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IN THE SUPREME COURT OF THE STATE OF IDAHO

JANICE FREER,

Appellant/Plaintiff,

vs.

CODY FREER,

Respondent/Defendant.

Supreme Court No: 42057-2014

Bonner County Case No. CV13-0197

Appeal from the District Court of the First Judicial District
Of the State of Idaho, in and for the County of Bonner

Honorable Barbara Buchanan, Presiding

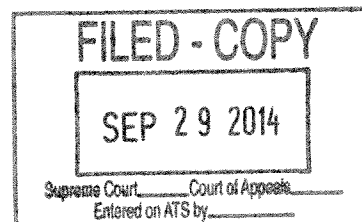
APPELLANT'S BRIEF ON APPEAL

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RESPONDENT, PRO SE



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RESPONDENT, PRO SE

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STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff/Appellant Janice K. Freer (hereinafter “Janice”) advanced funds to Defendant/Respondent Cody Freer (hereinafter “Cody”) so he could, among other things, purchase a vehicle and insurance which would assist Cody to secure employment. Janice maintains the parties had an oral agreement that Cody would repay her the money. Cody claims that Janice intended to gift him the funds at issue.

B. Proceedings

After trial to the bench, the District Court, the Honorable Barbara Buchanan presiding, found that Janice had intended to make a gift to Cody. The District Court also found that if the parties did have an oral agreement that Cody would pay Janice back, the oral agreement was unenforceable based on the statute of frauds.

C. Facts

Janice is Cody’s aunt. (Tr.8, Ln.4) Janice heard that Cody was incarcerated in Orofino, Idaho, and she started visiting him once a month starting in the fall of 2010. (Tr.8, Ln. 12) During these visits, Janice discussed with Cody lending him money upon his release to purchase a vehicle so he could obtain employment. (Tr.8, Ln. 24 – 9, Ln.6) Janice understood the agreement to be that Cody would make some kind of payment and maintain insurance on the vehicle or the vehicle would be returned. (Id) Shortly before any advances were made, Cody communicated to Janice that he also understood that the money advanced to purchase a vehicle would have to be repaid. (Tr.11, Ln.17 – 12, Ln. 8, Plaintiff’s Exhibit 2)

Based on this understanding, Janice advanced money eight separate times to Cody starting on or about April of 2011 and continuing until March of 2012 in the total amount of

\$17,628.36. (Tr.37, Ln.17, Plaintiff's Exhibit 21) The largest of the loans, \$14,000.00, was made to Cody by wire transfer on or about April 6, 2011, for Cody to purchase a truck. (Id) In addition to other advances, Janice paid for insurance on the truck that Cody failed to pay as required by her agreement with him. (Tr.21, Ln.17 – 22, Ln.3)

Cody was released from incarceration and worked at numerous jobs. (Tr.34, Ln.22 – 35, Ln.8) During the time he was released he made no payments to Janice, (Tr.34, Ln.9) and failed to maintain insurance on the truck. (Tr.21, Ln.17 – 22, Ln.3) Based on this, Janice requested that Cody sign over the title to the truck to her. (Tr.37 Ln.1, R.37-38) Cody refused, (R.22), and this lawsuit ensued.

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ISSUES ON APPEAL

- A. Did the District Court error when it found that Janice had intended to make a gift to Cody?
- B. Did the District Court error when it determined that any oral agreement between Cody and Janice was unenforceable based on the statute of frauds?
- C. Even if the oral agreement was subject to the statute of frauds, is it still enforceable based on the doctrine of part performance?
- D. Is Janice entitled to attorney's fees on appeal?

ARGUMENT

- I. **No substantial competent evidence exists that Janice intended to make a gift to Cody because no reasonable person would rely solely upon Cody's testimony at trial that Janice intended to make a gift when that testimony was inconsistent with his prior statements that show he knew the money was a loan.**

A. **Standard of Review**

A District Court's finding of fact will not be disturbed on appeal if they are supported by substantial and competent, even if conflicting, evidence and they are not clearly erroneous.

Kennedy v. Schneider, 151 Idaho 440, 442, 259 P.3d 586, 588 (2011). Evidence is substantial and competent if a reasonable trier of fact would accept it and rely on it. Lovitt v. Robideaux, 139 Idaho 322, 325, 78 P.3d 389, 392 (2003) citing *In re Williamson v. City of McCall*, 135 Idaho 452, 19 P.3d 766 (2001).

Appellate Courts give great deference to the factual finding of the District Court because, “[t]he trial court is better positioned than an appellate court to evaluate the demeanor, credibility, and testimony of the witnesses in weighing the evidence before it.” “Traditionally, to foster reliable testimony the witness has been generally required to testify: (1) under oath or affirmation, (2) in the personal presence of the trier of fact so demeanor can be observed, and (3) subject to cross-examination.” State v. Van Sickle, 120 Idaho 99, 102, 813 P.2d 910, 913 (Ct. App. 1991) citing the introductory comments to Article VIII of the Idaho Rules of Evidence.

Cody was not personally in the presence of the District Court when he testified in this matter because he testified by telephone from prison. (Tr.5, Ln.10) Because Cody was not personally in the presence of the District Court, the Court was unable to evaluate the demeanor of the witness and therefore the trial court's factual findings should not be entitled to as much deference as is normally accorded a District Court.

B. It was clearly erroneous for the District Court to find that Janice intended to make a gift because the only evidence of Janice's donative intent came from Cody's trial testimony which was inconsistent with his prior statements.

At trial, the only evidence that Janice intended to make a gift to Cody came from Cody's trial testimony. No other evidence of the gift is in the record. What is in the record are Cody's admissions that the advanced funds, including the money for the truck, was to be paid back together with his acknowledgment of the party's oral agreement. The District Court's finding that Janice intended to make a gift to Cody is clearly erroneous for the reason that it was not reasonable for the District Court to rely solely upon Cody's trial testimony to reach its conclusion in the face of his prior inconsistent statements.

The elements of a gift are (1) a donor competent to contract; (2) freedom of will of the donor; (3) the gift must be complete and nothing left undone; (4) the property must be delivered by the donor and accepted by the donee; and (5) the gift must go into immediate and absolute effect. Matter of Lewis' Estate, 97 Idaho 299, 302, 543 P.2d 852, 855 (1975). "A necessary element of an enforceable gift, be it inter vivos or causa mortis, is present donative intent, that is the giver's purpose or motive to transfer immediately to the donee dominion over the object given." Christiansen v. Rumsey, 91 Idaho 684, 686, 429 P.2d 416, 418 (1967). "Donative intent may be proven by direct evidence, including statements of donative intent, or inferences drawn from the surrounding circumstances, such as the relationship between the donor and donee." Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust, 147 Idaho 117, 126, 206 P.3d 481, 490 (2009).

The District Court did not recite which burden of proof it applied in determining Cody proved the truck was a gift. The District Court only stated it found, "...compelling evidence that the monies transferred from Janice to Cody were a gift." (R.132) Although it has never been

clearly stated, it would appear that the burden of proof in Idaho to establish a gift is a preponderance of the evidence.

Admitting that there was no consideration for the deed and contending, as she does, that it conveyed the property to her as a gift inter vivos, the defendant, Phyllis Whyte, brings herself within the rule that such gifts are not presumed and the burden is on the beneficiary to establish the gift. *Lo Presti v. Manning*, 125 Cal.App. 442, 13 P.2d 1002; 38 C.J.S., Gifts, § 65.

Where the donee stands in a fiduciary or confidential relationship to the donor the burden is increased to the extent of requiring the beneficiary to establish the gift by clear and convincing evidence.

Claunch v. Whyte, 73 Idaho 243,
248, 249 P.2d 915, 917-18 (1952)

Since there is no fiduciary relationship, then the burden of proof is a preponderance of the evidence.

Other than the fact that Janice is Cody's aunt, the only other evidence which would support a finding that Janice intended to give Cody the money to purchase a vehicle was Cody's trial testimony. Cody testified at trial:

She even at one point specifically said, 'If down the road you can pay me back, fine; if you can't or don't want to, it doesn't matter because I have the money to help you out and want to help you out. That is what family is for. (Tr.44, Ln11-15)

While I was incarcerated at Orofino Institution in Idaho, plaintiff made it known to me, as well as the money being a gift to help me get back onto my feet because she was financially in a good position to do so, she wanted to volunteer to pay for the first full year of full coverage insurance as a gift to help me with insurance so I'd have one less bill to worry about while I was out there. (Tr.47, Ln. 20 – Tr.48, Ln.1)

It was known through conversations and letters that it was a gift. Unfortunately, as I am incarcerated right now and have been this entire time through the whole process of this complaint, I haven't

had any access to any of the personal letters that the plaintiff sent to me while I was incarcerated. They're not here. (Tr.48, Ln. 5-10)

This is testimony was taken over the telephone and is not dependable or trustworthy.

Furthermore, this lawsuit was filed February 11, 2013 (R.9), and went to trial on November 8, 2013. (R.120) The point of the lawsuit was to collect money that had been lent to Cody by Janice. If Cody in fact had any kind of writing that evidenced this gift, he would have found a way to obtain it. Surely he could have arranged for it through his parents who were following the case as evidenced by their contact with the Court. (R.119) The only written evidence in this case is directly contradictory to Cody's trial testimony that he understood Janice to be making a gift.

While Cody claims he thought Janice was making a gift, his understanding even before the time of the loan was that the money had to be paid back. On March 17, 2011, Cody understood the money was to be repaid.

. . . i [sic] do want to emphasize that i hope you know your generosity and kindness is most definatly [sic] appreciated!! i [sic] never did get the impression from you [Janice] that this was something that was not to be paid back. ive [sic] assumed that it would the whole time, so no worries there, we are on the same page. (Plaintiff's Exhibit 2)

The money to purchase a vehicle was transferred less than one month later on April 6, 2011. (Plaintiff's Exhibit 21) The record is devoid of anything indicating that between March 17th and April 6th Janice's intent changed from making a loan to making a gift.

At trial, Cody attempted to explain away his written statement that the loan was to be repaid. "With no proof any money that was sent and without the plaintiff's side of the conversation, who is to say what I'm even referring to in the third line down where I write in the e-mail, 'I never did get the impression from you that this was something that was not be paid

back.” (Tr.45, Ln25 – Tr. 46, Ln.4) However, the very next sentence clearly indicates he was referring to paying the money back used to purchase a truck, “as [sic] far as price goes I definitely understand that too. I was only looking at rigs in the ten thousand range...”

(Plaintiff’s Exhibit 2)

Furthermore, Cody actually admitted that he and Janice had an oral agreement regarding the money Janice had lent to him. On May 31, 2012, Cody wrote Janice and asked for more money. (Plaintiff’s Exhibit 19) On June 10, 2012, Janice wrote back and declined to advance Cody any further money. (Plaintiff’s Exhibit 20) Janice then wrote Cody on Wednesday, October 24th which requested Cody to sign over the title of the truck to her because he was not making payments to Janice and not maintaining vehicle insurance. (Tr.37, Ln.3, R.37) In response to Janice’s request, Cody replied on November 3, 2012, that he was not willing to turn over the truck, but not because he believed it to be a gift. (Plaintiff’s Exhibit 22)

I spoke with my attorney about the matter, just for an opinion, not in regards to legalities FYI. She advised me that not only is my release dependant on having reliable insured transportation. But it is also accounted for in my P.S.R. (Pre-Sentence Report). My current and previous financial background is being thoroughly investigated and any large transaction over a certain \$ amount can have possible negative connotations from the P.S.R. officer in regards to my sentencing recommendations. All relevant conduct it accounted for and scrutinized. With transportation & a job, both of which I have waiting for me, my attorney is confident she can get me released this month. . . I am not going to stay locked up longer because I don't have my truck. I realize that you might be upset with me because of not being in the position to send you any money while I was out and also because of the scratch on the passenger side. Believe me when I say that both are equally if not more depressing to me as well! **I don't like being in debt to anyone.**

Then later in that same letter from Cody to Janice.

The sooner I am out and working the sooner I can and will be sending you monthly payments. Perhaps we should put some ideas to paper in regards to a contract. That way we have more 'in stone' understanding as to what is expected, opposed to our own understanding of the oral contract.

These letters clearly show Cody knew the loaned money was not a gift and was expected to pay Janice back. Cody specifically addresses making payments, being in debt and having an oral contract between him and Janice. If, in fact, Cody actually thought the money was a gift, then that fact would have been the main topic of Cody's response. The money was not a gift; it was a gracious loan. At trial, Janice described the oral agreement between herself and Cody.

And we had an oral agreement as far as the truck is concerned and the money that the truck was to have insurance on it at all times and Cody was to make a payment every month, be it small. But he was to make a payment every month and that if either one of those did not happen, that the truck was to be returned to me so. . . (Tr.9, Ln 1-6)

Janice's behavior was always consistent with this agreement. She has always required insurance on the truck and actually paid for it when Cody did not. In her first correspondence in the record where the truck is mentioned, Plaintiff's Exhibit 20, Janice expresses her concerns about the lack of insurance on the truck.

I have asked you on several occasions about insurance on the truck. Each time you did not say with certainty if the truck is insured. So, having said that, I would ask that you provide me with the name and phone number of your agent. Or, you can send me a copy of your insurance card. I would prefer name and number. As I have said to you in numerous conversations the truck must have insurance. You cannot afford and I cannot afford for the truck to be uninsured. (Plaintiff's Exhibit 20, page 4)

If Janice thought she had made a gift, she may have provided this advice anyway as having insurance is legally required and a good idea to protect your asset. However, she says that she wants insurance to protect her interest in the truck. Everything Janice did was consistent with an

understanding that she would be repaid or the truck would be turned over to her. Unfortunately, she did not think to note herself as a lien holder on the title and now Cody is taking advantage of that fact.

The only evidence in this case that Janice intended to make a gift was Cody's testimony which the District Court was unable to watch him give. All the other evidence points to a finding that the parties had an oral agreement Cody would repay Janice as he could. The District Court's finding that Janice intended to gift the money to Cody is clearly erroneous because no reasonable person would have accepted Cody's testimony over all the other evidence in the case to the contrary. The District Court's finding of gift is not supported by substantial, competent evidence and should be vacated and the matter remanded to the District Court for further proceedings.

II. The oral agreement is not within the statute of frauds because it was of an uncertain duration and could have been performed in a year.

The District Court held that even if an oral agreement between Janice and Cody existed, it was unenforceable based on Idaho Code §9-505(1) which provides that, “[a]n agreement that by its terms is not to be performed within a year from the making thereof,” must be in writing. This was error because the contract was of uncertain duration and could have been performed in one (1) year.

Oral contracts of uncertain duration are not subject to the statute of frauds set forth in I.C. 9-505(1). “Contracts of uncertain duration are simply excluded,…” Mackay v. Four Rivers Packing Co., 145 Idaho 408, 411, 179 P.3d 1064, 1067 (2008) citing Restatement (Second) of Contracts §130, Cmt a (1981).

Janice described the oral agreement between herself and Cody.

And we had an oral agreement as far as the truck is concerned and the money that the truck was to have insurance on it at all times and Cody was to make a payment every month, be it small. But he was to make a payment every month and that if either one of those did not happen, that the truck was to be returned to me so...¹

The agreement contained no time frame for the repayment of the loans. Idaho Code §9-505(1) does not apply.

The District Court ruled that the contract could not be performed within one (1) year because,

Based on these facts, and upon Janice's knowledge of Cody's sporadic work history, the Court finds that it is not a reasonable interpretation of the alleged contract's terms to believe that Cody was required to fully perform the contract by both securing gainful employment and repaying the entire loan amount of \$17,628.36 in the seven business days between Sunday, March 25, 2012, and Tuesday, April 3, 2012.” (R.166)

The District Court held that since Janice could not reasonably expect the money to be repaid within the year, then the duration of the contract is more than one (1) year. This is error because the expectations of the parties are not considered in determining if a contract can be performed within one (1) year, only the actual terms of the agreement and this agreement had no duration.

A promise which is not likely to be performed within a year, and which in fact is not performed within a year, is not within the Statute, if at the time the contract is made there is a possibility in law and in fact that full performance such as the parties intended may be completed before the expiration of a year. *Id.* The question is not what the probable, or expected, or actual, performance of the contract was, but whether the contract, according to the reasonable interpretation of its terms, required that it could not be performed within the year.

¹ Tr.9, ln 1-4.

Mackay v. Four Rivers Packing Co., 145 Idaho 408, 411, 179 P.3d 1064, 1067 (2008)

The contract here contained no duration so no term existed which reasonably could be interpreted to require that the contract could not be performed within one (1) year. This is why the contracts of uncertain duration are not subject to Idaho Code §9-505(1) – there is no duration term to evaluate. While it may not have been reasonable for Janice to expect to be repaid and even though it was unlikely that Cody could repay the money within one (1) year, it still could have happened.

The money was advanced to Cody from April 2011 to March 2012. Nothing would have prevented Cody from repaying the entire loan within one (1) year, however unlikely that might have been to occur given Cody's circumstances, so the agreement is not within the statute of frauds contained in Idaho Code §9-505(1). This Court should reverse the District Court's determination that the oral contract between Janice and Cody was unenforceable because it was subject to the statute of frauds.

III. Even if the parties oral contract is subject to the statute of frauds, Janice paid and Cody accepted the money which is part performance that would take the contract out of the statute of frauds.

No dispute exists that Janice paid Cody money and Cody accepted that money. Janice did so based on Cody's oral promise that he would repay her when he could. It would be inequitable for Cody to escape his half of the bargain after Janice performed hers.

The doctrine of part performance is an exception to the statute of frauds.

The equitable principle by which a failure to comply with the statute of frauds is overcome by a party's execution, in reliance on an opposing party's oral promise, of an oral contract's requirements."); 73 Am.Jur.2d Statute of Frauds § 313 ("The basis of the doctrine of part performance is that it would be a fraud upon

the plaintiff if the defendant were permitted to escape performance of his or her part of the oral agreement after permitting the plaintiff to perform in reliance upon the agreement.”).

Ogden v. Griffith, 149 Idaho 489, 493, 236 P.3d 1249, 1253 (2010)

In this case, Cody orally agreed that he would pay Janice back when he could. Based on that promise, Janice advanced him money. It would be inequitable to allow Cody to keep the benefits of the very contract he seeks to invalidate based on the statute of frauds.

If this Court determines that the statute of frauds does apply, it should rule that the oral agreement is enforceable based on the doctrine of part performance.

IV. Freer is entitled to an award of attorney’s fees on Appeal pursuant to Idaho Code §12-120.

Idaho Code §12-120(1) provides for an award of attorney’s fees where the amount pleaded is \$35,000 or less. For the statute to apply, the amount plead must specifically state that it is below the statutory minimum. Cox v. Mueller, 125 Idaho 734, 737, 874 P.2d 545, 548 (1994). The amount plead in this case is \$17,628.36. (R.17)

In addition, for the statute to apply, Janice was required to provide Cody notice of the claim at least ten (10) days prior to filing it. “The obvious purpose of I.C. §12–120(1) is to discourage litigation, since the statute requires the defendant to be notified of the plaintiff’s claim against defendant for at least ten days before a complaint can even be filed.” Cox v. Mueller, 125 Idaho 734, 737, 874 P.2d 545, 548 (1994).

On Wednesday, October 24th, presumably 2012², Janice demanded that Cody return the truck so she could sell it.

² The date states Wednesday, October 24, which calculates to be the year 2012.

I will need you to sign off on the title to the truck. **I will need to sell it.** I am so very sorry to have to write this. I saw the truck yesterday and I was quite surprised to see the scratches & damage. It was my understanding the truck was insured. For sure I know until the end of April. So, I don't know why you didn't file a claim and get it fixed. I am sure I will be able to sell it the way it is, but I may have to get it fixed. . . . I would ask that you have either your mom or dad bring it up to you and sign off. . . . **Then if you would just have them hang onto it until I can get the truck.** Again, I am so very sorry about this. Perhaps I may be in a position to help you again when you are released. (R.37-38)

Cody refused Janis' request and this suit ensued.

I am so very sorry to say that I am not going to be able to sign over the title. . . (Plaintiff's Exhibit 22)

Janice is entitled to attorney's fees on appeal pursuant to Idaho Code §12-120(1).

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CONCLUSION

Janice Freer endeavored to assist her nephew to obtain employment when he was released from prison by, amongst other things, providing him funds to purchase a new truck. All the evidence in this case indicates that Cody understood the funds were to be repaid, other than Cody's personal trial testimony. It is not reasonable to conclude that Janice intended to make a gift based solely on Cody's unsubstantiated trial testimony. Cody's trial testimony was inconsistent with his prior statements. It was clearly erroneous to find that Janice intended to make a gift to Cody.

Janice and Cody had an oral agreement that Cody would repay Janice the money she was lending him. That oral agreement is not subject to the statute of frauds and even if it was, it is still enforceable because Janice partially performed the agreement by lending the money and Cody accepted it. It would be inequitable for Cody to avoid his obligation to repay the money after having received the benefit of it.

DATED this 25th day of September, 2014.



ARTHUR M. BISTLINE
Attorney for Appellant/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 2014, I served a true and correct copy of the following APPELLANT’S BRIEF by the method indicated below, and addressed to the following:

Cody J. Freer
6640 Rude Street
Coeur d’Alene, ID 83815

- Regular mail
- Certified mail
- Overnight mail
- Facsimile
- Interoffice Mail
- Hand Delivered


JENNIFER JENKINS