account, she deposited the monthly child support she received from Kevin Spencer, the rental income she received from her separate properties, and $350 to $400 Gregory provided each month from his employment income. On August 12, 1999, Ann sold a portion of the property (about 2.5 acres) and a mobile home to Eric and Dawn Loveland for $88,500. To close on that sale, Ann had to pay off the existing mortgage debt owing to Countrywide. To pay that debt, she and Gregory borrowed $34,512 from

[1] This item excludes the proceeds from the Wyoming 100 sale in the trust account of Woolf, Combo & Thompson but includes any other interest in the Wyoming 100 contract for development of the Etna property.

			the Bank of Star Valley (BSV), giving a promissory note that they both signed. Ann also signed a quitclaim deed conveying the remaining Etna acreage to "Ann Barrett and Gregory Barrett, Wife and Husband as Tenants by the Entireties," and then she and Gregory signed a new mortgage in favor of BSV, pledging the property to secure repayment of the $34,512 loan. Ann signed all of the documents (the deed to the Lovelands, the quitclaim deed from Ann to Ann and Gregory, and the promissory note and mortgage to BSV) during the closing. Ann testified that she signed the quitclaim deed simply because it was placed in front of her at the closing and was required for the new loan. She testified that she would not have signed the quitclaim deed had she understood that she was giving Gregory a half interest in the property. Until the winter of 2003, Ann made the monthly payments on the debt to BSV from her checking account. (As noted above, into that account, Ann deposited the child support she received from Kevin Spencer and the monthly allowance Gregory provided from his employment income.) In the winter of 2003, the parties started a joint checking account, and Ann began making the payments from that account. The parties have now reduced the debt by $11,631 to $22,881. Gregory contends that Ann's signing the quitclaim deed transmuted

			the Etna real estate into community property; Ann concedes that the community estate has a claim against her separate estate for the $13,772 reduction in principal of the Countrywide and BSV debts, but she contends that the real estate remained her separate property. "[A] husband and wife may elect at any time to change their property rights." *Stockdale v. Stockdale,* 102 Idaho 870, 873, 643 P.2d 82, 85 (Ct. App. 1982). *Accord*, *Suchan v. Suchan*, 106 Idaho 654, 660, 682 P.2d 607, 613 (1984). Idaho Code § 32-917 allows spouses to transmute separate property into community property by following certain formalities. It states: "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." (A conveyance of land requires an "instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." Idaho Code § 9-503.) Here, the quitclaim deed signed by Ann meets the requirements of Idaho Code § 32-917. When one spouse claims that the other spouse intended to transmute property or to make a gift, the burden is on the party making the claim to prove the intent in question by clear and convincing evidence. *Ustick v. Ustick*, 104 Idaho 215, 222, 657 P.2d

			1083, 1090 (1983). Generally, a quitclaim deed executed with the formalities required by Idaho Code § 32-917 is sufficient to meet that burden of proof. *See, e.g., Bliss v. Bliss*, 127 Idaho 171, 898 P.2d 1081 (1995); *Hall v. Hall*, 116 Idaho 483, 777 P.2d 255 (1989). "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." *Hall v. Hall*, 116 Idaho 483, 484, 777 P.2d 255, 256 (1989). *Accord, e.g., Bliss v. Bliss*, 127 Idaho 171, 898 P.2d 1081 (1995). Here, the deed is plain and unambiguous. 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. Here, the deed shows no ambiguity, and the court finds that it transmuted the Etna real estate from separate property to community property. When the Lincoln County divorce court awarded this property to Ann in April 1996, it was worth about $160,000. (Ann's equity was about $34,000.) Ann and Gregory disagree on the current fair market value of the property. The court received in evidence Plaintiff's Exhibit 32, a September 2006 appraisal report by Thomas Ogle, a Certified General Real Estate Appraiser; the court also heard testimony from Mr. Ogle, Gregory and Ann. Gregory opined that Mr. Ogle undervalued the property by failing to give appropriate weight to a contract relating to development of the property. (See footnote 2 below.) Mr. Ogle testified that adding value for the possible development would be unduly speculative. Ann agreed; she opined that the contract did add any value to the property. Mr. Ogle was the only expert witness to testify concerning the fair market value.

			Because the court has decided to award the Etna property to the parties as tenants in common, the court need not determine the fair market value of the property.
$22,881 debt owing to Bank of Star Valley	Half	Half	See above.
Proceeds from Wyoming 100 sale in the trust account of Woolf, Combo & Thompson	$21334	$21334	See above. In September 2005, the parties sold a portion (about 2 acres) of the Etna property to Wyoming 100, LLC ("Wyoming 100") for $50,000.[2] The proceeds were placed in the trust account at Woolf, Combo & Thompson. (The parties agreed that the sale would have no impact on characterization of the Etna property as community or separate. See Defendant's Exhibit F.) During the September 10, 2007 informal conference in chambers, counsel agreed that the court should place one-half of this fund in the control of each party but that such allocation would have no impact on the characterization of the funds as community or separate property on appeal.
Real property at 278 Contor (lot ($15000)		$67,000	Gregory bought this lot for $9,000 before marriage; he also owned a

[2] As additional consideration, Wyoming 100 agreed to build a fence and provide a mechanized pop-up irrigation system. Wyoming 100 also agreed to pave up to 400 lineal feet of street and provide stubs for water, power and telephone for a five-lot subdivision on the parties' property. The contract required Wyoming 100 to begin construction by December 2006, but Wyoming 100 has not started any development yet; it is uncertain when development might begin.

To help insure that the lots could be developed, Gregory filed an application to change the highway access from agricultural to residential. The parties also spent about $400 to replace a strip of fence on the property; the evidence did not address whether that expenditure enhanced the value of the property.

and double wide mobile home ($52000))			singlewide mobile home situated on the lot. During the marriage, the parties constructed a cement pad on the lot, and on about November 29, 2001, they replaced the singlewide mobile home with a doublewide mobile home. To buy the doublewide home, the parties borrowed $31,152 from the Bank of Commerce (BOC). Both Gregory and Ann signed the promissory note. The noted provided that it would be secured by a deed of trust on the mobile home. By making monthly payments, the parties reduced the BOC debt by $9,830 to $21,322. On December 27, 2004, the parties borrowed $45,000 from Wells Fargo Bank; both parties signed the promissory note. They used $21,322 to pay off the BOC debt and they used the remaining $26,000 to consolidate other debts (vehicle loans). At or near the closing on the Wells Fargo loan, Gregory signed a quitclaim deed conveying the property to "Gregory P. Barrett and Ann Barrett, Husband and Wife." The parties stipulated that $67,000 is the fair market value of this property. (They attribute $52,000 to the doublewide home and $15,000 to the lot.) They also stipulated that the court should award the property to Gregory. They agree that if the court decides that the property has remained Gregory's separate property, then the community is entitled to a reimbursement claim equal to 77.6% of the property's value. Ann is not necessarily claiming

			that this property is community property, but she requests that the court's ruling on this property to be consistent with its ruling on the Etna property. Following the same reasoning the court used in connection with the Etna property, the court finds that the Contor property is community property.
Debt owing to Wells Fargo secured by property at 278 N. Contor		(40166)	See above. The parties agreed that Gregory would pay this debt; the court finds it is a community debt.
Sale proceeds from real property at 681 Katie Court[3]	8593	8593	This item represents the net proceeds from the sale of certain real property at 681 Katie Court. The parties acquired that property during marriage and agree that it is community property. As explained below, however, the parties invested some of Gregory's separate property in the Katie Court property. Accordingly, Gregory's separate estate is entitled to reimbursement as explained below. Before his marriage to Ann, Gregory owned certain realty the parties called the "Tennis Court Property." To buy the Tennis Court property, Gregory borrowed $96,500 from Wells Fargo Bank. He made monthly payments on that debt, and when the parties married, he owed $96,147. The parties continued making monthly payments during the marriage and reduced the debt by an

[3] The $1,593 each party received in May 2007 is included in the amounts listed. See Plaintiff's Exhibit 11.

			additional $5,230 to $90,917. The parties also improved the property using community labor and funds; the parties stipulated that those improvements enhanced the property's value by $3,000. On November 18, 2002, Gregory sold the Tennis Court property. He paid off the Wells Fargo debt with the proceeds, and he received a net cash payment of $14,526. From that fund, the community estate was entitled to reimbursement totaling $8,230 (representing the $5,230 reduction in mortgage debt and the $3,000 enhancement from the improvements). The balance, $6,296, remained Gregory's separate property. From the sale proceeds, the parties spent $1,526 on community expenses not specifically identified in the evidence. Accordingly, the community portion of the sale proceeds was reduced to $6,704. The parties invested the remaining $13,000—$6,296 of Gregory's separate property and $6,704 in community property—in the real estate at 681 Katie Court. The parties lived at the Katie Court property for several years. A few weeks before the trial in this matter, they sold the Katie Court property, realizing net proceeds of $17,186. From the net proceeds, the community must pay Gregory's $6,296 claim for reimbursement to his separate estate. By agreement, Gregory and Ann

			each took $1,593 from the community proceeds in May 1997. During the September 10, 2007 informal conference in chambers, counsel agreed that the court should place one-half of this fund in the control of each party but that such allocation would have no impact on the parties' positions or arguments on appeal.
Debt owing to Gregory's separate estate for reimbursement claim on 681 Katie Court sale	(3148)	(3148)	See above.
Real property located at 140 N. Adam (lot ($15000) and double wide mobile home ($52,000))	67000		Ann has been living at this residence since October 2005 and would like the court to award it to her. Gregory does not care whether the court awards it to him or to Ann, unless an award is needed to accomplish an equal division of property.
Debt owing to GMAC secured by real property at 140 N. Adam	(21843)		
Debt owing to Bonneville County for property tax on 140 N. Adam	(175)		See Plaintiff's Exhibit 26.
Mobile home located at 181 N. Adam		4000	Stipulation
Debt owing to Bonneville County for property taxes on 181 N. Adam		(58)	See Plaintiff's Exhibit 26.
Mobile home located in Thayne, Wyoming	4308		This property includes only the mobile home and not the land on

			which it sits. The parties agree that 7/13 of the value of this property is community property and 6/13 of the value is Ann's separate property. The parties do not agree on the fair market value of this property. Neither party presented any expert testimony to establish the value. From conflicting evidence, the court finds that the fair market value is $8,000. The court notes that this is an older singlewide trailer; Ann testified that the roof leaks, the trailer is in "rough shape," and it is not on a foundation. The parties paid only $7,000 for the mobile home.
Real property at 805 N. Stevens		9500	The parties agreed at trial that the court should award this rental property to Gregory at a value of $7,500. Later, however, Gregory testified that shortly before the trial, he incurred a debt of about $2,000 to seal the floor and replace the carpeting and then re-rented the property at a higher rate. (The parties stipulated that Gregory could provide the bills for the carpeting and sealing after trial; he has not done so.) Gregory then asked the court to characterize the debt as a community debt. Since Gregory incurred the debt during the parties' marriage, the court assumes that it was a community debt. *Simplot v. Simplot*, 96 Idaho 239, 526 P.2d 844 (1974). Gregory did not consult Ann before sealing and carpeting the floor; he made the improvements after the parties had agreed the court would

			award the property to him. Accordingly, awarding the property to Gregory at a value of $7,500 and requiring the community to pay the $2,000 debt would result in a windfall to Gregory. Instead, the court has valued the property at $9,500 to reflect the improvements Gregory made before trial.
Debt owing for expenses at 805 N. Stevens		(2000)	See above.
Debt owing to Bonneville County for property taxes on 805 N. Stevens		(78)	See Plaintiff's Exhibit 26.
1998 Toyota Tacoma truck		8425	Stipulation
Children's videos	1	1	Based on the parties' stipulation, Ann will pick out 6 more videos, and Gregory will send them to her.
Half food storage	1		Stipulation
Half food storage		1	Stipulation
Set of dining chairs	600		Stipulation
Silver mirror in master bedroom	40		Stipulation
Mirror in the basement		75	Stipulation
Tools (including but not limited to shovels, rakes, hoes, fence pliers, farm tools, etc.)		200	Based on the parties' stipulation, it appears the parties have already divided these items, and Gregory received $200 more in value than Ann received.
Baby jungle animal picture in Shannon's room	15		Stipulation
Cat and dog pictures in Brittana's room	20		Stipulation
1 plant stand from	25		Stipulation

Oakridge furniture			
1 plant stand from Oakridge furniture		25	Stipulation
Dogs on shelf picture in Kacey's room	15		Stipulation
American shelf/décor by the front door in the community home	50		Stipulation
4 stone vases with flowers	170		Stipulation
1 swivel rocker	1		Stipulation
1 swivel rocker		1	Stipulation
Boxes of sewing scraps	25		Stipulation
Set of dishes (green and white)	50		Stipulation
Plant stand in den	15		Stipulation
Greenery basket in the living room under the table		15	Stipulation
Shannon's jungle print comforter sheet	20		Stipulation
2 silver wire baskets in the master bathroom		10	Stipulation
Mirror, ivy and pictures located in the master bedroom	25		Stipulation
Unhung picture of grapes and fruit with a gold frame	1		Stipulation
Picture in the downstairs bathroom	25		Stipulation
Picture at the foot of the stairs		25	Stipulation
2 pictures in the den	35		Stipulation
1 Ficus tree	1		Stipulation
1 Ficus tree		1	Stipulation
Flower arrangement	35		Stipulation

above the mirror in the family room			
John Wayne movies	1	1	Based on the parties' stipulation, Ann will pick out 6 more videos, and Gregory will send them to her.
Community interest in PERSI accounts (Base plan and Choice plan)	Half	Half	The parties stipulated at trial to divide the community interest in these accounts equally by QDRO. (The court directs Gregory's attorney to prepare a proposed QDRO.)
Camcorder and Ann's nail apron with hammer & tools	125		$50 camcorder; $75 apron, hammer & tools
Half of food: Beans & Peas	1		Based on the parties' stipulation, it appears the parties have already divided these items.
Half of food: Beans & Peas		1	Based on the parties' stipulation, it appears the parties have already divided these items.
Sheets & Comforters to match Pillowcase from Shane's room		30	Stipulation
5 horses (Tony, Fire Heart, Winchester and 2 unnamed)	4000		Stipulation
Mirror in family room	75		Stipulation
Half of church related books acquired during the marriage	30		Stipulation
Half of church related books acquired during the marriage		30	Stipulation
1998 Toyota Sienna Van	5125		Stipulation
1998 Toyota Corrolla	4300		Stipulation
Half of buckets of	1		Stipulation

honey			
Half of buckets of honey		1	Stipulation
Half of income tax refund	2993		Based on the parties' stipulation, the parties will evenly divide their 2006 income tax refunds ($5,241 federal and $746 state). See Defendant's Exhibit N.
Half of income tax refund		2993	See above.
Property identified in paragraph 3 of the parties' Stipulation (Defendant's Exhibit M)	2585		See Defendant's Exhibit N.
Property identified in paragraph 4 of the parties' Stipulation (Defendant's Exhibit M)		9503	See Defendant's Exhibit N.
Debt owing to Bank of Commerce (Ready Reserve)	(149)		See Plaintiff's Exhibit 26.
Debt owing to Juab County Ambulance	(187)		See Plaintiff's Exhibit 26.
Debt owing to Intermountain Healthcare	(1847)		See Plaintiff's Exhibit 26.
Sub-total	$94292	$86315	
Equalization Payment from Ann to Gregory	(3988)	$3988	During the September 10, 2007 informal conference in chambers, counsel agreed Ann's equalization payment would not be due until any appeal from the trial court's decision was final.
Total	$90304	$90303	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ATTORNEYS FEES

7. Ann parties asked for an award of attorneys fees under Idaho Code § 32-704. Idaho Code § 32-704(3) states:

> The court may from time to time *after considering the financial resources of both parties and the factors set forth in section 32-705*, Idaho Code, order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this act and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

Idaho Code § 32-705 states, in relevant part:

> The . . . order shall be in such amounts . . . that the court deems just, after considering all relevant factors which may include:
>
> (a) The financial resources of the spouse seeking [the order], including the marital property apportioned to said spouse, and said spouse's ability to meet his or her needs independently;
>
> (b) The time necessary to acquire sufficient education and training to enable the spouse seeking [the order] to find employment;
>
> (c) The duration of the marriage;
>
> (d) The age and the physical and emotional condition of the spouse seeking [the order];
>
> (e) The ability of the spouse [against whom the order] is sought to meet his or her needs while meeting those of the spouse [seeking the order];
>
> (f) The tax consequences to each spouse;

(g) The fault of either party.

8. The court considers these factors as follows:

(a) The financial resources of the spouse seeking the order:

(1) The property allocated to Ann includes almost $33,000 cash (including the proceeds from the Wyoming 100 sale, the Katie Court sale and the tax refund). She also has very substantial equity in the Etna property and other real estate.

(2) Ann estimates that her minimum annual living expenses will be about $40,392. (See Defendant's Exhibit Q.) Ann could earn about $20,000 per year at Melalucca. Her other annual resources include $9,300 child support from Kevin Spencer, $10,848 child support from Gregory, and $1,704 in net rentals.

(3) Except for the $1,847 debt owing to Intermountain Health Care, Ann's only significant debts are related to her real estate holdings.

(b) The time necessary to acquire sufficient education and training:

The evidence did not address this factor.

(c) The duration of the marriage:

The parties were married for almost ten years.

(d) The age and the physical and emotional condition of the spouse seeking [the order]:

Ann suffered somewhat with depression, does not now suffer any physical or emotional ailments that would affect her ability to pay fees.

(e) The ability of the spouse [against whom the order] is sought to meet his or her needs while meeting those of the spouse [seeking the order]:

The evidence did not establish Gregory's minimum annual expenses. Gregory will earn $49,812 as a teacher during the 2007-2008 school year. He may also earn additional income as a carpenter-builder.

(f) The tax consequences to each spouse:

The evidence did not suggest any tax consequences related to a fee award.

(g) The fault of either party:

The court granted a divorce on grounds of irreconcilable differences.

9. Considering all these facts, it is clear that each party has the ability to pay his or her own attorneys fees. Accordingly, the court will exercise its discretion to order that each party bear his or her own fees and costs.

Dated 9-11-07.

Magistrate

CERTIFICATE OF SERVICE

I certify that on the 11 day of September 2007, I served a true and correct copy of the foregoing document on the persons listed below by mailing, with the correct postage thereon, by facsimile, or by causing the same to be hand delivered.

Deputy Court Clerk

Aaron J. Woolf P.O. Box 50160 Idaho Falls, ID 83405 FAX (208) 524-5451	☑ Courthouse Box ☐ FAX	☐ US Mail ☐ Hand Delivery
Royce B. Lee 770 South Woodruff Avenue Idaho Falls, ID 83401 FAX (208) 524-2051	☑ Courthouse Box ☐ FAX	☐ US Mail ☐ Hand Delivery

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY

GREGORY PAUL BARRETT, Plaintiff, vs. ANN MARIE BARRETT, Defendant.	Case No. CV-05-4852 **JUDGMENT AND ORDER ON ALL REMAINING ISSUES (PROPERTY AND DEBT DIVISION AND ATTORNEYS FEES)**

Based on the court's Findings of Fact and Conclusions of Law entered August 30, 2007 and entered this day, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The court confirms that the following property is the sole and separate property of the plaintiff (Gregory):

Greg's recliner
Church related books Gregory owned before marriage
Real property at 3580 Mobile Drive (Singlewide)
Property identified as Gregory's separate property in the parties' written Stipulation (Defendant's Exhibit M)
Debt owing to Bonneville County for property taxes on 3580 E. Mobile
$6,296 reimbursement claim against community estate for separate property contribution to purchase of 681 Katie Court

2. The court confirms that the following property is the sole and separate property of the defendant (Ann):

Four horses (Stormy, Cherokee, Misty, Shadow, Tiger)
Piano
Trampoline
Extra long log chain
Movies: Air Bud, Beethoven I & II, Lion King I & II
Church related books Ann owned before marriage
Property identified as Ann's separate property in the parties' written Stipulation (Defendant's Exhibit M)
6/13 interest in mobile home located in Thayne, WY
Bandsaw

3. The court divides the parties' community property and the parties' responsibility for paying the community debts as follows:

Description	To Ann	To Gregory
Real property in Etna, Wyoming	One-half (as tenant in common with Gregory)	One-half (as tenant in common with Ann)
$22,881 debt owing to Bank of Star Valley	Half	Half
Proceeds from Wyoming 100 sale in the trust account of Woolf, Combo & Thompson	$21334	$21334
Real property at 278 Contor (lot ($15000) and double wide mobile home ($52000))		$67,000
Debt owing to Wells Fargo secured by property at		(40166)

278 N. Contor		
Sale proceeds from real property at 681 Katie Court	8593	8593
Debt owing to Gregory's separate estate for reimbursement claim on 681 Katie Court sale	(3148)	(3148)
Real property located at 140 N. Adam (lot ($15000) and double wide mobile home ($52,000))	67000	
Debt owing to GMAC secured by real property at 140 N. Adam	(21843)	
Debt owing to Bonneville County for property tax on 140 N. Adam	(175)	
Mobile home located at 181 N. Adam		4000
Debt owing to Bonneville County for property taxes on 181 N. Adam		(58)
Mobile home located in Thayne, Wyoming	4308	
Real property at 805 N. Stevens		9500
Debt owing for expenses at 805 N. Stevens		(2000)
Debt owing to Bonneville County for property taxes on 805 N. Stevens		(78)
1998 Toyota Tacoma truck		8425
Children's videos (Ann will pick out 6 more videos, and Gregory will send them to her.)	1	1
Half food storage	1	
Half food storage		1
Set of dining chairs	600	
Silver mirror in master bedroom	40	
Mirror in the basement		75
Tools (including but not limited to shovels, rakes, hoes, fence pliers, farm tools, etc.)		200
Baby jungle animal picture in Shannon's room	15	
Cat and dog pictures in Brittana's room	20	
1 plant stand from Oakridge furniture	25	
1 plant stand from Oakridge furniture		25
Dogs on shelf picture in Kacey's room	15	
American shelf/décor by the front door in the community home	50	
4 stone vases with flowers	170	

1 swivel rocker	1	
1 swivel rocker		1
Boxes of sewing scraps	25	
Set of dishes (green and white)	50	
Plant stand in den	15	
Greenery basket in the living room under the table		15
Shannon's jungle print comforter sheet	20	
2 silver wire baskets in the master bathroom		10
Mirror, ivy and pictures located in the master bedroom	25	
Unhung picture of grapes and fruit with a gold frame	1	
Picture in the downstairs bathroom	25	
Picture at the foot of the stairs		25
2 pictures in the den	35	
1 Ficus tree	1	
1 Ficus tree		1
Flower arrangement above the mirror in the family room	35	
John Wayne movies (Ann will pick out 6 more videos, and Gregory will send them to her.)	1	1
Community interest in PERSI accounts (Base plan and Choice plan)	Half	Half
Camcorder and Ann's nail apron with hammer & tools	125	
Half of food: Beans & Peas	1	
Half of food: Beans & Peas		1
Sheets & Comforters to match Pillowcase from Shane's room		30
5 horses (Tony, Fire Heart, Winchester and 2 unnamed)	4000	
Mirror in family room	75	
Half of church related books acquired during the marriage	30	
Half of church related books acquired during the marriage		30
1998 Toyota Sienna Van	5125	

1998 Toyota Corrolla	4300	
Half of buckets of honey	1	
Half of buckets of honey		1
Half of income tax refund	2993	
Half of income tax refund		2993
Property identified in paragraph 3 of the parties' Stipulation (Defendant's Exhibit M)	2585	
Property identified in paragraph 4 of the parties' Stipulation (Defendant's Exhibit M)		9503 *
Debt owing to Bank of Commerce (Ready Reserve)	(149)	
Debt owing to Juab County Ambulance	(187)	
Debt owing to Intermountain Healthcare	(1847)	
Equalization Payment from Ann to Gregory (Ann's equalization payment is not be due until any appeal from the trial court's decision is final.)	(3988)	$3988

4. Each party shall bear his or her own fees and costs.

Dated 9-11-07.

Magistrate

CERTIFICATE OF SERVICE

I certify that on the _____ day of September 2007, I served a true and correct copy of the foregoing document on the persons listed below by mailing, with the correct postage thereon, by facsimile, or by causing the same to be hand delivered.

_____
Deputy Court Clerk

Aaron J. Woolf P.O. Box 50160 Idaho Falls, ID 83405 FAX (208) 524-5451	☐ Courthouse Box ☐ FAX	☐ US Mail ☐ Hand Delivery
Royce B. Lee 770 South Woodruff Avenue Idaho Falls, ID 83401 FAX (208) 524-2051	☐ Courthouse Box ☐ FAX	☐ US Mail ☐ Hand Delivery

AARON J. WOOLF
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Attorney for Defendant/Appellant, Ann Barrett.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

GREGORY PAUL BARRETT, Plaintiff/Respondent, vs. ANN MARIE BARRETT, Defendant/Appellant.	Case No. CV-05-4852 **NOTICE OF APPEAL**

COMES NOW, Defendant/Appellant, ANN MARIE BARRETT, by and through her attorney of record, Aaron J. Woolf, Esq., of the law firm of THOMPSON SMITH WOOLF & ANDERSON, PLLC, and hereby gives notice of her Appeal to the District Judges Division of the District Court and hereby submits the following information:

1. This Appeal is taken from the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Bonneville, Magistrate Division in Case No. CV-05-4852, entitled *Gregory Paul Barrett vs. Ann Marie Barrett.*

2. This Appeal is taken to the District Court of the Seventh Judicial District of

the State of Idaho.

3. The date and heading of the decisions from which the Appeal is taken are: *Findings of Fact and Conclusion of Law on Property and Debt Division and Attorneys Fees*, entered September 11, 2007, and the *Judgment and Order on All Remaining Issues (Property and Debt Division and Attorney Fees)*, entered September 11, 2007.

4. This Appeal is taken upon matters of both fact and law.

5. Appellant requests that a copy of the transcript be prepared for the trial which was held on June 18, 2007 through June 22, 2007.

6. The testimony and proceedings of the original trial held on June 18, 2007 through June 22, 2007, were recorded by tape recording which is in the custody of the Clerk of the District, Magistrate Division, Bonneville County.

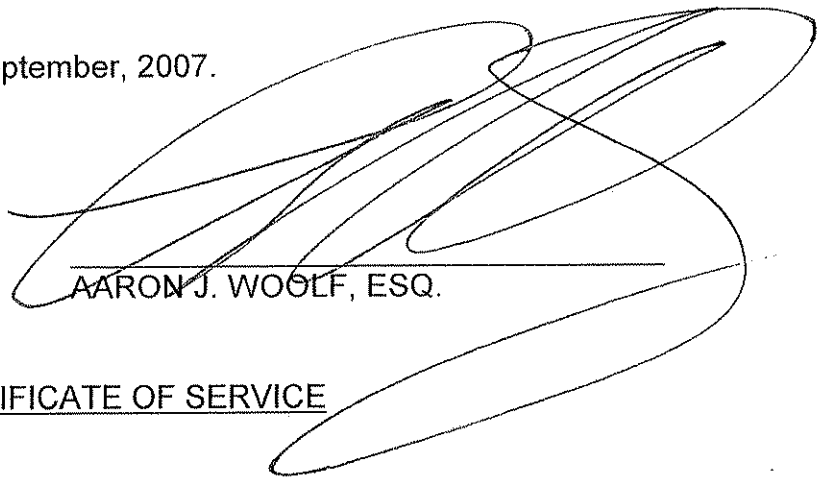
7. The issues on Appeal are:

   a. Did the Court err by finding that the deed signed by Ann Barrett transmuted her Etna, Wyoming real estate from separate property to community property?

   b. Did the Court err by finding that the proceeds from the sale of the Wyoming 100, LLC sale are community property?

8. Plaintiff reserves the right to submit additional issues on appeal as allowed by IRCP Rule 83(f)(6).

DATED this 14 day of September, 2007.



AARON J. WOOLF, ESQ.

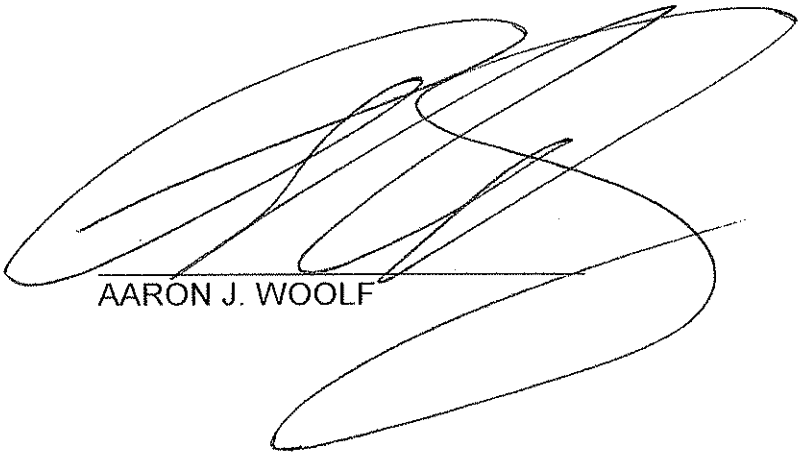
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in Idaho, with my office in Idaho Falls, and that on the 14 day of September, 2007, I served a true and correct copy of the following-described document on the parties listed below, by mailing or by facsimile, with the correct postage thereon, or by causing the same to be hand delivered.

DOCUMENT SERVED: NOTICE OF APPEAL

☐ Mailed ☐ Hand Delivered ☐ Fax

Royce Lee, Esq.
Attorney at Law
770 S. Woodruff
Idaho Falls, ID 83401
(208) 524-2051



AARON J. WOOLF

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Attorneys for Defendant, Ann Marie Barrett.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

GREGORY PAUL BARRETT, Plaintiff/Respondent, vs. ANN MARIE BARRETT, Defendant/Appellant.	Case No. CV-05-4852 **DEFENDANT'S BRIEF ON APPEAL**

COMES NOW, Defendant/Appellant, ANN MARIE BARRETT, by and through her attorney of record, Aaron J. Woolf, Esq., of the law firm of THOMPSON SMITH WOOLF & ANDERSON, PLLC, and hereby submits her Brief on Appeal, as follows:

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TABLE OF CASES AND AUTHORITIES

I. STATEMENT OF THE CASE

This case involves a divorce matter between the Plaintiff/Respondent, Gregory Paul Barrett (hereinafter, "Greg"), and the Defendant/Appellant, Ann Marie Barrett (hereinafter, "Ann"). A trial was held on 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. The grounds for divorce were left to the Court for determination, as provided for in the Decree of Divorce. Thereafter, on July 27, 2007, the parties filed a Stipulation Re: Grounds for Divorce, in which the parties, through counsel, stipulated that the divorce decree would be entered on irreconcilable difference grounds. On August 30, 2007, the Honorable Earl Blower entered his Findings of Fact and Conclusions of Law on Grounds for Divorce, Child Custody and Child Support and his Order on Grounds for Divorce, Child Custody and Child Support. The only relevant part of this decision and Order, for purposes of the present appeal, is that it formally entered the divorce grounds, as irreconcilable differences. On September 11, 2007, the Honorable Earl Blower entered his Findings of Fact and Conclusions of Law on Property and Debt Division and Attorneys Fees, along with his Judgment and Order on All Remaining Issues (property and debt division and attorneys fees). Ann filed her Notice of Appeal on September 14, 2007. 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. There were numerous Orders entered by the Magistrate after the Notice of Appeal was filed, but none of said Orders are relevant to the pending appeal.

This appeal surrounds rulings made by the Magistrate regarding certain real

property, which was known at trial as the "Etna property".

II. FACTUAL BACKGROUND

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

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. Tr., V.I, p. 378, L. 2-3. At trial, Ann testified that the Etna property was her separate property. Tr., V.I, p. 378, L. 11-13. Ann acquired the Etna property with her first husband, Kevin Spencer, when they purchased the land 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; and Plaintiff's exhibit 18 (Warranty Deed Ann and Kevin Spencer received when they acquired the property) Tr., V.I, p. 213, L. 12. 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 said Decree of Divorce, Ann was awarded the Etna property. Tr., V.I, p. 379, L. 7-10. At the time of Ann's divorce to 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 Decree was entered, Kevin Spencer signed two quitclaim deeds, whereby 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 reason for the two quitclaim deeds was

due to the fact that the first quitclaim deed contained an incorrect legal description. Tr., V.I, p. 379, L. 15-20.

Ann and Greg became married on November 1, 1997. Tr., V.I, p. 475, L. 8-10. In August of 1999, Ann sold part of the Etna property to Eric and Dawn Loveland. Tr., V.I, p. 383, L. 21-25; p. 384, L. 1-3. Specifically, Ann sold to the Loveland's two and one-half acres, including her marital residence, for $88,500.00. Tr., V.I, p. 384, L. 10-20. Ann transferred the acreage and the home through a Warranty Dee signed on August 12, 1999, by she 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 to Kevin Spencer, there was a debt due and owing on the Etna property, to Countrywide, in the approximate amount of $126,000.00. 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 Loveland's, Countrywide was owed $122,355.54. Plaintiff's exhibit 22. Thus, when Ann sold the acreage and home to the Loveland's for $88,500.00, there was still a remaining balance owed to Countrywide in the approximate amount of $34,000.00, even after the proceeds from the sale were applied to the Countrywide debt. Tr., V.I, p. 386, L. 8-20; Plaintiff's exhibit 22 (Settlement Statement for the sale of the property to the Lovelands). Ann was required to pay off the Countrywide loan during the closing of the sale of the acreage and home to the Loveland's. Tr., V.I, p. 386, L. 8-20; Plaintiff's exhibit 22. In order to do so, Ann acquired a loan through the Bank of Star Valley, in the amount of $35,881.55, to pay off the remaining balance on the Countrywide loan. Tr., V.I, p. 386, L. 16-20; Plaintiff's exhibit 24 (Promissory Note for the loan at the Bank of Star Valley).

Countrywide was paid in full. Defendant's exhibit D (check to Countrywide).

The closing for the sale of the acreage and home to the Lovelands and the new loan through the Bank of Star Valley took place in one day, on August 12, 1999. Tr., V.I, p. 388, L. 9-18. The closing took place at the Bank of Star Valley in Afton, Wyoming. Tr. V.I, p. 388, L. 19-20. During the closing, Ann, Greg, and a representative from the title company were present. Tr., V.I, p. 388, L. 23-25. Ann and Greg signed dozens of documents. Tr., V.I., p. 389, L. 9-17. Ann did not read each of the documents, and she did not believe that Greg did either, as the documents were presented to the parties too fast. Tr., V.I, p. 389, L. 18-25. Greg admitted that he did not read all of the documents presented at closing. Tr., V.I, p. 718, L. 17-19. The closing lasted for 20 to 30 minutes. Tr., V.I, p. 390, L. 2-3. During the closing, Ann signed a Quitclaim Deed, which indicated that she was transferring the Etna property to she and Greg, as Tenants by the Entireties. Plaintiff's exhibit 23. Ann did not recall anything specifically said to she and Greg at the closing, and she did not recall signing the Quitclaim Deed, which was admitted as Plaintiff's exhibit 23. Tr., V.I, p. 390, L. 4-23. In fact, Ann did not specifically recall signing any of the documents that were signed at closing. Tr., V.I, p. 390, L. 24-25; p. 391, L. 1.

Ann admits that she signed the Quitclaim Deed which was admitted as exhibit 23, but she said that she signed it because it was among several documents that she was required to sign. Tr., V.I, p. 391, L. 2-6. Ann did not recall the closing agent giving her any explanation of the meaning of the Quitclaim Deed. Tr., V.I, p. 391, L. 7-9. Ann testified that if she had been told that the Quitclaim Deed was effectively giving Greg a one-half interest in the Etna property, she would not have signed it. Tr., V.I, p. 391, L. 10-20. Ann,

by signing the Quitclaim Deed, did not intend to give Greg a one-half interest in the Etna property. Tr., V.I, p. 391, L. 21-24.

Prior to signing the documents at closing, Ann and Greg never discussed that Ann was giving Greg an interest in the Etna property. Tr., V.I, p. 392, L. 4-11; Tr., V.I, p. 718, L. 20-25. After closing, Ann and Greg did not discuss the fact that Ann had potentially given Greg a one-half interest in the Etna property. Tr., V.I, p. 392, L. 12-18; Tr., V.I, p. 718, L. 20-25. The first time Greg brought up the fact that he may have an interest in the Etna property, was after this Divorce action was filed. Tr., V.I, p. 392, L. 19-25; p. 393; L. 1-6; Tr., V.I, p. 719, L. 21-25; p. 720, L. 1-5; Tr., V.I, p. 695, L. 9-12.

During marriage, Greg did not take much of an interest in the Etna property. Tr., V.I, p. 393, L. 10-11 and 23-25. From the date of marriage until the closing date in August, 1999, Ann paid the mortgage payment to Countrywide and the homeowner's insurance, all from her separate checking account. Tr., V.I, p. 394, L. 8-25; p. 395; p. 396, L. 1-23. The monies she used to pay these expenses were from her child support from her previous marriage, the rental income she was receiving from her separate property, and from a small allowance given to her by Greg. Tr., V.I, p. 394, L. 8-25; p. 395; p. 396, L. 1-23. Ann continued to make the mortgage payment on the Etna property, from her separate bank account, from the date of closing until the winter of 2003. Tr., V.I, p. 396, L. 24-25; p. 397, L. 1-23. Thereafter, the parties had a joint account, but Ann continued to make the mortgage payment to the Bank of Star Valley, with the exception of one or two instances where Greg made the mortgage payment. Tr., V.I, p. 400, L. 7-11. During the entire marriage, Ann always felt that this debt was her obligation, and Greg never offered any

help in paying this debt. Tr., V.I, p. 399, L. 17-25; p. 400, L. 1-6.

In December, 2005, Ann sold approximately 2 acres of the Etna property to Wyoming One Hundred, LLC. Tr. V.I, p. 401, L. 14-21. This acreage was part of the 15 acres Ann owned before marriage. Tr., V.I, p. 413, L. 1-6. In exchange for the sale of the approximately 2 acres, Ann received $49,322.19 and she was supposed to have five lots developed on her property, along with various other improvements. Tr. V.I, p. 403, L. 1-16; Defendant's exhibit G; Tr. V.I, p. 404, L. 12-25; p. 405; p. 406; p. 407, L. 1-20; Plaintiff's exhibit 27. None of the improvements that were supposed to be made, had been begun, pursuant to the agreement with Wyoming One Hundred, LLC, and the time period within which they were to have begun, had long expired. Tr., V.I, p. 405; p. 406; p. 407, L. 1-20. The proceeds received from the sale of the approximate 2 acres were placed into Ann's attorney's trust account. Tr., V.I, p. 401, L. 22-25; p. 402, L. 1-24; Defendant's exhibit F; Plaintiff's exhibit 31. The parties agreed that the sale of the parcel of property to Wyoming One Hundred, LLC, would have absolutely no effect on the classification of the proceeds (separate property vs. community property) from the sale of said property, nor the remaining parcel of the Etna property which was not being sold. Defendant's exhibit F. Ann and Greg, through counsel, agreed that some of the funds held in Ann's attorney's trust account could be used for various expenses incurred by the parties in this divorce action. Tr., V.I, p. 412, L. 20-25; p. 413, L. 1-9. The remaining balance in said trust account totaled $42,668.24, at the time of trial. Tr., V.I, p. 413, L. 10-23.

When Ann received the property in her Divorce to Kevin Spencer, the Etna property was worth $160,000.00. Tr., V.I, p. 380, L. 7-18; Plaintiff's exhibit 19. At trial, Ann testified

that the Etna property was now worth $350,000.00, and that the increase in value was due to natural appreciation. Tr., V.I, p. 381, L. 2-25; p. 382, L. 1-3. Even Greg's expert witness, Tom Ogle, who was hired to appraise the real property, agreed that the Etna property was worth $350,000.00, as of September 19, 2006, the date of his appraisal. Tr., V.I, p. 333, L. 5-6. He also testified that the jump in value, from at least 2002, through the date of the appraisal, was due to natural appreciation. Tr., V.I, p. 345, L. 7-24. The only changes made to the Etna property during the parties' marriage were upkeep and repairs, with no significant improvements. Tr., V.I, p. 382, L. 4-14. A gate was put onto the property by Greg, however, the same was minimal, and it was constructed at a minimal cost. Tr., V.I, p. 414, L. 22-25; p. 415; p. 416; p. 417; p. 418; p. 419, L. 1; Defendant's exhibit H. Ann remarked that the Contract which was admitted as Plaintiff's exhibit 27, and which required Wyoming One Hundred, LLC to improve the five lots on Ann's property, has no added value to the Etna property, as the Contract is worthless. Tr., V.I, p. 616, L. 5-25; p. 617, L. 1-16. Tom Ogle agreed with this, as he opined that it was too speculative to give a value to the potential subdivision. Tr., V.I, p. 347, L. 10-25; p. 348.

At the time of trial, the Etna property consisted of approximately 10 acres, a mobile home, a hay shed, a storage shed, and a little corral. Tr., V.I, p. 383, L. 13-16; Tr., V.I, p. 382, L. 15-22. All of the structures on the Etna property which were located on said property at trial, were there when Ann received the property from Kevin Spencer, with the exception of the little corral. Tr., V.I, p. 382, L. 20-22.

The balance of the loan owed to Countrywide as of the date of marriage was $123,960.94. Tr., V.I, p. 214, L. 22-25; p. 215, L. 1-21; Plaintiff's exhibit 21. The balance

of the loan owed to Countrywide as of the date the loan was paid off, during the closing in August, 1999 was $121,819.55. Tr., V.I, p. 214, L. 22-25; p. 215, L. 1-21; Plaintiff's exhibit 21. The original balance on the debt owed to the Bank of Star Valley was $35,881.55. Plaintiff's exhibit 24. The debt owed to the Bank of Star Valley on or about the date of divorce was $23,086.19. Tr. V.I, p. 400, L. 14-25; p. 401, L. 1-13; Defendant's exhibit E.

In the Court's September 11, 2007 Findings of Fact and Conclusions of Law on Property and Debt Division and Attorneys Fees, the Magistrate found that the signing of the Quitclaim Deed (Plaintiff's exhibit 23) transmuted the Etna property, which was Ann's separate property, into community property. The Magistrate further found that the proceeds held in Ann's attorney's trust account were community property, for the same reasons the Etna property was found to be community property. From this decision, Ann filed her Notice of Appeal on September 14, 2007.

III. ISSUES PRESENTED ON APPEAL

Ann's issue on appeal is as follows:

1. Did the Magistrate err in finding that the Quitclaim Deed executed by Ann, during a refinance, transmuted the Etna property from Ann's separate property to community property?

IV. STANDARD OF REVIEW

The characterization of property, will not be upheld if the record demonstrates an abuse of discretion by the trial court. Matter of Eliasen's Estate, 105 Idaho 234, 238 (1983). The division of community property is subject to the sound discretion of the trial court, but the trial court's determination will not be upheld if there has been a clear showing

of an abuse of discretion. Hoskinson v. Hoskinson, 139 Idaho 448, 458 (2003).

The District Court exercises free review over questions of law. Stevens v. Stevens, 135 Idaho 224, 227 (2000).

V. ARGUMENT

1. The Magistrate erred by finding that the Quitclaim Deed signed by Ann during a refinance transmuted her separate property into community property.

The Magistrate found that by Ann's execution of the Quitclaim Deed (Plaintiff's exhibit 23), she transmuted her separate property interest into community property. The Magistrate thus found that the Etna property and the proceeds in Ann's attorney's trust account from the sale of a part of the Etna property to Wyoming One Hundred, LLC, were community property. In ruling in this manner, the Magistrate erred.

The law regarding transmutation in Idaho is well documented. Idaho Code §32-917 allows spouses to transmute separate property into community property by following certain formalities, which include the following: the contract 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. Idaho Code §32-917 (2007). However, when one spouse claims the other spouse intended to transmute property or to make a gift, the burden is on the party making the claim to prove the intent in question by clear and convincing evidence. Ustick v. Ustick, 104 Idaho 215, 222 (1983). This is a high burden. Hoskinson v. Hoskinson, 139 Idaho 448, 459 (2003).

A. Hoskinson v. Hoskinson controls.

The Idaho Supreme Court has addressed the very issue pending in this case, in

Hoskinson v. Hoskinson, 139 Idaho 448 (2003). In Hoskinson, the Idaho Supreme Court upheld the Magistrate's determination that despite a Deed executed by husband, whereby he conveyed his separate property interest in real property to himself and his wife, during a refinance, the property remained husband's separate property. The facts in Hoskinson are strikingly similar to those in the present case, as can be seen by the Supreme Court's rendition of the Magistrate's findings:

> In 1998 Reed's home was the subject of two separate quitclaim deeds. In one deed Elizabeth conveyed her interest in the property to Reed. In the other deed Reed conveyed his interest in the same property to himself and Elizabeth, as "husband and wife." Both deeds were signed and notarized on January 23, 1998. The conveyance from Elizabeth to Reed was recorded the same day. The conveyance from Reed to himself and Elizabeth was recorded on February 9, 1998. Elizabeth claims that the second conveyance transmuted Reed's property from separate to community property.
>
> . . .
>
> Here, the parties offered conflicting evidence of the intent behind the quitclaim deeds. Elizabeth testified that Reed asked her to sign a quitclaim deed to facilitate the financing and that she refused to sign until Reed agreed to sign a deed conveying the property to her and Reed. Reed denied that allegation. He testified he signed the quitclaim deed simply because the lender presented it to him during the loan closing, that he signed it along with many other papers the lender presented to him, and that he had no intent to transmute his property into community property. Reed notes that he alone signed the promissory note for the new loan. Under these circumstances, the court finds that Elizabeth has not proved a transmutation by clear and convincing evidence. The evidence did not establish that Reed intended to make a gift to the community. The evidence did not establish whether the deed to Reed and Elizabeth was signed before or after the deed to Reed. As noted above, Elizabeth damaged her credibility with her lack of candor during her testimony on other issues;

> therefore, the court is inclined to believe Reed's testimony on the issue.

Hoskinson at 459-60.

The important facts to note in Hoskinson, are that the husband signed a deed, to his separate property, during a refinance, to himself and his wife; husband signed the deed, along with other documents presented to him at closing; husband did not intend to transmute his separate property into community property; and husband's deed was recorded after the deed wife had signed whereby conveying her interest in the property to husband. The important legal issue to note in Hoskinson is that parol evidence was considered by the Magistrate to determine whether wife had proved a transmutation of husband's separate property by clear and convincing evidence. The Magistrate's decision was upheld by the Supreme Court, and nothing was said regarding the parol evidence rule.

The facts in Hoskinson, are nearly identical to those in the present case. Ann needed to refinance the Countrywide debt, on her sole and separate property, when she sold a portion of her Etna property to the Lovelands. During the refinancing, she was handed dozens of documents to sign. One of the documents she did sign, was a Quitclaim Deed which Greg argues, transferred her separate property interest to she and Greg. The Quitclaim Deed was recorded. Ann had absolutely no intention of giving Greg any interest in her separate property. Ann and Greg did not discuss the possibility that Ann was giving Greg a one-half interest in the Etna property before or after Ann signed the Quitclaim Deed. In fact, the first time Greg brought up the issue that he had a one-half interest in the Etna property, was after the divorce complaint was filed. Greg agreed with all of the

aforementioned facts. Greg offered no testimony in support of his claim that Ann's separate property was transmuted, other than the Quitclaim Deed. Thus, the facts illustrating that there was no transmutation of Ann's separate property, in this case are even stronger than those in Hoskinson.

The Magistrate, in the matter before this Court, erred in failing to consider the facts listed above, as he was required to do so, pursuant to the Hoskinson decision. Again, in Hoskinson, the Magistrate considered intent testimony regarding the deeds, in order to determine whether the wife had proven a transmutation by clear and convincing evidence. This was upheld by the Supreme Court. In the case before this Court, the Magistrate found that there was no ambiguity in the deed, and that the deed, itself, transmuted the Etna property from Ann's separate property to community property. Despite the legal doctrine approved of in Hoskinson, the Magistrate failed to consider the facts surrounding the execution of the deed and the parties' intent, and instead, only looked to the deed. This was an error, in light of Hoskinson. Further, when the facts of this case are reviewed, it is abundantly clear that Greg cannot prove, by clear and convincing evidence that a transmutation took place. In fact, all of the evidence points in favor of no transmutation having taken place.

This result is also equitable. At trial, Ann and Greg's expert testified that the Etna property was now worth $350,000.00. Further, there was $42,668.24 in Ann's attorney's trust account. If the Magistrate's decision is upheld, Ann loses approximately $200,000.00, of her separate property1. The only reason for this loss, would be because she refinanced

1 It is acknowledged that there would still be a community property interest, even if Ann prevails, but it will

a debt on her separate property and signed a document which was required to be signed by the Title Company. This is simply not right. Especially in light of the Hoskinson decision.

In his Findings of Fact and Conclusions of Law on Property and Debt Division and Attorneys Fees, the Magistrate attempts to distinguish the present case from Hoskinson, but his argument is not persuasive. The Magistrate states as follows:

> 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.

Those facts were cited to in the Supreme Court case of Hoskinson. However, the Magistrate then continues in his Findings of Fact and Conclusions of Law on Property and Debt Division and Attorneys Fees, as follows:

> 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.

None of this analysis was cited by the Supreme Court in Hoskinson. Thus, this analysis cannot be relied upon in distinguishing Hoskinson from the present case. In Hoskinson,

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be minimal compared to the $400,000.00 community property interest the Magistrate has allowed for. In fact, in Ann's Proposed Findings of Fact and Conclusions of Law, she argues that the community is entitled to an interest in the amount of $8,283.05. This amount was arrived upon by taking into account the reduction in principal on the loans, during marriage (see Gapsch v. Gapsch, 76 Idaho 44, 53 (1954)), less the reimbursement to Ann from the community for the use of her separate property monies held in her attorney's trust account.

the Supreme Court upheld the Magistrate's consideration of the parties' intent in determining whether the wife had proved a transmutation by clear and convincing evidence, in the factual scenario whereby a Quitclaim Deed is signed on a spouse's separate property, during a refinance. The parol evidence rule was not even referred to in Hoskinson. This is not a situation where a deed is given during a purchase or an attempt to transfer property between spouses. Rather, this is an all too common occurrence, whereby one spouse is required to sign a Quitclaim Deed granting their separate property to husband and wife, during a refinance. The Supreme Court's ruling in Hoskinson is equitable and resolves this problem, by requiring a Magistrate to review not only the deed, but also, the facts surrounding the entering into of the deed, as well as the parties' intent.

Even assuming that the analysis presented by the Magistrate in his attempt to distinguish Hoskinson can be considered, it is not correct. The fact that there were two deeds, does not mean that they were ambiguous, and thus, parol evidence could be considered. Both deeds in Hoskinson were executed and recorded. The deed from husband to husband and wife was recorded after the deed from wife to husband. This scenario, is actually much clearer than the factual scenario in the case at hand. By signing two deeds, it is clear that the parties had discussions regarding how the property was to be titled. Further, the deed granting the property to both parties was recorded after the deed from wife to husband. There is no ambiguity in that factual scenario, and this further illustrates that the Magistrate is incorrect in attempting to distinguish the current case from Hoskinson.

The factual pattern in Hoskinson is identical to that in the present case. Perhaps more importantly, once the facts of the present case are considered, as required by the legal holding in Hoskinson, it is clear that Greg cannot meet his burden of showing that Ann has transmuted her separate property by clear and convincing evidence, and thus, the Etna property and the proceeds held in Ann's attorney's trust account, must remain her separate property. To hold as the Magistrate did, is error.

i. The Case Law Cited By The Magistrate In His Decision, Is Distinguishable.

In part of the Magistrate's decision, he cites to Hall v. Hall, 116 Idaho 483 (1989) and Bliss v. Bliss, 127 Idaho 170 (1995), for the propositions that generally, a quitclaim deed executed with the formalities required by Idaho Code §32-917 is sufficient to meet the burden that the spouse intended to transmute their property into community property and further, 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.

In Hall, the husband and wife acquired a ranch from husband's grandparent's for $60,000.00. Hall at 483. At trial, husband's grandmother testified that at the time of the sale, the ranch was worth $100,000.00 and that the value above the $60,000.00 purchase price was a gift. Hall at 484. The deed specifically said "for value received", and thus, the testimony provided by husband's grandmother directly contradicted the language of the deed. Hall at 484. The Supreme Court held that "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". Id. Hall dealt with a factual pattern regarding a purchase and sale of real property. Hoskinson and the present case pertaining to a refinancing scenario. These are completely two different factual scenarios. During a purchase, it is understood that both spouses are acquiring an interest in property when their names are placed on a deed. This is not the case during a refinance, where the sole purpose of the transaction is usually to obtain a loan and not to alter the title to the property. Further, Hall dealt with a husband arguing that despite what the deed said regarding consideration, he should be able to present additional evidence regarding an alleged gift. This is not the factual scenario in Hoskinson nor the facts before this Court.

In Bliss, husband granted forty-eight acres to wife, and the deed was recorded. Bliss at 174. The deed stated, in pertinent part, "THE GRANTOR, GORDON F. BLISS, a married man, . . . for and in consideration of ONE DOLLAR and OTHER GOOD and VALUABLE CONSIDERATION, conveys and quit claims to ALTHEA BLISS, a married woman, *as her separate property*, whose address is . . ., the following described real estate. . . (italics added, capitalization original)." Id. At trial, the husband testified that he signed the deed because he was trying to shelter the property from the IRS. Id. The Supreme Court held that husband's statements were not admissible to contradict the deed's clear language. Id. Again, the facts in Bliss are entirely different from the facts in Hoskinson and the present case. In Bliss, husband executed a deed to transfer property to wife as her sole and separate property. He knew that he was transferring the property, even if it was to avoid the IRS. In Hoskinson and the present case, as argued above, the

deed was signed during a refinance. Again, there are two entirely separate purposes related to the transactions in Bliss and Hoskinson. In Bliss, the sole purpose of the execution of the deed was to transfer title of the property to wife. Conversely, in Hoskinson, and the present case, the purpose of the underlying transaction was to obtain financing, and not to transfer title to the property. Ann had no knowledge that she was potentially transferring her separate property into community property. Nor did the husband in Hoskinson. This scenario is completely different than in Bliss.

ii. Griffin v. Griffin is instructive.

Griffin v. Griffin, 102 Idaho 858 (Idaho Ct. App., 1982), is another Idaho case which dealt with the issue of transmutation during a refinance scenario. In Griffin, husband acquired property before marriage. Griffin at 860. During marriage, husband and wife refinanced the property which husband acquired before marriage. Id. As part of the refinancing, husband and wife both signed the loan application, which stated that title to the property would vest in the names of both, as joint tenants. Id. Further, both parties, as part of the refinancing, executed a note and deed of trust. Id. Title to the property husband acquired before marriage, remained in his name. Id. Wife argued, at trial, in part, that husband had transmuted his separate property into community property because of the refinancing. Id. at 861. The Magistrate did not discuss the transmutation issue, but he found that husband's property remained separate property, which is to say, that no transmutation took place. Id. The Idaho Court of Appeals affirmed the Magistrate's decision, when it held that no transmutation of husband's separate property had occurred. Id. at 862. Of important note, is the Court of Appeals reference to the loan application

form, which stated that the title would vest in the names of husband and wife, and which was signed by both parties. Id. at 861. The Court of Appeals minimized this fact by reiterating a portion of the decision of the district court, which stated that "the existence of the plaintiff's signature on the deed of trust in all likelihood can be explained away as a precautionary measure required by a prudent creditor". Id.

This case is not directly on point, as there was no Quitclaim Deed signed by husband to husband and wife. However, it is instructive in the present case, as it is line with Hoskinson. First of all, it is a transmutation case, which revolves around a refinancing of husband's separate property during marriage. Second of all, despite the written document which was signed by both parties, which purported to illustrate their agreement that the property should be titled jointly, in both husband's and wife's name, no transmutation was found, as the signing of the document by wife was "a precautionary measure required by a prudent creditor". Third, the Court of Appeals, looked to all of the evidence surrounding the entering into of the documents, in determining whether the Magistrate had erred in finding that no transmutation had taken place.

In the case before this Court, the Quitclaim Deed was signed by Ann, due to the title company's or the lender's request. Ann did not request that she sign a Quitclaim Deed, and in fact, she did not even know that she signed the Quitclaim Deed. The reason it was signed, was because of a "precautionary measure required by a prudent creditor/title company". There was no other reason, and Greg did not even offer any conflicting evidence, regarding the same. Thus, the facts of Griffin are somewhat consistent with the

facts of the present case. This is further reason as to why it should be found that the Magistrate erred by finding that a transmutation occurred by clear and convincing evidence.

B. The parol evidence rule should not prohibit intent testimony in this matter.

Even if it is determined that Hoskinson is not controlling on the facts of this case, the parol evidence rule should not apply to this case, and thus, the Magistrate should consider the facts regarding why Ann signed the Quitclaim Deed in question, along with the parties' intent, in determining whether Greg has established a transmutation of Ann's separate property, by clear and convincing evidence.

i. The execution of a Quitclaim Deed during a refinancing is entirely different than the signing of a formal marital settlement agreement or transmutation agreement.

Idaho Code §32-917 defines the requirements for a valid marriage settlement agreement between spouses. I.C. §32-917 (2007). The requirements of I.C. §32-917 are also used to determine whether there has been a valid transmutation agreement. Stockdale v. Stockdale, 102 Idaho 870, 873 (Idaho Ct. App., 1982). The Idaho Supreme Court in Stevens v. Stevens, 135 Idaho 224, 227-28 (2000), defines a marriage settlement agreement as a prenuptial agreement or an agreement being made with an eye towards separation and/or divorce. Likewise, a transmutation agreement, is an arrangement between spouses which changes the character of their property from separate to community and vice versa. Stockdale at 872. Both of these documents are formal documents entered into by husband and wife. Typically, they are lengthy documents which specifically defines the property rights being given to the other spouse or to both spouses.

Based upon the formality and completeness of these documents, the clear and convincing evidentiary standard is met, once they are entered into. Conversely, the signing of a Quitclaim Deed, during a refinance, which purports to transfer one spouse's separate property interest to both spouses, as community property, is quite different.2 The Quitclaim Deed, is often not read during the closing, and it contains standard, boilerplate language, as was the case between Ann and Greg. Thus, in the refinancing scenario, there should be more of a requirement than merely complying with I.C. §32-917, in determining whether a spouse has proven a transmutation by clear and convincing evidence. That additional requirement, is to look to all of the facts surrounding the entering into of the Quitclaim Deed during the refinance, and the intent of the parties regarding the signing of the Quitclaim Deed during the refinance. To find otherwise, as the Magistrate did in this case, merely serves to potentially punish a spouse, who is attempting to refinance her separate property, when not only was there no intent to transmute their separate property into community property, but rather, they may not even know that they signed the Quitclaim Deed.

ii. The parol evidence rule is inapplicable to the facts before this Court, as the Quitclaim Deed executed by Ann is ambiguous.

The signing of a Quitclaim Deed during a refinance is quite different than the signing of a deed to transfer property. When a Quitclaim Deed is signed, merely to transfer

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2 It is acknowledged that a deed signed by one spouse to the other, not during a refinancing situation, is a valid transmutation. See Bliss. Further, a deed signed by one spouse, regarding that spouse's separate property, to both spouses, not during a refinance, would be a valid transmutation. However, this is much different than a deed signed during a refinance. The purpose of the transaction when there is no refinance, is to transfer the real property. The purpose during a refinancing may be to only obtain a loan, or it may be to obtain a loan and to transfer the property. This is why the holding in Hoskinson is correct, because it requires a Court to look at the intent of the parties, in the refinancing situation, to determine

property, there can only be one purpose, and that is to transfer the property in question. A Quitclaim Deed, signed during a refinance, usually, is signed merely because it is required by the title company while a party is refinancing a debt on their separate property, as was the case in Hoskinson and this case. Though, it may also be that a Quitclaim Deed is signed, during a refinance, to not only obtain a loan, but also to transfer title to the property. Thus, the Quitclaim Deed, signed during a refinance, is ambiguous. It is well settled that parol evidence may be considered to aid the trial court in determining the intent of the drafter of a document if an ambiguity exists. Simons v. Simons, 134 Idaho 824, 828 (2000). Thus, the parol evidence rule should not apply in a situation, as we have here, where one spouse owns separate property, and during the refinance, she signs a Quitclaim Deed in favor of herself and her husband, as the competing purposes behind the deed in this scenario shows that the deed itself, is ambiguous. Parol evidence, should then be properly considered, so as to determine the intent of the parties, as to whether the Quitclaim Deed was signed just to obtain a new loan, or conversely, to obtain a new loan and to transfer property to both spouses, as community property.

iii. If the parol evidence rule is held to apply to the factual scenario of this case, it does a great injustice to the clear and convincing evidence standard for gifts and transmutations.

As stated above, Idaho law is clear that where one spouse claims that the other spouse intended to transmute property or to make a gift, the burden is on the party making the claim to prove the intent in question by clear and convincing evidence. Ustick v. Ustick, 104 Idaho 215, 222 (1983).

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whether the party arguing for a transmutation has met their burden by clear and convincing evidence.

If the parol evidence rule can be used to prohibit intent testimony in the situation before this Court, as ruled by the Magistrate, then the clear and convincing standard is essentially eradicated, as the Court would only need to see if a deed was signed, regardless of the facts surrounding the execution of the same. It is admitted that this exception to the parol evidence rule should be limited to the refinancing situation, as illustrated in this case. The reason for this exception is because there is generally no intention to transmute a spouse's separate property to community property, during the refinance. However, there may be a scenario, whereby the spouse refinancing does intend to transmute his/her separate property to community property during a refinance. This refinance example differs greatly from the factual situation in Bliss. In Bliss, the Husband fully intended to execute the deed and to transfer the real property out of his name. That was the entire purpose of the transaction. Conversely, during a refinance, the new loan is the main transaction, and the signing of documents, including any deeds presented, if even known, is secondary. This is the reason the Court should be allowed to look at all of the surrounding circumstances when a deed is signed, whereby purporting to transfer one spouse's separate property, into community property, during a refinance. This allows the clear and convincing evidence standard, which is required to prove a transmutation, to not be swallowed by the parol evidence rule, in the refinancing situation.

C. Ann Quitclaimed her separate property to Greg to refinance a loan on her separate property, and not to presently convey title to her separate property.

In Barmore v. Perrone, 179 P.3d 303 (2008), the Idaho Supreme Court recently addressed a factual scenario similar to the facts at hand in the present case. In said case,

husband signed a quitclaim deed purportedly conveying real property located in Idaho, to his wife. Id. at 305. After this deed was signed, wife sought to annul their marriage. Id. Wife moved for partial summary judgment on the issue of whether the real property which was quitclaimed to her, was hers. Id. Husband argued that the sole purpose of the quitclaim deed was to avoid probate, and not unconditionally presently to convey the property to Barmore. Id. The Magistrate ruled in favor of Wife. Id. The District Court reversed the Magistrate Court's decision, and thereafter, the matter was appealed to the Supreme Court. Id. One of the main issues addressed by the Supreme Court was whether the parol evidence rule bars admission of evidence of husband's intent. Id. at 307. In determining that it does not, the Idaho Supreme Court sated as follows:

> A deed "does not take effect as a deed until delivery with intent that it shall operate. The intent with which it is delivered is important. This restricts or enlarges the effect of the instrument." Bowers v. Cottrell, 15 Idaho 221, 228, 96 P. 936, 938 (1908) (internal quotations omitted). In addition, "[e]ven where the grantee is in possession of the deed, though that may raise a presumption of delivery, still it may be shown by parol evidence that a deed in possession of the grantee was not delivered." Id. (internal quotations omitted). The "controlling element in the question of delivery" is the intention of the grantor and grantee. Id. "The question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed." Id. (internal quotations omitted). "[T]he real test of the delivery of a deed is this: Did the grantor by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered. Estate of Skvorak, 140 Idaho 16, 21, 89 P.3d 856, 861 (2004) (internal quotation omitted).
>
> "It is beyond controversy that the evidence of delivery must come from without the deed. In other words, a deed never shows upon its face nor by the terms thereof a delivery,

> and parol evidence thereof must necessarily be admitted when the question of delivery arises." Whitney v. Dewey, 10 Idaho 63, 655, 80 P. 1117, 1121 (1905).
>
> Since delivery of a deed is necessary for the deed's validity, any evidence is admissible if it indicates the absence of delivery. Therefore, the parol evidence rule does not bar admission of evidence used for the purpose of determining whether delivery of the relevant deed occurred.

Id. at 307-08.

Wife argued that the factual scenario in Barmore v. Perrone, was identical to that in the case of Bliss, whereby the Idaho Supreme Court refused to consider evidence regarding husband's intent, because doing so would have contradicted the deed's plain language. The Idaho Supreme Court in Barmore v. Perrone, distinguished Bliss, by stating that "This ruling (in Bliss) was correct because husband was not challenging the validity of the deed itself or that he intended to convey the property, i.e., deliver the deed, but instead challenged only the purpose for delivering the deed, attempting to contradict the plain language of the deed." (parentheses added). Id. at 308. Thereafter, the Idaho Supreme Court held that since husband was challenging the delivery of the deed, extrinsic evidence should be permitted, and thus, the parol evidence rule would not bar the admission of evidence regarding husband's intent in executing the deed. Id.

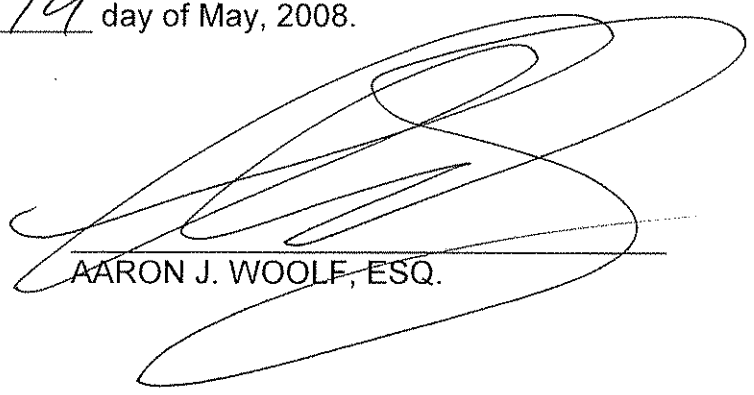
In the case at hand, Ann did not intend to convey the Etna property to Greg. She testified to the same, when she testified that she did not intend to give Greg a one-half interest in the Etna property, and further, if she knew that by signing the deed, she was giving him a one-half interest in the property, she would have never signed the deed. Ann did not intend to convey (i.e., deliver the deed to) her Etna property. Rather, she was

merely attempting to refinance a debt on her separate property. Based upon the same, evidence of Ann's intent in executing the Quitclaim Deed at issue is not barred by the parol evidence rule, and it should have been considered by the Magistrate in determining whether Greg met his burden of proving a transmutation by clear and convincing evidence. And once Ann's intent evidence is considered, along with all of the other evidence regarding the entering into of the Quitclaim Deed, as argued, above, it becomes abundantly clear that Greg cannot meet his burden of proving a transmutation by clear and convincing evidence, as he only relies upon the Quitclaim Deed, itself.

VI. CONCLUSION

In conclusion, Ann requests that this Court reverse the Magistrate's ruling that the Etna property and the funds held in Ann's attorney's trust account were transmuted into community property. Ann would further request, that this Court find, as a matter of law, that there was no transmutation, and thus the Etna property and the funds held in Ann's attorney's trust account are her separate property. Ann would also request that the issue of the community property interest in Ann's separate property be remanded to the Magistrate for determination, based upon the evidence already presented.

Respectfully submitted this 14 day of May, 2008.



AARON J. WOOLF, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in Idaho, with my office in Idaho Falls, and that on the 14 day of May, 2008, I served a true and correct copy of the following-described document on the parties listed below, by mailing, with the correct postage thereon, or by causing the same to be hand delivered.

DOCUMENT SERVED: **DEFENDANT'S INITIAL BRIEF ON APPEAL**

PARTIES SERVED:

Royce B. Lee, Esq.
Attorney at Law
770 South Woodruff Avenue
Idaho Falls, ID 83401
Fax (208) 524-2051

☐ Mailed ☒ Hand Delivered ☐ Faxed

AARON J. WOOLF, ESQ.

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Idaho State Bar #1691

Attorney for Plaintiff Greg Barrett

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

GREGORY PAUL BARRETT, Plaintiff/Respondent, v. ANN MARIE BARRETT, Defendant/Appellant.	Case No. CV-05-4852 PLAINTIFF'S BRIEF ON APPEAL

COMES NOW Plaintiff/Respondent, Gregory Paul Barrett, by and through his attorney of record, Royce B. Lee, of the law firm Royce B. Lee, P.A., and hereby submits his Brief on Appeal as follows:

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TABLE OF CASES AND AUTHORITIES

I. STATEMENT OF THE CASE

Greg Barrett concurs in the statement of the case in Ann Barrett's Brief on Appeal.

II. FACTUAL BACKGROUND

Greg Barrett submits the following statement of facts to supplement the statement of facts in Ann Barrett's Brief on Appeal.

Both Greg and Ann Barrett jointly participated in negotiating the terms of the loan with the Bank of Star Valley which was used to refinance the loan on the Etna, Wyoming, property when they sold two and a half acres to Mr. and Mrs. Loveland on August 12, 1999. Ann and Greg met together at the Bank of Star Valley with a distant cousin of Ann 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 loan was given to both Ann and Greg. 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 to close the Bank of Star Valley loan on the Etna property. During the closing the title agent 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 Ann claims no memory now about signing specific documents at closing, 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. She had the opportunity to ask any questions about the documents and what they meant if she did not understand them. She 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, including the Quitclaim Deed from Ann to Greg and Ann. TR., V.I, P. 230, L. 5 to 8. Ann admitted that she did sign the Etna Quitclaim Deed 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 knew what she was signing when she signed the Quitclaim Deed. Ann admitted that she knew 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.

Ann had previous experience in real estate 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 633, L. 4; and TR., V.I, P. 378, L. 17 to 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 to 13. Ann knew and understood the effect of those two Deeds prior to her signing the Quitclaim Deed to her and Greg on the Etna property in August, 1999. TR., V.I, P. 379, L. 11 to P. 380, L. 1 and TR., V.II, P. 633, L. 5 to 25. Ann and Greg jointly signed on August 12, 1999, a Warranty Deed to the Lovelands on the two and a half acres of the Etna property at the same time Ann signed the Quitclaim Deed to Greg at the closing of the new loan from the Bank of Star Valley on the Etna property. Plaintiff's Exhibit 22 and Defendant's Exhibit B; TR., V.II, P. 630, L. 5 to 24; TR., V.I, P. 384, L. 2 to 19; and TR., V.I, P. 216, L. 6 to 17. Ann admitted that the Quitclaim Deeds from Kevin Spencer to her at Exhibit 20 were the same as, and accomplished the same thing as, the Quitclaim Deed from Ann, to Ann and Greg on the Etna property. Exhibit 23 and TR., V.II, P. 635, L. 10 to P. 636, L. 9.

Ann Barrett raised no objection during the closing of the Etna loan to any documents, including the Quitclaim Deed. TR., V.I, P. 230, L. 7 to 8; P. 232, L. 15 to 17. She made no objection to the Quitclaim Deed after the closing until after the divorce was filed. TR., V.II, P. 637, L. 7 to 22.

Greg testified that he understood at the time of closing the meaning of the Quitclaim Deed from Ann to Greg and Ann which was signed by her at closing and he understood and assumed it was a valid transfer of a one-half interest to him. 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 Etna loan and as a result had legal responsibility to pay that loan. TR., V.I, P. 230, L. 16 to P. 231, L. 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 to 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 to 13. Ann did not maintain a separate property account for payment of the Etna loan after marriage and before or after the refinancing in 1999 with the Bank of Star Valley.

The fair market value of the Etna property at the date of Ann's divorce in April, 1996, was established by the Decree of Divorce to be $160,000.00. The Decree also recited that the mortgage at that time was $124,000.00 so there was equity of $34,000.00. Plaintiff's Exhibit 19. The Etna property value appreciated by the time of the divorce of Ann and Greg in 2007. However, according to Tom Ogle, who appraised the Etna property, 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. 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 that the big increase occurred after 2002. 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, (one-half of the $34,000.00 at the prior divorce in 1996), or slightly higher but not significantly higher. 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 and repairing and maintaining the property fences, TR., V.I, P. 382, L. 4 to 8, applying and obtaining a permit to increase the access from a narrow farming access on Highway 89 to a 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 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. TR., V.I, P. 338, L. 6 to 11.

Greg was primarily responsible for negotiating a better sale price for two acres of the Etna property sold to the Wyoming 100, LLC, in 2005 for access to an adjoining

development project. 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 Barrett 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 sale proceeds of $49,322.19 paid to Greg and Ann, and placed in Aaron Woolf's trust account during the proceedings by stipulation of the parties.

III. ISSUE PRESENTED ON APPEAL

Ann's issue on appeal is as follows:

1. Did the Magistrate err in finding that the Quitclaim Deed executed by Ann, during a refinance, transmuted the Etna property from Ann's separate property to community property?

IV. STANDARD OF REVIEW

The District Court as 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.* The characterization of property is subject to the sound discretion of the trial court, and should be upheld in the absence of a clear showing of an abuse of discretion. *Matter of Eliasen's Estate, 105 Idaho 234, 668 P.2d 110 (1983).*

V. ARGUMENT

1. The Magistrate ruled correctly that Ann transmuted her separate property into community property by transferring a Quitclaim Deed to herself and Greg Barrett.

In Defendant's Brief on Appeal Ann argues that there should be a different rule when a Husband or Wife refinance separate property and transfer title to both Husband and Wife. Alternatively, Ann argues that application of the parol evidence rule violates the clear and convincing evidence rule for a transmutation.

A. *Hoskinson v. Hoskinson* supports Greg Barrett's claim of a transmutation from separate property to community property.

Ann submits the case of *Hoskinson v. Hoskinson, 139 Idaho 448, 80 P.3d 1049 (2003),* as controlling in the present case. However, the *Hoskinson* case is distinguishable based on the facts of that case and actually supports Greg Barrett's position and the trial judge's decision in the present case.

In the *Hoskinson* case the husband obtained financing which utilized his separate 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 conveyed a quitclaim deed back to her and him. The husband claimed that he had signed a quitclaim deed adding the wife only because the lender gave it to them to sign at closing and that the wife had signed her quitclaim deed back to him to release her claim to his separate property after the financing. 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 the new loan and the wife did not become personally obligated on the new loan. The trial judge noted that it was unclear which deed had been signed first and 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 of the separate property interest of the husband in his real estate to a community property interest for husband and wife. The Idaho Supreme Court did not rule that a deed from one spouse to the other during refinancing is not a transmutation, nor did it suggest a different rule in refinancing cases. The Supreme Court merely held there was sufficient evidence to support the trial judge's findings.

In the *Hoskinson* case there are important factual differences to consider when comparing it to the present case. First, Greg Barrett signed the promissory note and deed of trust at the time of the refinancing and became personally obligated on the new loan. 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. Greg assumed a significant obligation on the new loan which is adequate and legal consideration for receiving a community property interest in the property. Second, in the present case there was no quitclaim deed back to Ann Barrett 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 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 Supreme Court did not rule whether as a matter of law the transfer from husband to wife in *Hoskinson* was or was not a valid transfer. The Supreme Court merely upheld the trial judge's conclusions as being sufficiently supported by 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.

After determining there was an ambiguity in the transfer documents the trial judge in *Hoskinson* considered parol evidence regarding the intent of the parties. Ann argues that the trial judge should have considered parol evidence in the present case even though there was no ambiguity in her transfer documents. However, in contrast with the *Hoskinson* facts, in the present case there was no ambiguity from conflicting deeds,

there was no alternate deed reversing the other deed and there was no written agreement to counter or undo the transfer of the Etna property into Greg's and Ann's names.

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

i. THE CASE LAW CITED BY THE MAGISTRATE IN HIS DECISION SUPPORTS GREG BARRETT'S POSITION.

Ann argues in Defendant's Brief on Appeal that the case law cited by the trial judge in the present case is distinguishable. In the first case cited by the trial judge, *Hall v. Hall, 116 Idaho 483, 777 P.2d 555*, 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 transfer deed said that the property was transferred "for value received." Based on these facts the Idaho Supreme Court upheld the application of the parol evidence rule and found that the deed was plain and unambiguous so the court must determine the intent from the deed itself. The Court stated that the parties were not allowed to contradict a clear deed with oral or written statements, and only if the document is ambiguous will evidence of facts and surrounding circumstances be admissible. In *Hall* the Supreme Court held that the deed

was clear and unambiguous in its statement that the transfer was "for value received" so consideration was given and parol evidence would not be admissible to support a claim that part of the transfer was a gift to the grandson.

The 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 Quitclaim Deed to herself and Greg as tenants by the entirety[1]. Because there was no ambiguity in the deed, the deed controls, and additional evidence about the parties' intent from the facts and circumstances cannot be considered.

The second case relied upon by the trial judge in the present case was *Bliss v. Bliss, 127 Idaho 170, 898 P.2d 1081.* In that case the husband had signed a deed to his wife on forty-eight acres of real property and the deed was recorded. At the divorce trial husband argued that he had signed the deed in order to avoid an IRS lien against him on the forty-eight acres. The wife gave conflicting testimony as to the parties' intent regarding the deed. 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 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-

[1]Tenancy by the entirety is recognized in Wyoming where the Etna property is located and the closing occurred. Wyoming statutes, §34-1-140. For purposes of this case both parties have treated the community property laws of Idaho as consistent with a Tenancy by the entirety.

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.

The 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.

> 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." Id. 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). *Bliss v. Bliss, 127 Idaho 170, 174-5.*

The Supreme 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.

The applicable facts in *Bliss* are identical to the facts in the present case. Ann conveyed by Quitclaim Deed an interest in real property to herself and Greg. The Deed is clear and unambiguous. 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. The same presumption in I.C. §32-906(2) applies in the present case to show that Greg received a separate one-half interest in the community 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 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 her signed deed to Greg Barrett.

The same principles in *Hall v. Hall* and *Bliss v. Bliss,* apply in this case. Ann's deed to Ann and Greg is clear and unambiguous. On its face it conveys a one-half undivided interest in the Etna property to Greg. Therefore, the presumption of Idaho Code §32-906(2) applies in favor of Greg. Ann has the burden to go forward with other evidence to overcome that presumption. She gave no admissible evidence to counter

the presumption. Therefore, the deed should be enforced as a valid transfer to Greg Barrett.

ii. THE TRANSFER OF A QUITCLAIM DEED FROM ANN TO GREG COMPLIED WITH ALL STATUTORY REQUIREMENTS FOR CONVEYANCES OF REAL PROPERTY AND TRANSFERS BETWEEN SPOUSES.

The requirements for a valid conveyance of real property are noted in Idaho Code §9-503 and 9-505, which are statutory declarations of the common law rule based on the statute of frauds, as follows:

> **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....

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

A similar requirement is found at Idaho Code §55-601 which requires that the conveyance of real property must be in writing and signed to be valid.

> **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....The name of the grantee and his complete mailing address must appear on such instrument.

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.

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 who has previously recorded a transfer 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.

These sections make the transfer conclusive against Ann because there was no restriction or limitation in the deed and there was no other written agreement to the contrary between Ann and Greg. This section operates as more than a presumption and binds Ann conclusively to the deed which she transferred to Greg.

Other requirements are provided by statute in situations involving husbands and wives. Idaho Code §32-906(2) 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 – Income from separate and 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....

Additional rules are established by statute regarding property rights between spouses and by marriage settlement agreements. Idaho Code §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.

The requirements for an enforceable marriage settlement agreement is provided at Idaho Code §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 Quitclaim Deed signed by Ann Barrett to Ann and Greg Barrett satisfies the requirements of this section. The transfer was in writing, and was executed and acknowledged in the same manner as a conveyance of land, which were noted above in Idaho Code §9-503 and 55-601.

A marriage settlement agreement must be recorded in the county recorder's office where the real estate is located which in the present case was done by the closing agent.

> **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....

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.

A review of these Idaho statutes regarding transfers of real property and conveyances between spouses and marriage settlement agreements indicates the following conclusions:

1. Ann satisfied all statutory requirements for a 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 in 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 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).

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

6. The loan agreement and the deed by Ann to Greg constitutes a marriage settlement agreement between them in which a one-half interest in the property was transferred to Greg and he accepted responsibility for payment of the loan. I.C. §32-917, 918.

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

8. Pursuant to Idaho Code §32-916 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.

The conclusion from this review of the controlling statutes for the present case is that the transfer from Ann to Greg by Quitclaim Deed constitutes 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.

iii. GREG SATISFIED HIS BURDEN OF PROOF BY CLEAR AND CONVINCING EVIDENCE THAT THE DEED TRANSMUTED ANN'S SEPARATE PROPERTY TO COMMUNITY PROPERTY

The original burden of proof to show a transmutation of property during marriage is on the person claiming such transmutation and it must be shown by clear and convincing evidence. *Ustick v. Ustick, 104 Idaho 215, 657 P.2d 1083.* When that evidence has been presented then the burden of persuasion shifts to the opposing party to show sufficient evidence to the contrary. *Bliss v. Bliss, 127 Idaho at 174; I.R.E. 301.*

Greg satisfied his original burden of proof to show by clear and convincing evidence that a transmutation occurred based on Ann Barrett signing a clear and unambiguous Quitclaim Deed transferring a one-half interest in the Etna property to him. Such Deed was required by a lending agency which granted a loan to Ann and Greg for refinancing on her previous separate property. The Quitclaim Deed was recorded in the normal course of the transaction. Completing these formalities satisfies the statutory requirements for deeds and marriage settlement agreements and further creates a presumption of validity which Ann must overcome in order to prevail.

Ann failed to provide any testimony to counter Greg's testimony except her own statement that she did not intend to give Greg a one-half interest. She did not present any reverse Quitclaim Deed, or a reverse marriage settlement agreement, or admissions by Greg, or any other legitimate evidence. Therefore, Ann's failure to meet her burden of persuasion means Greg's evidence is controlling and the trial judge's findings of facts and conclusions should be upheld.

B. THE PAROL EVIDENCE RULE PROHIBITS TESTIMONY OF INTENT IN THE PRESENT CASE.

Ann argues in her Brief on Appeal in Section B that even if the *Hoskinson* case does not apply to the facts in the present case the court should still consider parol evidence about the intent and circumstances of the transfer by Quitclaim Deed to Greg. The claim for such argument is that when spouses are refinancing property it is different than a formal marriage settlement agreement or transmutation agreement. This

argument is contrary to the provisions of Idaho Code §32-917 which defines what is required for a formal marriage settlement agreement. As noted above, that requirement is that it must be in writing, and acknowledged and recorded. Ann's argument proposes another requirement to Idaho Code §32-917 that it must be lengthy and complex. Such is contrary to the statutes of Idaho and would impose an unreasonable burden on married parties in their dealings with each other.

i. A DEED DURING REFINANCING IS A VALID AND EFFECTIVE METHOD TO TRANSMUTE PROPERTY DURING MARRIAGE AND IT SATISFIES THE REQUIREMENTS FOR A MARRIAGE SETTLEMENT AGREEMENT.

Ann argues that a Quitclaim Deed used in a refinancing situation should be treated differently than a deed in a sale or purchase agreement by spouses. However, the Quitclaim Deed to Greg and Ann will be treated the same as any other Quitclaim Deed in relation to the rights of the Bank of Star Valley as lender, and for all subsequent purchasers of the property, and for title insurance purposes on the property, and for creditors of either Ann or Greg who may seek to use the Etna property as a resource for payment of a debt, and for governmental tax entities who may seek to enforce payment of taxes against the Etna property on behalf of either Ann or Greg. The purpose of the recording of the real estate documents is to provide notice to the world of the claims to ownership of the property. Ann knowingly signed the Quitclaim Deed and the legal

ramifications of signing that Deed are effective as to all other persons and entities and must be effective as to Greg and Ann also.

Ann argues that she did not understand the effect of a Quitclaim Deed and did not really intend to convey a one-half interest in the Etna property to Greg by signing the Quitclaim Deed. However, failing to read or understand a contract, is not a valid defense. A similar argument was made in the recent case of *Cristo Viene Pentecostal Church v. Paz, 144 Idaho 304, 160 P.3d 743, (2007).* 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 Supreme Court held that failure to read or understand a contract when signing it is not an excuse. 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.

ii. REFINANCING OF SEPARATE PROPERTY BY A SPOUSE IS SUBJECT TO THE SAME RULES AS IN OTHER REAL ESTATE TRANSACTIONS.

Ann argues that the law regarding parol evidence should be different in her case between spouse's, than it is in other cases of real estate transactions because refinancing is inherently ambiguous. Greg argues that the same law should apply in this case as applies to other real estate transactions. The case of *Bliss v. Bliss, supra,* dictates that Greg's argument and the trial judge's decision in the present case are correct. Like in the

present case, in *Bliss* a spouse signed a deed to the other spouse and later argued he did not really intend to transfer the property to the spouse. The Idaho Supreme Court held that the grantor spouse was bound by the deed and was not allowed to disclaim intent at a later date. In *Bliss* one quitclaim deed was sufficient to transmute property to the other spouse, without any other written documentation.

The case of *Griffin v. Griffin, 102 Idaho 858, 642 P.2d 949* is instructive on when a refinance of separate property during marriage will not cause a transmutation. In that case husband refinanced his separate property during marriage. The 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 there was no deed to the wife and there could be no oral transmutation.

In the present case there is a clear and unambiguous deed from Ann to Ann and Greg, so the opposite conclusion from *Griffin* would be reached that there was a transmutation during refinancing. Ann is then left to argue that there was some other oral agreement that the deed would not really apply. This argument that there was an oral transmutation agreement was rejected in *Griffin* during refinancing by the spouse.

Ann further argues that if the parol evidence rule applies it would create an injustice and the clear and convincing evidence rule of *Ustick v. Ustick* would be eradicated, but only in "refinance cases" between spouses. Another way of stating this premise is that if one spouse in a refinancing case feels an agreement was unfair then

parol evidence should be allowed so the judge can determine fairness by reviewing the intent and surrounding circumstances of an agreement. Such an application would be contrary to the Idaho statutes regarding real estate transactions and transfers between spouses as noted above. The effect of such an argument would be that Ann should be allowed to undo one portion of the transaction that was to her detriment even though that part, Greg joining as a responsible party on the loan, was necessary in order to accomplish the new financing which was a benefit to Ann. That eliminates the right of Greg Barrett to decide whether or not he would sign on the promissory note and assume responsibility therefore if he was not going to also be a part owner of the property which was being refinanced. Ann should not be allowed to undo a transaction which was to her detriment and retain all of the benefits from the same transaction.

C. ANN'S QUITCLAIM DEED DURING REFINANCING CONVEYED A PRESENT TITLE TO GREG.

Ann argues in Part C of Defendant's Brief on Appeal that the recent case of *Barmore v. Perrone, 145 Idaho 340, 179 P.3d 303 (2008)* should allow her to present testimony on intent because the deed was never "delivered". In that case the husband signed a Quitclaim Deed to his wife on his separate real property. He claimed the purpose was to avoid probate if he died, so that the deed could transfer ownership to his wife at that time. He claimed there was no intent to deliver the deed and make it presently effective rather than at his death. The case was decided at the trial court level on a Motion for Summary Judgment. The magistrate had refused to consider an

Affidavit from the husband reciting the above facts about his intent to avoid probate and the lack of delivery of the deed. The Affidavit further stated that the husband and wife had previously prepared a similar deed from husband to wife on other property husband had owned in California, and this was also done with the intent to be effective at his death to avoid probate. 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. The Supreme 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. As a result the summary judgment was incorrect and must be reconsidered by the trial court.

In *Barmore v. Perrone, supra,* the Idaho Supreme Court ruled that the husband's claim that he did not "intend" the deed to be effective when signed, was the same as claiming he did not "deliver" the deed at the time of signing, since the husband claimed it was only intended to be "delivered" when he died in order to avoid probate. Ann never raised the issue in the five day trial about whether the Quitclaim Deed was "delivered" to Greg. She only testified that she did not "intend" to give Greg a one-half interest in the Etna property.

In *Barmore* the deed was never recorded in the county recorder's office. In the present case Ann's Quitclaim Deed to Greg was recorded in the county recorder's office. The recording of a deed creates a presumption of delivery. *Hartley 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, 249 P. 890 (1926). In *Hartley v. Stibor,* 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 Barrett 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 is undisputed. Ann did not claim at trial that there was no delivery of the deed. Therefore, the argument from *Barmore v. Perrone* does not apply in this case.

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 and the trial exhibits. This Court should uphold the trial court's decision that Greg met his burden of proof of clear and convincing evidence through the plain and unambiguous Quitclaim Deed from Ann to Greg and that Ann failed to meet her burden of persuasion that somehow the Deed she signed was not valid.

DATED this 11 day of June, 2008.

Royce B. Lee

CERTIFICATE OF SERVICE

I do hereby certify that on this 11th day of June, 2008, a true and correct copy of the foregoing was served upon the following party as indicated:

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

GREGORY PAUL BARRETT, Plaintiff/Respondent, vs. ANN MARIE BARRETT, Defendant/Appellant.	Case No. CV-05-4852 **DEFENDANT'S REPLY BRIEF ON APPEAL**

COMES NOW, Defendant/Appellant, ANN MARIE BARRETT, by and through her attorney of record, Aaron J. Woolf, Esq., of the law firm of THOMPSON SMITH WOOLF & ANDERSON, PLLC, and hereby submits her Reply Brief on Appeal, as follows:

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I. ARGUMENT

1. The statutory arguments advanced by Greg are not dispositive of the issue before this Court.

Greg argues in section V.1.A.ii. of Plaintiff's Brief on Appeal, that he should prevail as the quitclaim deed from Ann to Greg complied with the statutory requirements for conveyances of real property and transfers between spouses. Essentially, Greg makes three (3) different statutory arguments. First, he argues that pursuant to Idaho Code §55-601, et seq., the quitclaim deed is conclusive against Ann. Second, Greg argues that Idaho Code §32-906(2) applies to this case, and since Ann signed the quitclaim deed, it is presumed that she conveyed to Greg a separate property interest in the Etna property. And finally, Greg argues that pursuant to Idaho Code §32-916, et seq., Ann's execution of the quitclaim deed is a valid marital settlement agreement which transmutted Ann's separate property into community property. All of these arguments must fail.

Idaho Code §55-606 does state that "a conveyance of an estate in real property is conclusive against the grantor". However, this rule, alone, does not answer the question in a marital, refinancing, situation. First of all, as stated previously, in Hoskinson v. Hoskinson, 139 Idaho 448 (2003), the Idaho Supreme Court upheld the Magistrate's determination that despite a Deed having been executed by husband, whereby he conveyed his separate property interest in real property to himself and his wife, during a refinance, the property remained husband's separate property. Thus, the facts in Hoskinson, which are nearly identical to the factual situation in this case, creates an exception to the general rule outlined in Idaho Code §55-606. Second of all, in cases

involving spouses, in order to prove a transmutation of property or a gift, the burden is on the party making the claim to prove the intent in question by clear and convincing evidence. Ustick v. Ustick, 104 Idaho 215, 222 (1983). As argued in Defendant's Brief on Appeal, in the refinancing scenario, involving spouses, the Court must look to parol evidence to determine whether a transmutation or a gift, has been proven by clear and convincing evidence. If it is not, then there is a great injustice done to the clear and convincing evidentiary standard, regarding transmutations and gifts. Again, it is simply not right for a spouse who is refinancing a debt on his/her separate property, to lose his/her separate property, simply because they signed a quitclaim deed granting the property to both spouses. The Court must look to the surrounding circumstances and the intent of the parties' to determine, during the refinancing, whether the spouse who signed the quitclaim deed intended to create a community property interest, or rather, as is the case here (and in Hoskinson), whether the spouse was merely attempting to refinance a loan owed on her separate property, with no intent to transfer an interest to both spouses. Third, Barmore v. Perrone, 179 P.3d 303 (2008) is dispositive, as despite a properly executed quitclaim deed from husband to wife, the intent of the parties' was reviewed to determine whether delivery of the deed was intended; or in other words, whether the grantor had the "intent to convey immediately". The Court did not only look to the deed, in Barmore.

Idaho Code §32-906(2) simply does not apply, as it refers to property being transferred to the grantee spouse as his/her sole and separate property. It says nothing about community property. The factual scenario in this case deals with a purported transfer of Ann's separate property to community property, and not Greg's separate

property. Even if Idaho Code §32-906(2) applies to this case, it merely creates a presumption, when the deed is signed. Idaho Code §32-906(2) (2007) and Bliss v. Bliss, 127 Idaho 170, 174 (1995). This shifts the burden to the other party, pursuant to IRE Rule 301, to come forward with evidence to rebut the presumption, although the party who is seeking to prove the transmutation continues to carry the burden of persuasion. Bliss at 174. The effect of the statutory presumption under IRE Rule 301 is that the party in whose favor the presumption operates is relieved from having to adduce further evidence of the presumed fact until the opponent introduces substantial evidence of the nonexistence of the fact. Id. Here, Greg met his initial burden, with the quitclaim deed, and thus the presumption of Idaho Code §32-906(2) would work in his favor. Thereafter, it would be Ann's obligation to come forward with evidence to rebut the presumption. She can clearly do so. All of the evidence illustrates that there was no intent to transmute Ann's separate property into community property. Ann needed to refinance the Countrywide debt, on her sole and separate property, when she sold a portion of her Etna property to the Lovelands. During the refinancing, she was handed dozens of documents to sign, and she did not even remember signing the quitclaim deed. Ann had absolutely no intention of giving Greg any interest in her separate property. Ann would not have signed the quitclaim deed had she known that she was giving Greg a one-half interest. Ann and Greg did not discuss the possibility that Ann was giving Greg a one-half interest in the Etna property before or after Ann signed the quitclaim deed. In fact, the first time Greg brought up the issue that he had a one-half interest in the Etna property, was after the divorce complaint was filed. Greg agreed with all of the aforementioned facts. Greg offered no testimony in support of his

claim that Ann's separate property was transmuted, other than the quitclaim deed. All of this evidence must be considered, despite the fact that it may be parol evidence, for all of the reasons argued by Ann in Defendant's Brief on Appeal. When it is considered, it is clear that Ann has rebutted the presumption. Then, Greg is left with the burden of persuasion, and he cannot meet this burden, as all of the evidence is in Ann's favor.

Greg's last statutory argument is that the execution of the quitclaim deed is a valid marital settlement agreement, and thus, Ann transmuted her separate property into community property. Obviously, Ann disagrees with this argument. All of the reasons for her disagreement are outlined in Defendant's Brief on Appeal, and they need not be addressed, again.

2. Barmore v. Perrone requires the Magistrate to look to parol evidence in this case, and this issue was raised by Ann at trial.

Ann cited to Barmore v. Perrone, 179 P.3d 303 (2008), for the proposition that she did not intend to convey the property to Greg (i.e., she did not deliver the deed). Greg argues that this issue was not raised by Ann at trial. This argument fails. The Idaho Supreme Court in Barmore addressed the identical argument, and found that the issue had not been raised for the first time on appeal, and thus was to be considered. Id. Specifically, the Idaho Supreme Court stated as follows:

> However, Barmore argues that Perrone has raised this issue for the first time on appeal, and that it therefore was not preserved for appeal. Barmore is incorrect. Perrone argued to the magistrate court that the intent necessary to effect conveyance of the deed was lacking:
>
> > It is therefore unequivocally clear that Mr. Perrone neither intended a gift or to transmute, presently, his

> interest in the Star, Idaho property.... Mr. Perrone clearly never intended to either gift or transmute his current interest in the Star, Idaho property but rather to duplicate the Simi Valley, California property (where a quitclaim deed was executed between Mr. Perrone and Mrs. Barmore) and where the proceeds were used to obtain the community property residence in Star, Idaho where again Mr. Perrone executed a quitclaim deed to Mrs. Barmore that would only become effective upon his demise, not upon her request for divorce. To validate a transmutation upon these circumstances permits one party to mislead the other party and unfairly gain ownership of property that clearly never intended (sic) to be immediately transmuted.
>
> That argument is identical to an argument that delivery was lacking, since Idaho law has made clear that "delivery" and "intent to convey immediately" are synonymous terms.

Id. Ann, throughout the trial, testified, and argued that she did not intend to convey the Etna property to Greg. Specifically, Ann testified that she had absolutely no intention of giving Greg any interest in her separate property; that she and Greg did not discuss the possibility that Ann was giving Greg a one-half interest in the Etna property before or after Ann signed the quitclaim deed; that the first time Greg brought up the issue that he had a one-half interest in the Etna property, was after the divorce complaint was filed; that she signed numerous documents at the closing, but she did not recall signing the quitclaim deed which was admitted as Plaintiff's exhibit 23; and that if Ann had known she was giving Greg an interest, she would not have signed the quitclaim deed. Ann also argued, in Defendant's Proposed Findings of Fact and Conclusions of Law, which was filed on July 30, 2007, that she had no intention of conveying the Etna property to Greg (see pages 17 and 18). Thus, as she argued that she had no intent to immediately convey the property to

Greg, she argued that the deed had not been "delivered". The issue was raised below, and Barmore applies to this case.

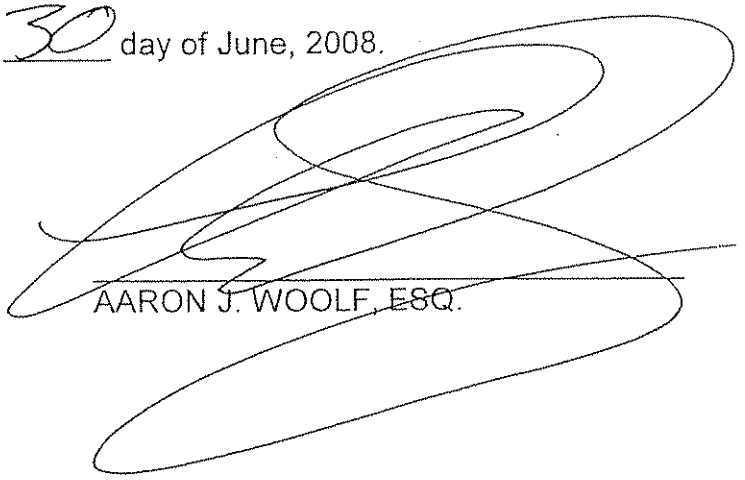
Greg states in his brief that the deed was never recorded in Barmore. This is not true. Nowhere in Barmore is it stated that the deed was not recorded. Thus, the argument made by Greg to distinguish Barmore, must fail. Furthermore, the recording of a deed, does not mean that the deed was "delivered". Hartley v. Stibor, 96 Idaho 157, 160 (1974). Recordation of a deed merely creates a presumption of delivery. Id. The key issue in determining whether a deed has been delivered (or whether the grantor had the "intent to convey immediately") is the intent of the grantor to pass immediate and present title to the property. Id. and Barmore. And as stated in Defendant's Brief on Appeal, "a deed never shows upon its face nor by the terms thereof a delivery, and parol evidence thereof must necessarily be admitted when the question of delivery arises." Barmore (citing to Whitney v. Dewey, 10 Idaho 63, 655, 80 P. 1117, 1121 (1905).). Thus, in this case, regardless of the fact that the quitclaim deed Ann signed was recorded, the Magistrate should have looked to parol evidence to determine whether a delivery (or "the intent to convey immediately") occurred.

II. CONCLUSION

In conclusion, Ann requests that this Court reverse the Magistrate's ruling that the Etna property and the funds held in Ann's attorney's trust account were transmuted into community property. Ann would further request, that this Court find, as a matter of law, that there was no transmutation, and thus the Etna property and the funds held in Ann's attorney's trust account are her separate property. Ann would also request that

the issue of the community property interest in Ann's separate property be remanded to the Magistrate for determination, based upon the evidence already presented.

Respectfully submitted this 30 day of June, 2008.



AARON J. WOOLF, ESQ.

CERTIFICATE OF SERVICE

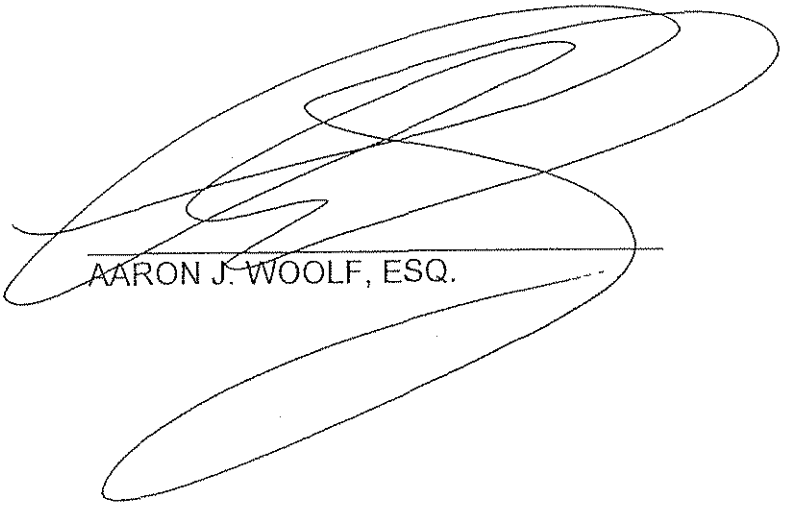
I HEREBY CERTIFY that I am a licensed attorney in Idaho, with my office in Idaho Falls, and that on the 30 day of June, 2008, I served a true and correct copy of the following-described document on the parties listed below, by mailing, with the correct postage thereon, or by causing the same to be hand delivered.

DOCUMENT SERVED: **DEFENDANT'S REPLY BRIEF ON APPEAL**

PARTIES SERVED:

Royce B. Lee, Esq.
Attorney at Law
770 South Woodruff Avenue
Idaho Falls, ID 83401
Fax (208) 524-2051

☐ Mailed ☐ Hand Delivered ☐ Faxed



AARON J. WOOLF, ESQ.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

GREGORY BARRETT, Plaintiff, vs. ANN MARIE BARRETT, Defendant.	)	Case No. CV-2005-4852 MINUTE ENTRY ON ORAL ARGUMENT ON ISSUES OF APPEAL

On July 7, 2008, at 10:00 A.M., the parties brought oral argument on appeal on this matter for hearing before the Honorable Jon J. Shindurling, District Judge, sitting in open court at Idaho Falls, Idaho.

Mr. Daniel Williams, Court Reporter, and Ms. Grace Walters, Deputy Court Clerk, were present.

Mr. Royce Lee appeared on behalf of the plaintiff. Mr. Aaron Woolf appeared on behalf of the defendant.

Mr. Woolf argued in mitigation.

Mr. Lee argued in aggravation.

Mr. Woolf then presented rebuttal argument.

The Court will consider whether the Parole Evidence Rule will apply in this case and whether the case should be remanded back to the magistrate, and will issue an order after further research into the matter.

Court was thus adjourned.

JON J. SHINDURLING
District Judge

c: Royce Lee
Aaron Woolf

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

Gregory Paul Barrett, Plaintiff/Respondent, vs. Ann Marie Barrett, Defendant/Appellant.	Case No. CV-05-4852 OPINION AND DECISION ON APPEAL

This is an appeal from the Magistrate Court of the Seventh Judicial District in and for the County of Bonneville, Honorable Earl Blower, Magistrate Judge. Ann Marie Barrett appeals from the September 11, 2007 Findings of Fact and Conclusions of Law on Property and Debt Division and Attorneys Fees which found that the signing of a Quitclaim Deed transmuted an Etna, Wyoming property into community property.

I.
FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on November 1, 1997. Respondent filed for divorce on August 29, 2005. A trial for divorce was held on 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.

Ann acquired a property in Etna, Wyoming in her first marriage to Kevin Spencer. In her 1996 divorce from Spencer, Ann was awarded the Etna property. Spencer signed two quitclaim deeds giving Ann the sole interest in the Etna property.

In August 1999 Ann sold part of the Etna property to Eric and Dawn Loveland. Ann sold to the Lovelands two and one-half acres, including her marital residence, for $88,500. Ann transferred the acreage and the home through a Warranty Deed. When Ann sold the property to the Lovelands, she owed Countrywide $122,355.54 on a loan secured by the Etna property. Ann applied the proceeds of the sale to the loan, leaving a balance of $34,000. Ann was required to pay off the loan during the closing of the sale of the property. In order to do so, Ann and Greg acquired a loan through the Bank of Star Valley for $35,881.55 and paid off the loan. At the time of the divorce, the debt owed to the bank of Star Valley was $23,086.

At the closing for the sale of the property and the new loan, Ann and Greg signed dozens of documents related to the loan. Though they had the opportunity to examine the documents, neither of them read all of the documents. Among the documents was a quitclaim deed on the remainder of the Etna land, transferring the land to her and Greg. Ann says that she does not remember signing the quitclaim deed, though she admits that she signed the document as the document bears her signature.

In December 2005, after Greg had filed for divorce, Ann sold 2 acres of the Etna property for $49,322.19 and improvements on her property. $42,668.24 of the proceeds of that sale were placed in Ann's attorney's trust account. At the time of the divorce, the remaining property was appraised at $350,000.

In the court's September 11, 2007 Findings of Fact and Conclusions of Law, Judge Blower found that the signing of the quitclaim deed transmuted the Etna property, which was Ann's separate property.

Ann filed a Notice of Appeal on September 14, 2007.

On May 14, 2008 Ann filed her Brief on Appeal.

On June 12, 2008 Greg filed his Brief on Appeal.

On Jul 7, 2008 the parties brought oral argument on appeal on this matter. The court took the appeal under advisement at that time.

The Court has reviewed the record of the proceedings below and provides the following analysis and decision.

II.
STANDARD OF REVIEW

District Court review of a Magistrate's decision is governed by Idaho Rules of Civil Procedure 83(a)-(z). All appeals from the Magistrates Division shall be heard by the District Court as an appellate proceeding unless the District Court orders a trial *de novo.* I.R.C.P. 83(b). This Court has not ordered that this matter be heard as a trial *de novo*, and therefore, this review is upon the record and has occurred in the same manner and upon the same standards of review as an appeal from the District Court to the Supreme Court. I.R.C.P. 83(u).

In a District Court review of a magistrate court's ruling, the findings of the magistrate judge will be upheld if supported by substantial, competent though conflicting evidence. *Barton v. Barton*, 132 Idaho 394, 396, 973 P.2d 746, 748 (1999) citing *Smith v. Smith*, 124 Idaho 431, 436, 860 P.2d 634, 639 (1993). The weight to be given evidence is within the trial court's province and will not be set aside unless clearly erroneous. I.R.C.P. 52(a); *Tentinger v. McPheters*, 132 Idaho 620, 977 P.2d 234 (Ct.App.1999); *Magic Valley Truck Brokers, Inc. v. Meyer*, 133 Idaho 110, 982 P.2d 945 (Ct.App.1999); and *Holley v. Holley*, 128 Idaho 503, 915 P.2d 733 (Ct.App.1996). If the findings are supported, the conclusions of law then must be examined as to whether they are founded on a proper

application of legal principles. *Desfosses v. Desfosses*, 120 Idaho 354, 356, 815 P.2d 1094, 1096 (1991), *Hentges v. Hentges*, 115 Idaho 192, 194, 765 P.2d 1094, 1096 (Ct. App. 1988).

The characterization of property is subject to the sound discretion of the trial court, and should be upheld in the absence of a clear showing of an abuse of discretion. *Matter of Eliasen's Estate,* 105 Idaho 234 (1983). The District Court exercises free review over questions of law. *Stevens v. Stevens,* 135 Idaho 224, 227 (2000).

The party challenging the findings has the burden of showing error, and the appellate court will review the evidence in the light most favorable to the prevailing party. *Martsch v. Nelson*, 109 Idaho 95, 100, 705 P.2d 1050, 1055 (Ct. App. 1985). Error may not be presumed on appeal, and an appellant must make an affirmative showing of such error to prevail. *Carpenter v. R.R. Cattle Co., Inc.*, 108 Idaho 602, 701 P.2d 222 (1985).

III.
ISSUES ON APPEAL

Did the magistrate err in finding that the Quitclaim Deed executed by Ann, during a refinance, transmuted the Etna property from Ann's separate property to community property?

IV.
ANALYSIS

Appellant argues that the Magistrate failed to uphold the clear and convincing standard for transmuting separate property by enforcing the parol evidence rule. *Ustick v. Ustick,* 104 Idaho 215, 222 (1983) requires, "where it is asserted, as in this case, that a spouse intended to transmute property or to make a gift, the burden is on the party urging the assertion to prove the intent in question by clear and convincing evidence."

Under the parol evidence rule, when a contract has been reduced to a writing that the parties intend to be a final statement of their agreement, is not admissible to vary, contradict, or

enlarge the terms of the written contract. *Simons v. Simons,* 134 Idaho 824, 828 (2000).

Parol evidence may be considered to aid the trial court in determining the intent of the drafter of a document if an ambiguity exists. *Matter of Estate of Kirk,* 127 Idaho 817 (1995).

Respondent argues that the quitclaim deed is clear and unambiguous and that it complies with the various Idaho statutory requirement s for conveyances of real property and transfers between spouses.

At trial, Appellant urged the magistrate to adopt the reasoning he had applied in the case of *Hoskinson v. Hoskinson,* 139 Idaho 448 (2003). The facts in *Hoskins* are similar to those at hand, except in *Hoskinson* the parties had signed two quitclaim deeds. In his findings of fact from *Hoskinson,* the magistrate considered parol evidence when he held:

> [T]he parties offered conflicting evidence of the intent behind the quitclaim deeds. Elizabeth testified that Reed asked her to sign a quitclaim deed to facilitate the financing and that she refused to sign until Reed agreed to sign a deed conveying the property to her and Reed. Reed denied that allegation. He testified he signed the quitclaim deed simply because the lender presented it to him during the loan closing, that he signed it along with many other papers the lender presented to him, and that he had no intent to transmute his property into community property. Reed notes that he alone signed the promissory note for the new loan. Under these circumstances, the court finds that Elizabeth has not proved a transmutation by clear and convincing evidence. The evidence did not establish that Reed intended to make a gift to the community. The evidence did not establish whether the deed to Reed and Elizabeth was signed before or after the deed to Reed. As noted above, Elizabeth damaged her credibility with her lack of candor during her testimony on other issues; therefore, the court is inclined to believe Reed's testimony on the issue.

Hoskinson, 139 Idaho at 459-60.

The Idaho Supreme Court upheld the magistrate's decision in *Hoskinson* that the holder of a quitclaim deed "failed to sustain her burden of proving a transmutation." *Id.* at 460.

Appellant contends that the magistrate should have considered her intent when

she signed the quitclaim deed, as the magistrate did in *Hoskinson.* In *Hoskinson,* the magistrate considered the defendant's testimony that he only signed the quitclaim deed because "the lender presented it to him during the loan closing, that he signed it along with many other papers the lender presented to him, and that he had no intent to transmute his property into community property." *Id.* at 359. In this case the magistrate refused to consider such evidence in determining the characterization of the property.

Respondent argues that *Hoskinson* is factually distinguishable from this case. The respondent contends that there was an ambiguity in the quitclaim deeds in the *Hoskinson* case not found here. However, 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. Any ambiguity in this case would also arise from the circumstances surrounding the quitclaim deed; the magistrate found that the quitclaim deed itself was unambiguous.

Appellant also cites to the case of *Griffin v. Griffin*, 102 Idaho 858, (Ct. App. 1982), where the Idaho Court of Appeals affirmed a magistrate's opinion finding that no transmutation had occurred even though the parties had signed a loan agreement stating that the title to the property would vest in both parties. The court in *Griffin* explained that "the existence of the plaintiff's signature on the deed of trust in all likelihood can be explained away as a precautionary measure required by a prudent creditor." *Griffin,* 102 Idaho at 861.

Griffin is factually differentiable from this case. As Respondent points out, the court in *Griffin* held that there was no transmutation because there was no deed to the wife, not because of ambiguity in a deed. Respondent argues that the reasoning behind

Griffin would demand the finding of a transmutation in this case, where Appellant signed a deed. However, the finding in *Griffin* is not based on the existence or nonexistence of a deed, but rather in the lack of clear and convincing evidence that a transmutation took place. The court explained that the statements on the loan application explicitly assigning the parties to a joint tenancy "offer some support to appellant's transmutation argument, but they are not predominant." *Id.*

Respondent argues that *Bliss v. Bliss,* 127 Idaho 170 (1995) is a more accurate comparison to this case. In *Bliss,* there is no transmutation of separate property to community property. Instead, in *Bliss* the husband conveyed his interest in community property to the wife through a quitclaim deed. *Bliss* at 173-74. This conveyance of property is ruled by I.C. § 32-906(2) which creates a presumption that the conveyed property is separate. The court held that the quitclaim deed was unambiguous and that the conveyance was valid. However, the presumption in I.C. § 32-906(2) is wildly different from the *Ustick* standard which requires clear and convincing evidence of intent to transmute separate property into community property. Additionally, the appellant in *Bliss* claimed to have conveyed his interest to avoid taxation; the conveyance did not arise out of a refinancing arrangement.

Similarly, the case of *Hall v. Hall,* 116 Idaho 483 (1989), also cited by Respondent, refused to allow parol evidence in a case where 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." *Hall* at 484. The magistrate had considered testimony from the husband's grandmother that the conveyance was intended as a gift, and the Idaho Supreme Court remanded the case back

with the instruction to ignore the parol evidence testimony. *Id.* Again, the *Hall* case did not deal with the transmutation of separate property into community property and had nothing to do with a refinancing agreement. Significantly, the *Hall* case, like the other cases cited by Respondent, does not invoke the high demands of the clear and convincing standard *Ustick* requires.

Appellant appears to argue for a standard requiring courts to examine parol evidence whenever there is a conveyance of property related to a refinancing situation. This court does not find in the caselaw any hint of a mandate requiring courts to always consider parol evidence.

However, it is apparent that courts are granted much broader leeway in considering parol evidence in situations where an otherwise unambiguous document is part of a refinancing situation. In such situations, parties often sign many documents that neither side prepared. These documents are generally prepared by a third party seeking to protect its interests alone. Appellant presented testimony and evidence that she did not intend to grant a one half interest to Respondent and that she signed the document simply because the lender presented it to her. In such situations, the intentions of the parties are rarely clear simply from reading a document prepared by a third party. Intention of a transmutation can only be shown by clear and convincing evidence. Here, the magistrate should have considered parol evidence before determining that there was clear and convincing evidence of a transmutation of separate to community property.

V.
CONCLUSION

The judgment of the magistrate is reversed. The court remands to the magistrate for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Dated this 29 day of August, 2008.

Jon J. Shindurling
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of August, 2008, I served a true and correct copy of the foregoing OPINION AND DECISION ON APPEAL upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

Attorneys for Plaintiff/Respondent

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Idaho Falls, ID 83401

Attorneys for Defendant/Appellant

Aaron Woolf
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Idaho Falls, ID 84305-0160

Ronald Longmore
Clerk of the District Court
Bonneville County, Idaho

by Grace Walters
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY

GREGORY PAUL BARRETT, Plaintiff, vs. ANN MARIE BARRETT, Defendant.	Case No. CV-05-4852 **ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PROPERTY AND DEBT DIVISION FOLLOWING REMAND**

In his August 29, 2008 Opinion and Decision on Appeal, District Judge Jon J. Shindurling remanded this case with instructions to consider parol evidence in determining whether the plaintiff proved a transmutation of the "Etna property" by clear and convincing evidence. Applying that standard, the court concludes that the plaintiff did not meet his burden of proof. Although the defendant signed a quitclaim deed purporting to convey the Etna property to herself and the plaintiff, other evidence

indicated that she did not intend a gift to the plaintiff. That evidence includes the following: (1) the defendant's testimony that she did not intend to give the plaintiff an interest in the property but signed the deed only because it was presented to her by a lender as part of a refinancing process; (2) the relatively small amount of the refinance loan ($34,512) compared to the fair market value of the property (at least $350,000); (3) the absence of any discussion between the parties about any intention to make a gift; and (4) the defendant's testimony that she continued to consider repayment of the refinance loan to be her responsibility.

Because the court now concludes that the Etna property and the proceeds from the Wyoming 100 sale are the defendant's separate property, the defendant's separate property estate must reimburse the community estate $13,772 for the reduction in the principal of the original and refinance mortgage loans accomplished with the use of community funds. Additionally, the defendant, not the community, should be solely responsible for the repayment of the refinance loan.

The court directs the defendant's attorney, Mr. Woolf, to prepare an amended judgment consistent with these findings and conclusions.

Dated September 17, 2008.

Magistrate

CERTIFICATE OF SERVICE

I certify that on the 17 day of September 2008, I served a true and correct copy of the foregoing document on the persons listed below by mailing, with the correct postage thereon, by facsimile, or by causing the same to be hand delivered.

Deputy Court Clerk

Aaron J. Woolf P.O. Box 50160 Idaho Falls, ID 83405 FAX (208) 524-5451	☑ Courthouse Box ☐ FAX	☐ US Mail ☐ Hand Delivery
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Attorneys for Defendant, Ann Marie Barrett.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE MAGISTRATES DIVISION

GREGORY PAUL BARRETT, Plaintiff, vs. ANN MARIE BARRETT, Defendant.	Case No. CV-05-4852 **MOTION TO RECONSIDER**

COMES NOW, Defendant, Ann Marie Barrett, by and through her attorney of record, Aaron J. Woolf, Esq., of the law firm of THOMPSON SMITH WOOLF & ANDERSON, PLLC, and hereby moves this Court for to reconsider its *Additional Findings of Fact, Conclusions of Law on Property and Debt Division Following Remand*, which was entered on September 17, 2008. This Motion is based upon the Court file, and I.R.C.P. Rule 11(a)(2)(B), 52(b), and 59(e). In support thereof, Defendant argues and requests as follows:

This Court found, in its *Additional Findings of Fact, Conclusions of Law on Property and Debt Division Following Remand*, which was entered on September 17, 2008, that the proceeds held in Ann's attorney's trust account (proceeds for the Wyoming 100, LLC in the amount of $42,668.24) are Ann's separate property. As the Court will recall, the parties paid for community expenses in the amount of $6,653.70, out of these funds, during the pendency of the action. The expenses incurred, were as follows: $1,500.00 to Dr. Lindsey for the custody evaluation; $1,480.56 to GMAC Mortgage for payments on the 140 N. Adam property; $300.00 to Dr. Lindsey for the custody evaluation; $600.00 to Dr. Lindsey for the custody evaluation; $2,433.00 to the Idaho State Tax Commission for the parties' taxes; $450.00 to Amy Sheets for mediation; $6.37 to Zip Print for copies; and $33.77 to Zip Print for copies. See testimony and see Plaintiff's exhibit 31.

A debt incurred during marriage is presumed to be a community debt. Gardner v. Gardner, 107 Idaho 660, 662 (Idaho Ct. App. 1984). When separate funds of one spouse are used for the benefit of the community, such as payment of debt arising from acquisition of community property, the separate estate is entitled to reimbursement of the amount expended (including the interest portion), absent clear and convincing evidence that a gift of separate funds was made or intended. Ustick v. Ustick, 104 Idaho 215 (Idaho Ct. App. 1983). Although there is no case directly holding that a spouse's separate estate is entitled to be reimbursed for contributions made to the community estate, regardless of whether the payment was related to an underlying asset, attorney Bruce Collier has written a very scholarly and thorough discussion of community and separate reimbursement claims in divorce actions, which article was

published in The Advocate, September, 2002 Edition, p. 14, and attached as exhibit A to Defendant's Proposed Findings of Fact and Conclusions of Law which was filed on July 30, 2007. Mr. Collier concludes that "when the separate estate contributes to the community estate in a way that benefits the community estate, even if no specific community property is improved or equity in any community asset is enhanced, reimbursement for the amount contributed is allowed unless a gift is established." In his article, Mr. Collier cites to Idaho authorities to support his conclusion. And finally, it has been held that the community is entitled to reimbursement for Husband's separate tax liability paid by the community during marriage. Swanson v. Swanson, 134 Idaho 512 (2000).

Based upon the above legal authority, the community should be ordered to reimburse Ann's separate estate in the amount of $6,653.70.

Oral argument is requested.

DATED this 23 day of September, 2008.

AARON J. WOOLF, ESQ.
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in Idaho, with my office in Idaho Falls, and that on the 23 day of September, 2008, I served a true and correct copy of the following-described document on the parties listed below, by mailing, with the correct postage thereon, or by causing the same to be hand delivered.

DOCUMENT SERVED: **MOTION TO RECONSIDER**

PARTIES SERVED:

Royce B. Lee, Esq.
770 South Woodruff Avenue
Idaho Falls, ID 83401
Fax (208) 524-2051

☐ Mailed ☐ Hand Delivered ☒ Faxed

AARON J. WOOLF, ESQ.

Royce B. Lee, P.A.
Attorney at Law
770 South Woodruff Avenue
Idaho Falls, Idaho 83401
Telephone: (208) 524-2652
Facsimile: (208) 524-2051
Idaho State Bar #1691

Attorney for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

GREGORY PAUL BARRETT, Plaintiff/Appellant, v. ANN MARIE BARRETT, Defendant/Respondent.	Case No. CV-05-4852 NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT, ANN MARIE BARRETT, AND THE PARTY'S ATTORNEY, AARON WOOLF OF THOMPSON, SMITH, WOOLF & ANDERSON, PLLC, AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, Gregory Paul Barrett, appeals against the above named Respondent, Ann Marie Barrett, to the Idaho Supreme Court from the Opinion and Decision on Appeal entered in the above entitled action on the 29th day of August, 2008, the Honorable Judge Shindurling presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(2), I.A.R.

3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal:

   a. Whether the District Court Judge on appeal erred by remanding the case to the trial court with instructions to consider parol evidence on whether a Quitclaim Deed, by Ann Barrett of her separate property to Greg Barrett and Ann Barrett as husband and wife, constituted a valid transmutation of her property to community property.

4. Has an order been entered sealing all or any portion of the record? No.

5. Is a reporter's transcript requested? Yes. It has already been prepared for the appeal to the District Court.

6. The Appellant requests the following documents to be included or excluded in the clerk's record in addition to those automatically included under Rule 28, I.A.R.: Court orders regarding custody, visitation and child support do not need to be included in the clerk's record.

7. I certify:

a. That a copy of this notice of appeal has been served on the reporter. However, the reporter's transcript has already been prepared for the prior appeal to the District Court.

b. That the clerk of the district court has not been paid the estimated fee for preparation of the reporter's transcript because a transcript has already been prepared.

c. That the estimated fee for preparation of the clerk's record has been paid.

d. That the appellate f iling fee has been paid.

e. That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 8th day of October, 2008.

Royce B. Lee

CERTIFICATE OF SERVICE

I do hereby certify that on this 8th day of October, 2008, a true and correct copy of the foregoing was served upon the following party as indicated:

Aaron Woolf, Esq.
Thompson, Smith, Woolf & Anderson, PLLC
3480 Merlin Drive
P.O. Box 50160
Idaho Falls, ID 83405-0160

[ ]HAND DELIVERY
[X]U.S. MAIL
[ ]FAX NO_____

Lynette D. Stumpp

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

GREGORY PAUL BARRETT,

Plaintiff/Appellant,

vs.

ANNE MARIE BARRETT,

Defendant/Respondent.

CLERK'S CERTIFICATE OF APPEAL

Case No. CV-2005-4852

Docket No. 35763

Appeal from: Seventh Judicial District, Bonneville County

Honorable Jon J. Shindurling, District Judge, presiding.

Case number from Court: CV-2005-4852

Order or Judgment appealed from: Opinion and Decision on Appeal, entered 8-29-08

Attorney for Appellant:	Royce B. Lee
Attorney for Respondent:	Aaron Woolf
Appealed by:	Plaintiff
Appealed against:	Defendant
Notice of Appeal Filed:	10-8-08
Appellate Fee Paid:	Yes
Was District Court Reporter's Transcript requested?	Yes
If so, name of reporter:	Nancy Marlow

Dated: October 14, 2008

RONALD LONGMORE
Clerk of the District Court

By: _____
Deputy Clerk

Jenny 21

BONNEVILLE COUNTY
IDAHO

2008 OCT 23 PM 4:38

AARON J. WOOLF
Idaho State Bar #5791
THOMPSON SMITH WOOLF & ANDERSON, PLLC
3480 Merlin Drive
P.O. Box 50160
Idaho Falls, ID 83405
Telephone (208) 525-8792
Fax (208) 525-5266

Attorney for Defendant/Appellant, Ann Barrett.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

GREGORY PAUL BARRETT, Plaintiff, vs. ANN MARIE BARRETT, Defendant.	Case No. CV-05-4852 **AMENDED RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION**

COMES NOW, Defendant, Ann Marie Barrett, by and through her attorney of record, Aaron J. Woolf, Esq., of the law firm of THOMPSON SMITH WOOLF & ANDERSON, PLLC, and hereby files this amended response to Plaintiff's Motion for Reconsideration, which was filed on or about October 3, 2008, as follows:

1. Ann is in complete agreement that the 278 N. Contour property should be treated identically to the Etna, Wyoming property. Thus, Ann is in agreement with the 278 N. Contor property being classified as Greg's separate property.

2. The parties' stipulated that if the Court found that the real property and mobile home at 278 N. Contor, to be Greg's separate property, then Greg's separate

property interest would be 22.04% (see the attached Exhibit "A" for a copy of the transcript from trial) of the equity and the community property interest would be 77.06% interest of the equity. At the time of trial, the parties stipulated that the value of the mobile home and real property was $67,000.00 (see Defendant's Exhibit "M"). Furthermore, the debt owed to Wells Fargo, which was secured by the real property and mobile home was $40,165.85 (see Plaintiff's Exhibit "26"). Thus, the total equity in the real property and mobile home is $26,834.15. Pursuant to the stipulation of the parties, Greg's separate property interest in said equity is $6,010.85 ($67,000 - $40,165.85 X 22.04%), and the community property interest, which should be awarded to Greg, is $20,823.30 ($67,000 - $40,165.85 X 22.04%).

3. In the Court's Judgment and Order on All Remaining Issues (Property and Debt Division and Attorneys Fees), entered September 11, 2007, Greg received the 278 N. Contor property as community property, with a net equity of $26,834.15. He will continue to receive said property, but his community interest should now be listed at $20,823.60, for a difference of $6,011.00.

4. Based upon the above, Ann would owe Greg an additional $3,005.50 in regard to the ultimate equalization payment, and this should be considered in Ann's Motion to Determine Final Equalization Payment.

DATED this 23 day of October, 2008.

AARON J. WOOLF, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in Idaho, with my office in Idaho Falls, and that on the 23 day of October, 2008, I served a true and correct copy of the following-described document on the parties listed below, by mailing or by facsimile, with the correct postage thereon, or by causing the same to be hand delivered.

DOCUMENT SERVED: **AMENDED RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION**

Royce Lee, Esq.
Attorney at Law
770 S. Woodruff
Idaho Falls, ID 83401
Fax: (208) 524-2051

☒ Mailed ☐ Hand Delivered ☐ Fax

AARON J. WOOLF, ESQ.

Commerce referring to the Ca[illegible]le home as security. Is this the Promissory Note you took out in purchasing this Cavco mobile home?
A I believe so.
Q Who signed the loan documents?
A It says Greg Barrett and Ann Barrett.
Q Are these documents correct records relating to the Cavco mobile home?
A I believe they are, yes.
MR. LEE: I move to introduce Exhibit No. 9 into evidence.
MR. WOOLF: No objection.
THE COURT: Nine is admitted then.
(Plaintiff's Exhibit No. 9 admitted.)
(Discussion held off the record.)
(Plaintiff's Exhibit No. 10 marked.)
Q (By Mr. Lee) Greg, I'd like to show you Exhibit No. 10.
A Okay.
Q What is that document?
A This is a Quit Claim Deed.
Q Who is it from and who is it to?
A Greg Barrett to Greg and Ann Barrett.
Q What property has been conveyed by this Quit Claim Deed?

A The property at 278 North Contor Avenue, Idaho Falls, Idaho, 83401, Bonneville County.
Q And is this recorded in the Bonneville County records?
A Yes.
Q And is that your signature on there?
A Yes, it is.
Q Does this relate to the same property where the Cavco mobile home is located?
A Yes.
Q So this one is dated December 23rd and a loan was -- your loan was dated November 29th and this was dated December 23rd. After your loan was in place you signed a Quit Claim Deed putting Ann's name on the ownership?
A That's what we did, yes.
Q Can you tell us the circumstances around this Quit Claim Deed?
A We wanted to do a refinance and the mortgage company wanted it to be real property, is that the term, instead of personal property, and so we changed it over and made it real property and put it in both names.
Q Is this Exhibit No. 10 a true and correct copy of that Quit Claim Deed?

A I beli[illegible]s.
MR. LEE: Move to introduce Exhibit 10.
MR. WOOLF: No objection.
THE COURT: Ten is admitted.
(Plaintiff's Exhibit No. 10 admitted.)
Q (By Mr. Lee) Now, your loan was already -- it looks like your loan was already in place before you did the Quit Claim Deed, is that how you remember it?
A (No response.)
Q Well, I'm not sure, we'll come back to that.
So when you put Ann's name on this Quit Claim Deed you had already declared the mobile home to be real property?
A That's correct.
Q And so by putting Ann's name on the Quit Claim Deed, what was your understanding of what happened as a result?
A That made Ann a part owner of the home and the lot and all the property connected together.
Q Do you remember you and Ann talking about this question, what it means to put her name on the Quit Claim Deed?
A It was just that we were going to refinance the property and we were going to have it in both names. I was giving it to her.

Q Did you and she talk about that?
A Maybe briefly.
Q Do you recall any specific conversations between you and Ann when you did this --
A I just know that we were going to do it and we were going to refinance the whole property and Ann's name was going to be on it.
Q So what was your interpretation of the legal effect of putting her name on that paper?
A She was now part owner of the property.
Q And what part is hers?
A All. It's all of it, she's part owner of all of it.
Q And equal owner with you?
A Oh, yes.
Q As community property and such?
A Yes, that's correct.
MR. LEE: And, Your Honor, for the record we agree on the price and there is a reference on Exhibit A about how that price is actually divided up if need be based on some additional testimony. That's in the other explanation column over here.
MR. WOOLF: So it's my understanding that if the court finds that the land is Greg's separate property, then his separate property portion of the

EXHIBIT 4

equity would be 22.4 percent ro ?
MR. LEE: Correct.
MR. WOOLF: And if he finds that it's community property it's immaterial. So essentially we agree that if the Court finds Greg has a separate property interest in the real property that it would be 22.4 percent.
THE COURT: There's a stipulation to that effect; right?
MR. LEE: Yes.
MR. WOOLF: Yes.
THE COURT: I'm sorry, how much of this is stipulation where she says in her comments $52,000 represents the value of the mobile home, $15,000 represents the value of the land? Did the parties agree on that?
MR. WOOLF: Yes, for that -- those are in the stipulations as well.
MR. LEE: Right. For their values we agree.
THE COURT: So then the dispute is with regard to whether -- now let's see. Sorry. How much of the -- sorry, how much of the $67,000 is community property and how much is separate property?
MR. LEE: That is the dispute. And I have to say the entry on Exhibit A under the husband's column

where it says Plaintiff agrees with the above, that's not quite correct.
THE COURT: Okay.
MR. LEE: We need to probably cancel that out.
THE COURT: All right.
MR. LEE: So the dispute is whether it became community property or not.
MR. WOOLF: And if it didn't, then Greg's separate property portion of the equity would be 22.4 percent.
MR. LEE: Correct.
Q (By Mr. Lee) So I'm going to move up our Exhibit No. 7 one more line and we arrive at 140 North Adam, which is land, a lot and a double-wide mobile home on it. Does that sound right?
A Yes, that's correct.
Q And that, for the record, on Defendant's Exhibit A, that's No. 5. It appears we have a stipulation on the value at $67,000. Do you feel comfortable with that price?
A Yes, I do.
Q But there is a difference of opinion about who would receive this. Each of you are asking for this item. Tell us what your position is on who should get it. First of all, we agree that it's community

property; c e
A Yes.
Q So tell us your position on who should get this item.
MR. WOOLF: And for the record, Your Honor, there is a stipulation from our standpoint regarding the value at $67,000 and that it is community property, and that stipulation is contained in the written stipulation filed with the Court as well.
MR. LEE: Okay. Good.
MR. WOOLF: The only dispute is who receives this property.
THE COURT: Okay.
MR. WOOLF: Is that right, Royce?
MR. LEE: That's correct.
Q (By Mr. Lee) So tell us your position on who should receive the property at 140 North Adam.
A I'm just going to be frank and say it's entirely up to the Judge to decide which way it goes. Either way is okay with me.
Q All right. They either get $67,000 worth of property or $67,000 worth of credit on something else?
A I'd be happy either way, sure.
Q And does that depend somewhat on how the rest of the property settles out?

A That is correct.
Q Right now who lives at this property?
A Ann does.
Q Ann and her three children and the two boys then are living here at the present time?
A That's correct.
Q Let's move up to the next line where we talk about Katie Court. Has there been a recent sale of that property?
A Yes.
THE COURT: Just a second. 681 Katie Court, there it is. All righty. Now wait a minute.
MR. LEE: I should have e-mailed my extra property list.
THE COURT: The property you were just talking about was --
MR. LEE: 140 North Adam.
THE COURT: -- 140 North Adam and I put my notes under 181 North Adam. All right. Let me move them. All righty. Sorry. Now we're on 681 Katie Court. The way you're throwing me here is you're going up the list instead of down the list.
MR. LEE: I know. I shouldn't have done that, I know.
Q (By Mr. Lee) All right. Let's talk about 681

Royce B. Lee, P.A.
Attorney at Law
770 South Woodruff Avenue
Idaho Falls, Idaho 83401
Telephone: (208) 524-2652
Facsimile: (208) 524-2051
Idaho State Bar #1691

Attorney for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

GREGORY PAUL BARRETT, Plaintiff/Appellant, v. ANN MARIE BARRETT, Defendant/Respondent.	Case No. CV-05-4852 AMENDED NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT, ANN MARIE BARRETT, AND THE PARTY'S ATTORNEY, AARON WOOLF OF THOMPSON, SMITH, WOOLF & ANDERSON, PLLC, AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, Gregory Paul Barrett, appeals against the above named Respondent, Ann Marie Barrett, to the Idaho Supreme Court from the Opinion and Decision on Appeal entered in the above entitled action on the 29th day of August, 2008, the Honorable Judge Shindurling presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(2), I.A.R.

3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal:

   a. Whether the District Court Judge on appeal erred by remanding the case to the trial court with instructions to consider parol evidence on whether a Quitclaim Deed, by Ann Barrett of her separate property to Greg Barrett and Ann Barrett as husband and wife, constituted a valid transmutation of her property to community property.

4. Has an order been entered sealing all or any portion of the record? No.

5. Is a reporter's transcript requested? Yes. It has already been prepared for the appeal to the District Court. It should be included as a part of the Clerk's record.

6. The Appellant requests the following documents to be included or excluded in the clerk's record in addition to those automatically included under Rule 28, I.A.R.: Court orders regarding custody, visitation and child support do not need to be included in the clerk's record.

7. Only the following exhibits should be included in the Clerk's record. Such are the exhibits which relate to the issue on appeal.

Plaintiff's Exhibit Numbers – 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34.

Defendant's Exhibit Numbers – A, B, C, D, E, F, G, H, I, J, K, L, M, P.

8. Only the following pleadings should be included in the Clerk's record as they are the only pleadings which relate to the issue on appeal.

a. Verified Complaint for Dissolution of Marriage 8/29/05
b. Verified Counterclaim for Dissolution of Marriage 9/14/05
c. Answer 9/14/05
d. Answer to Counterclaim 9/16/05
e. Stipulation
f. Minutes Report of Court Trial, June 18 to June 22, 2007
g. Decree of Divorce 7/03/07
h. Defendant's P roposed Findings of Fact and Conclusions of Law 7/30/07
i. Plaintiff's Post Trial Memorandum 7/31/07
j. Findings of Fact and Conclusions of Law on Property and Debt Division and Attorney Fees 9/11/07
k. Judgment and Order on All Remaining Issues (Property and Debt Division and Attorney's Fees) 9/11/07
l. Notice of Appeal to District Court 9/14/07
m. Defendant's Brief on Appeal 5/14/08
n. P laintiff's Brief on Appeal 6/12/08
o. Minute Entry on Oral Argument on Issues of Appeal 7/08/08
p. Opinion and Decision on Appeal 8/29/08
q. Additional Findings of Fact and Conclusions of Law on Property and Debt Division Following Remand 9/17/08
r. Motion to Reconsider 9/23/08
s. Notice of Appeal to Supreme Court 10/08/08
t. Clerk's Certificate of Appeal 10/16/08

9. I certify:

a. That a copy of this notice of appeal has been served on the reporter. However, the reporter's transcript has already been prepared for the prior

appeal to the District Court. The reporter's transcript should be included as a support exhibit of the Clerk's record.

b. That the clerk of the district court has not been paid the estimated fee for preparation of the reporter's transcript because a transcript has already been prepared.

c. That the estimated fee for preparation of the clerk's record has been paid.

d. That the appellate filing fee has been paid.

e. That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 30 day of October, 2008.

Royce B. Lee

CERTIFICATE OF SERVICE

I do hereby certify that on this 30th day of October, 2008, a true and correct copy of the foregoing was served upon the following party as indicated:

Aaron Woolf, Esq.
Thompson, Smith, Woolf & Anderson, PLLC
3480 Merlin Drive
P.O. Box 50160
Idaho Falls, ID 83405-0160

[ ]HAND DELIVERY
[X]U.S. MAIL
[ ]FAX NO_____

Lynette D. Stumpp

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY

GREGORY PAUL BARRETT, Plaintiff, vs. ANN MARIE BARRETT, Defendant.	Case No. CV-05-4852 **ORDER WITHDRAWING "ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PROPERTY AND DEBT DIVISION FOLLOWING REMAND"**

Upon further inspection of the court's file, it appears that the District Court did not issue a remittitur pursuant to I.R.C.P. 83(z)(2)(A) and that the plaintiff timely filed a Notice of Appeal to the Idaho Supreme Court from the District Court's August 29, 2008 Opinion and Decision on Appeal. Accordingly, this court should not have entered its September 17, 2008 "Additional Findings of Fact and Conclusions of Law on Property and Debt Division Following Remand" and now withdraws the same.

Dated November 5, 2008.

Magistrate

CERTIFICATE OF SERVICE

I certify that on the 5th day of November 2008, I served a true and correct copy of the foregoing document on the persons listed below by mailing, with the correct postage thereon, by facsimile, or by causing the same to be hand delivered.

Deputy Court Clerk

Aaron J. Woolf P.O. Box 50160 Idaho Falls, ID 83405 FAX (208) 524-5451	☑ Courthouse Box ☐ FAX	☐ US Mail ☐ Hand Delivery
Royce B. Lee 770 South Woodruff Avenue Idaho Falls, ID 83401 FAX (208) 524-2051	☑ Courthouse Box ☐ FAX	☐ US Mail ☐ Hand Delivery

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

GREGORY PAUL BARRETT, Plaintiff/Appellant, vs. ANNE MARIE BARRETT, Defendant/Respondent.	**AMENDED CLERK'S CERTIFICATE OF APPEAL** Case No. CV-2005-4852 Docket No.

Appeal from: Seventh Judicial District, Bonneville County

Honorable Jon J. Shindurling, District Judge, presiding.

Case number from Court: CV-2005-4852

Order or Judgment appealed from: *Opinion and Decision on Appeal, entered 8-29-08*

Attorney for Appellant:	Royce B. Lee
Attorney for Respondent:	Aaron Woolf
Appealed by:	Plaintiff
Appealed against:	Defendant
Notice of Appeal Filed:	10-8-08
Appellate Fee Paid:	Yes
Was District Court Reporter's Transcript requested?	Yes
If so, name of reporter:	Nancy Marlow

Dated: November 18, 2008

RONALD LONGMORE
Clerk of the District Court

By: _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

GREGORY PAUL BARRETT, *Plaintiff/Appellant,* vs. ANNE MARIE BARRETT, Defendant/Respondent.	**CLERK'S CERTIFICATE** Case No. CV-2005-4852 Docket No. 35763

STATE OF IDAHO)
)
County of Bonneville)

I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the above and foregoing Record in the above-entitled cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I do further certify that only the exhibits requested, in the above-entitled cause, will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript (if requested) and Clerk's Record, the following is a list of requested exhibits.:

Transcripts:
Volume I ~~(unable to locate~~
Volume II

Plaintiffs Exhibits:
7. Real Property List
8. Loan Payoff
9. 24x 48 Mobile Home
10. Quit Claim Deed-Contor
11. Katie Ct. Loan Docs

12. Tennis Ct. SaleDocs
13. Tennis Ct. Deed
14. Loan Doc- Tennis Ct.
15. Payments-Tennis Ct.
16. Katie Ct. Proceeds
17. Warranty Deed-Tennis Ct.
18. Warranty Deed-Etna
19. Spencer Divorce Decree
20. Quit Claim-Etna
22. Closing Stmt-Etna
23. Quit Claim-Etna
24. Promissory Note-Etna
25. Mortgage-Etna
26. Debt List
27. Purch Agrmt-Etna
28. Warranty Deeds-Etna
29. Subdivision-Etna
30. Develop Status Email
31. Def's Trust Act Stmt
32. Appraisal-Etna
33. Access Change Permit
34. Access Change Appl

Defendant's Exhibit:
A. Combined Property List
B. Wrnty Deed-Lovelands
C. Loan Disclosure 8/12/99
D. Check-Country Wide 8/99
E. Pay-Off as of 7/22/07
F. Letter Dated 0/15/05
G. Check from WY 100 LLC
H. Photos (hey 89 Gate)
I. Wrnty Deed Contor
J. Loan for Contor Prop
K. Wells Fargo Loan Docs
L. Quit Claim Deed 11/23/07
M. Stipulation 6/15/07
P. Rental Income/Expense

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 9th day of December, 2008.

RONALD LONGMORE, CT
Clerk of the District Court

By: _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

GREGORY PAUL BARRETT, Plaintiff/Appellant, vs. ANNE MARIE BARRETT, Defendant/Respondent.	)	**CERTIFICATE OF SERVICE** Case No. CV-2005-4852 Docket No. 35763

I HEREBY CERTIFY that on the 9th day of December, 2008, I served a copy of the Reporter's Transcript (if requested) and the Clerk's Record in the Appeal to the Supreme Court in the above entitled cause upon the following attorneys:

Royce B. Lee, Esq.
770 S Woodruff Avenue
Idaho Falls, ID 83401

Attorney for Appellant

Aaron J. Woolf, Esq.
P.O. Box
Idaho Falls, ID. 83405

Attorney for Respondent

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

RONALD LONGMORE
Clerk of the District Court

By: _____
Deputy Clerk

7TH JUDICIAL DISTRICT COURT
COUNTY OF BONNEVILLE
STATE OF IDAHO

AARON J. WOOLF
Idaho State Bar #5791
THOMPSON SMITH WOOLF & ANDERSON, PLLC
3480 Merlin Drive
P.O. Box 50160
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

GREGORY PAUL BARRETT, Plaintiff, vs. ANN MARIE BARRETT, Defendant.	Case No. CV-05-4852 **ORDER**

BASED UPON the Stipulation entered into between Plaintiff and Defendant, by and through their respective attorneys of record, and good cause appearing therefore;

IT IS HEREBY ORDERED that the following documents shall be added to the Clerk's Record on Appeal:

a. Defendant's Reply Brief on Appeal which was filed on or about June 30, 2008.

b. Plaintiff's exhibit 21.

IT IS FURTHER ORDERED that the hearing currently scheduled for February 2, 2009 is vacated.

DATED this 11 day of February, 2009.

Honorable Jon Shindurling
~~Magistrate~~ District Judge

NOTICE OF ENTRY

I HEREBY CERTIFY that a copy of the foregoing was on the 11 day of February, 2009, provided to every party affected thereby, as follows:

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Deputy