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Freer v. Freer Respondent's Brief 2 Dckt. 42057

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JANICE K. FREER

Appellant/Plaintiff,

vs.

CODY J. 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

RESPONDENTS BRIEF ON APPEAL

Cody Freer
6640 Rude St.
Coeur D' Alene, ID 83815

RESPONDENT, PRO SE

Arthur Bistline
Bistline Law, PLLC
1423 N, Government Way
Coeur D' Alene, ID 83814

ATTORNEY FOR APPELLANT

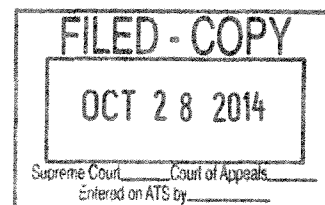


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STATEMENT OF CASE

A. Nature of Case

Plaintiff/Appellant Janice K. Freer (hereinafter "Janice") gifted monies on numerous different occasions to Defendant/Respondent Cody Freer (hereinafter "Cody") in order for him to purchase a vehicle for transportation to and from work. At no point was there ever any such kind of an oral or written agreement between parties for recompense of the gifted amounts, therefore Cody maintains that no repayment was to be made. Janice alleges that all monies were to be repaid and that Cody agreed to repay such amounts.

B. Proceedings

After trial to the bench, the District court, The Honorable Barbara Buchanan presiding, found that Janice had indeed intended to make a gift to Cody. The District court also found that if there ever would have been any type of oral agreement for Cody to pay Janice back, The agreement would have been unenforceable based on the statute of frauds, Idaho Code §9-505(1).

C. Facts

Janice is Cody's aunt. (Tr.8, Ln.4) Janice heard that Cody was incarcerated in Orofino, Idaho, and started coming to visit Cody once a month or more starting in the fall of 2010. (Tr.8, Ln.12) During these visits Janice made it well known to Cody that she was in a financially well off state and that she wanted to help Cody get back on his feet upon

release from prison. Janice further discussed gifting monies to Cody to purchase a vehicle as well as pay for the first full year of insurance on the vehicle. During these discussions with Cody, Janice made it very clear that if Cody was not in a position to repay monies or if Cody did not wish to repay monies that it was not an issue because more importantly Janice only wished to help out her nephew. At no point did Cody ever make any direct or indirect acknowledgement that any gifted monies were to be repaid or that any kind of oral agreement ever existed.

Based on this understanding, Janice went forward with gifting monies to Cody on eight separate occasions starting on April 4, 2011 and continuing until March 24, 2012 for a total sum of \$17,628.36. The first check was written to Cody on April 4, 2011 and the final wire transfer to Cody was on March 24, 2012-a period of 355 days. During this time period, Janice wrote a check to Cody, wired him funds on three separate occasions (including a \$14,000.00 wire transfer), and sent him money via money order. Janice also used her American Express and Visa cards to pay for other expenses related to the truck including insurance which Janice insisted on paying so Cody had one less thing to worry about. (Plaintiff exhibit No.21)

Shortly after the final wire transfer from Janice to Cody, Janice mailed a handwritten letter to Cody Asking for Cody to sign the title of his truck over to her. (Tr.37 Ln.1, R.37-38) Cody responded by letter stating that he would not be able to comply to Janice's request and that she should perhaps put some ideas down on paper in the form of a contract so that Cody and Janice could be on the same page with what was now expected. Janice refused and this lawsuit ensued.

ISSUES ON APPEAL

- A. The District Court did not error when finding that Janice did indeed gift monies to Cody.**
- B. The District Court did not error when determining that if any oral agreement did exist between Janice and Cody it was unenforceable based on the statute of frauds.**
- C. There was no partial performance by Cody to support claims of any kind of oral agreement by Janice.**
- D. Janice is not entitled to any attorney's fees incurred by her in this matter.**

ARGUMENT

- I. **No substantial competent evidence exists that Janice loaned monies to Cody with any expectation for recompense because no reasonable person would rely upon Janice's personal journal entries, court testimony, or blatantly obvious spite and malice as sufficient evidence to conclude otherwise.**

A. **Standard of Review**

The district courts finding of fact should not be disturbed on appeal when it is supported by substantial and competent, non-conflicting, evidence that is clearly not 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.

Although in a feeble attempt Janice filed the original complaint against Cody while Cody was incarcerated and had no access whatsoever to any legal documentation or aid, the District Court still found sufficient, non-conflicting, and competent evidence to conclude that Janice did intend to gift monies to Cody and that no enforceable oral or written agreement ever existed. Even though Cody was never personally in the presence of the District Court when he testified in this matter, the court was still able to correctly and justly evaluate his testimony and confirm the factual findings of the case.

Janice contends that she and Cody had an oral agreement for recompense of gifted monies and that Cody failed to comply with this agreement. Cody maintains that no such agreement ever existed and that even if such an agreement ever even did exist that it is void under Idaho Code §9-505(1). Idaho Code §9-505(1) clearly states that;

Agreements are to be in writing. In the following case 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:

1. An agreement that by its terms is not to be performed within a year from the making thereof.

B. It was clearly fair and just for the District Court to find that Janice did intend to make a gift to Cody because no sufficient evidence was presented to prove otherwise and Cody's trial testimony was consistent with his prior statements.

At trial, Janice was unable to provide sufficient evidence to prove that monies gifted to Cody were anything but just that, a gift. **Under Idaho law, a "gift" is defined to mean "a voluntary transfer of property by one to another without consideration or compensation therefor."** *Stanger v. Stanger*, 98 Idaho 725, 728, 571 P.2d 1126, 1129 (1977). The only evidence provided by Janice to support her claims of the monies being a loan came from her personal journal entries and letters that she had written to Cody. The court has the responsibility to weigh both sides of an argument equally and make a just decision based on competent evidence provided. The court exercised this duty with precision and integrity when making its decision to file judgment in favor of Cody that all monies were indeed a gift from Janice. **Delivery is accomplished when the grantor "relinquish[es] all present and future dominion over the property."** *Boston Ins. Co. v. Beckett*, 91 Idaho 220, 222, 419 P.2d 475, 477 (1966), and *Williams*, 126 Idaho at 443, 885 P.2d at 1159

In Zimmerman v. Fawkes, 70 Idaho 389, 219 P.2d 951 (1950), the Idaho Supreme Court stated the essential elements of a 'gift inter vivos' are: (1) A donor competent to contract; (2) freedom of will of 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;** (5) the gift must go into absolute and immediate effect. The Idaho Supreme Court went on to say in Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust, 147 Idaho 117, 206 P.3d 481 (2009), that under Idaho law a 'gift' is defined to mean **"a voluntary transfer of property or money by one to another without consideration or compensation therefor."** And that "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 donor and donee." 126, 206 P.3d 481, 490 (2009).

In this case Janice voluntarily sent a sum of \$17,628.36 to Cody over a period of 355 days without any consideration or compensation from Cody, as she herself stated in her June 10, 2012, letter to Cody. *See plaintiff's Exhibit No. 20*, at 3, *supra*. Over that one year period, Janice continued to send money directly to Cody, or as she alleges, make truck inspection and insurance payments on Cody's behalf, without receiving any payment or express written acknowledgement of any debt from Cody. Once again, Idaho Code §9-505(1) clearly states that; **Agreements are to be in writing. In the following case 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. The law is very clear and concise with this point.

From the date that this lawsuit was filed on February 11, 2013 until the date it went to trial on November 8, 2013, Cody was incarcerated in Bonner County Jail, Sandpoint Idaho, Kootenai County Jail, Coeur D' Alene Idaho, Nez Perce County Jail, Lewiston Idaho, Clearwater County Jail, Orofino Idaho, Idaho State Correctional Institution, Boise Idaho, Ada County Jail, Boise Idaho, and finally Federal Correctional Institution Sheridan, Sheridan Oregon. During this time Cody had absolutely no access to any sort of legal resource or any of the personal letters or emails written to him by Janice where she directly states that she was intending to make a monetary gift to Cody. Not only was there no access to a legal library regarding civil law for Idaho, but during all listed transports, Cody was not allowed to bring along **any** paperwork with him to the next housing facility. Janice argues that during the time between when the complaint was filed until trial that Cody could have easily obtained this evidence, however being incarcerated in county jails, state prison, and federal prison, such a thing is literally impossible.

Janice filed into evidence an email from Cody to Janice, dated March 17, 2011 in which Cody wrote: ...I do want to emphasize that I hope you know your generosity and kindness is most definatly [sic] appreciated!! I never did get the impression from you that this was something that was not to be paid back. I've assumed that it would be that whole time, so no worries there, we are on the same page. As far as price goes I

definitely [sic] understand that too. I was only looking at rigs in the ten thousand range but started drifting a bit after seeing some really nice ones that caught my eye..."

Plaintiff's Exhibit No. 2. This letter is not only inapplicable but insufficient evidence of an alleged loan from Janice to Cody. The email was only referring to Janice's potential purchase of a vehicle for Cody. In the letter Cody does not expressly acknowledge any specific debt, nor could he because no vehicle had even been purchased yet and Janice had not yet sent Cody any monies either.

Janice also submitted several journal entries in which she wrote that Cody "will pay back out of 1st paycheck" (*Plaintiff's Exhibit No. 3*, dated 4/4/11) and "will pay back when he gets a job" (*Plaintiff's Exhibit No. 5* dated 4/5/11) and "says he will pay back everything" (*Plaintiff's Exhibit No. 10* dated 11/9/11) and "no worries will pay back" (*Plaintiff's Exhibit No. 14* dated 1/9/12). These journal entries are insufficient evidence of any type of loan because despite the one sided journal entries, Cody in fact never made any payments to Janice over the 355 day time period yet Janice continued to send Cody money. The clear inferences that can be drawn from Janice continuing to send Cody money without any recompense, as well as the familial relationship between Janice and Cody are more than sufficient evidence to establish Janice's donative intent and the fact that this was indeed a gift.

Throughout the entire process Cody never once expressly acknowledged that any monies sent to him by Janice was a loan or that any of it was to be repaid. Janice wrote a personal letter to Cody on October 24, 2012 requesting that Cody sign over the

title of his truck to Janice because she claims that the vehicle did not have insurance on it and that Cody had not sent Janice any payment for the money that she had sent him. On November 3, 2012 Cody responded with a personal letter to Janice (*Plaintiff's Exhibit No. 22*).

I spoke with my attorney about this matter, just for an opinion, not in regards to legalities FYI. She advised me that not only in my release dependent on having reliable insured transportation, but it is also accounted for in my P.S.R. My current and previous financial background is thoroughly investigated and any large transactions over a certain dollar amount can have possible negative connotations from the P.S.R. officer in regards to my sentencing recommendation. All relevant conduct is accounted for and scrutinized. With transportation and a job, both of which I have waiting for me, my attorney is confident that she will be able to 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 the 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 a more 'in stone' understanding as to what is expected, opposed to our own understanding.

This letter is not sufficient evidence to show that monies sent to Cody by Janice were anything more than gifts. In it Cody states that he doesn't like to be in debt to anyone but he does not directly express being in any kind of debt to Janice. Cody does at one point say that the sooner he is out the sooner he can be sending payments to Janice, but he does not directly confirm what these payments would be for or how much he would be intending to pay. Furthermore, Cody offers to put together a written contract with Janice so that there is a more 'in stone' understanding of what is

expected. Janice clearly rejected this idea by filing lawsuit and that would have been her opportunity to have clear and substantiated evidence of an alleged loan which would require repayment. Under Idaho law 'If there be no express promise, but a promise is to be raised by implication of law, from the acknowledgement of the party, **such acknowledgement ought to contain an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay...**' Mahas v. Kasiska, 47 Idaho 179, 186, 276 P.315, 317 (1928) (citation omitted).

Janice's behavior has been inconsistent throughout this entire process. Whereas at first she was more than willing to help Cody without any express consent of repayment and with no acknowledgement of there being any form of a debt, she later developed givers remorse and rashly decided to file lawsuit against her nephew Cody while he was incarcerated and had no way to properly or justly defend or represent himself. The District Courts decision to rule in Cody's favor is clearly a fine example of correct, just and fair execution of the Courts responsibility.

II. If an oral agreement existed it would fall under the statute of frauds because of there not being any written acknowledgement of a debt and due to the fact that it could not have been performed within one year.

At trial Janice argued that the alleged oral agreement in this case does not fall under the Statute of Frauds because she claims that it could have been performed within one year. At the hearing, Janice's counsel asserted that because the final transfer of monies occurred 355 days into the year time period, Cody had ten days (i.e. the 365th day) to repay all alleged loans. Janice's attorney opined that Cody could have won the lottery or borrowed money from someone else to repay alleged loans, and therefore,

his full performance within one year was not impossible, thus making the Statute of Frauds inapplicable. Not only would a reasonable person not rely on this outrageous claim as sufficient evidence to rule in Janice's favor, but Idaho's Statute of Frauds also states:

Idaho's Statute of Frauds provision is found in Idaho Code §9-505. Section 9-505 provides that "an agreement that by its terms is not to be performed within a year from the making thereof" is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. I.C. § 9-505. Evidence of such agreement cannot be received without the writing or secondary evidence of its contents. *Id.* According to the restatement (Second) of Contracts, courts construe this statute narrowly. Restatement (Second) of contracts § 130, cmt. A (1981). Under the prevailing interpretation, the enforceability of a contract under the one year provision does not turn on the actual course of subsequent events, nor on the expectations of the parties as to the probabilities. *Id.* Contracts of uncertain duration are simply excluded, and the provision only covers those contracts whose performance cannot possibly be completed within one year. *Id.*

Leading treatises follow this general rule. It is well settled that the oral contracts invalidated by the Statute because they are not to be performed within a year include only those which *cannot* be performed within that time period. 9 Samuel Williston, A Treatise on the Law of Contracts § 24:3 (West 1999). **A promise which is not likely to be performed within a year, and which is in fact 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 not be completed before the expiration of the 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 time period. *Id.* Further a promise which is performable at or until the happening of any specified contingency which may or may not occur within one year is not within the Statute.**

Idaho cases are in accord. A contract which is capable of being performed and might have been fully performed and terminated within a year does not fall within the statute. *Darknell v. Coeur d' Alene & St. Joe Transp. Co.*, 18 Idaho 61, 69 108 P.536, 539 (1910) (contract was to be terminated on sale of plaintiff's stock in the corp., which sale might have taken place the following day or any day during the year). Where the termination of a contract is dependent upon the happening of a contingency which may occur within a year, although it may not

happen until the expiration of a year, the contract is not within the Statute, since it may be performed within a year. **Where contract does not contain a definite term of duration, and was subject to several contingencies which could have occurred within one year, the Statute of Frauds did not bar enforcement of the contract.** *Gen. Auto Parts Co. Inc. v. Genuine Parts Co.*, 132 Idaho 849, 857, 979 P.2d 1207, 1215 (1999).

In this case, the alleged oral agreement, as pled in complaint, was that: "Each of the said loans was made verbally with the understanding that it would be repaid in a timely manner commencing as soon as Cody secured employment. The total of all loans made by Janice to Cody was \$17,628.36." Therefore, the alleged oral loan agreement was subject to the contingency of Cody obtaining employment. Because Janice pled in her Complaint and offered proof at trial that her understanding of the alleged oral agreement was that the loans would be repaid when Cody obtained employment, she cannot now, after the judgment, attempt to alter the terms of the agreement to remove the contingency of employment and claim that alleged loans could have been repaid by lottery winnings, other loans, or some other unknown means.

Janice's final wire transfer was on Saturday March 24, 2012, which was 355 days after she wrote the first check to Cody on April 4, 2011. Therefore to fall outside the statute of frauds, there must be a possibility in law and fact that full performance such as the parties intended (which is repayment of the entire \$17,628.36 to Janice) could be completed before the expiration of one year on Tuesday April 3, 2012, upon the happening of the specified contingency of Cody obtaining gainful employment. Based on these facts, it is not reasonable interpretation of the alleged oral contract's terms to believe that Cody was required to fully perform the contract by both securing gainful

employment and repaying the entire sum of \$17,628.36 in the seven business days between Sunday March 25, 2012 and Tuesday April 3, 2012. Such an expectation is not only outrageous but duly unjust as well. The District Court ruled properly on this case by concluding that there was no enforceable contract oral or otherwise between Janice and Cody and also by concluding that simply by accepting Janice's monetary gift is not sufficient compelling evidence to suggest that there was partial performance by Cody.

Idaho supreme court under Idaho Code §9-505 specifically states that an alleged agreement to guaranty the debt of one to another "is invalid, unless the same or some note of memorandum thereof, be in writing and subscribed by the party charged, or by his agent. **Failure to comply with the statute of frauds renders any oral agreement unenforceable both in an action at law for damages and in a suit in equity for specific performance.**" Even if there were sufficient facts to prove the oral agreement and it was proved, it is still unenforceable if there is not a sufficient writing to comply with the statute of frauds. "In order to render an oral contract falling within the scope of the statute of frauds enforceable by action, the memorandum thereof must state the contract with such certainty that its essentials can be known from the memorandum itself, or by a reference contained in it to some other writing, without recourse to parol proof to supply them, otherwise it cannot be enforced at law or in equity.

Hoffman v. S V Co. Inc., 102 Idaho 187, 189, 628 P.2d 218, 220 (1980).

III. **Janice is not entitled to 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 \$35,000.00 or less. For the statute to apply, the amount plead must specifically state that it is below the statutory minimum. In Janice's appellants brief she claims that the amount plead for attorney's fees is \$17,628.36 which is also the exact same amount of money plead for in the complaint for monies allegedly loaned. So the grand total plead for in this case is \$35,256.72 which clearly exceeds the statutory minimum.

In addition for the statute to apply, Janice was required to provide Cody notice of the claim at least ten 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 24, 2012, Janice requested that Cody sign over the title of his truck so that Janice could sell it for profit to herself.

"...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 and the 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 would ask that you have either your Mom or Dad bring it (the title) up to you and sign off...Then if you would just have them hang on to it until I can get the truck. Again I am so very sorry about this. Perhaps I may be in the position to help you again when you are released. (R.37-38)

As Janice stated in her letter to Cody she wanted to sell the vehicle for personal gain due to the fact that she developed givers remorse and was now regretting the

position she willing put herself in. Janice re-affirms this inference by clearly stating that “Perhaps I may be in the position to **help** you again in the future.” It is blatantly obvious that Janice intended to gift these monies instead of loan them as she now alleges. Furthermore, this letter from Janice is not sufficient notification of an ensuing lawsuit should Cody not simply sign over his vehicle to her. I.C. §12-120(1) clearly states that for the statute to apply Cody would have had to have at least ten days’ notice of an ensuing lawsuit in order for Janice to be entitled to any recompense for her decision to file claim. Due to this not being sufficient or compelling evidence of a proper notice, Janice is not entitled to attorney’s fees on appeal pursuant to I.C. §12-120(1).

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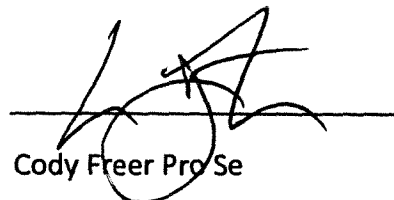
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Conclusion

Janice Freer in an attempt to be a gracious and loving aunt to Cody Freer, gifted him monies following his release from prison in 2011. At no point was there ever any acknowledgement by Cody that any of the monies were to be repaid and no sufficient evidence was ever presented in this case to show express intent to repay any of said gifts. It is not reasonable for Janice to now, out of a sense of givers remorse, claim that all gifts were in fact loans. The District Court clearly made a fair and just decision in concluding that these monies were in fact gifts.

Janice any Cody never had an oral or written agreement for repayment of any monies that Janice gifted to Cody. Even if there was to have been an agreement it would be null and void under the Idaho Statute of Frauds and therefore unenforceable. Janice has failed to provide sufficient and compelling evidence to support her allegations that there was to be repayment of monies gifted to Cody. It would not only be unjust but also inequitable for Janice to now receive judgment in her favor when this is clearly a cut and dry case of spite and malice.

DATED this 24th day of October, 2014.


Cody Freer Pro Se
Respondent/Defendant

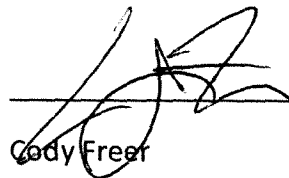
CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2014, a true and correct copy of the following RESPONDENT'S BRIEF was served to the following addressed individuals listed below, by the method listed below.

Arthur Bistline
Bistline Law, PLLC
1423 N, Government Way
Coeur D' Alene, ID 83814

- Regular Mail
- Certified Mail
- Overnight Mail
- Facsimile
- Interoffice Mail
- Hand delivered

Idaho Court of Appeals
P.O. Box 83720
Boise, ID 83720-0101



Gedy Freer