11-25-2011

Garrett v. Garrett Clerk's Record v. 2 Dckt. 38971

Vol 2 of 3

(VOLUME 2)

LAW CLERK

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

JACK L. GARRETT,
an individual,

Plaintiff-Counterdefendant-Appellant,

-vs-

THELMA V. GARRETT,
an individual,

Defendant-Counterclaimant-Respondent.

Appealed from the District of the Third Judicial District for the State of Idaho, in and for Canyon County

Honorable GREGORY M. CULET, District Judge

Rebecca A. Rainey
RAINEY LAW OFFICE
910 W. Main St., Ste. 258
Boise, Idaho 83702

Attorney for Appellant

Christ T. Troupis
TROUPIS LAW OFFICE
P. O. Box 2408
Eagle, Idaho 83616

Attorney for Respondent

38971

IN THE SUPREME COURT OF THE

STATE OF IDAHO

JACK L. GARRETT, an individual, Plaintiff-Counterdefendant-Appellant, -vs- THELMA V. GARRETT, an individual, Defendant-Counterclaimant-Respondent.	)	Supreme Court No. 38971-2011

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE GREGORY M. CULET, Presiding

Rebecca A. Rainey, RAINEY LAW OFFICE, 910 W. Main St., Ste. 258,
Boise, Idaho 83702

Attorney for Appellant

Christ T. Troupis, TROUPIS LAW OFFICE, P. O. Box 2408,
Eagle, Idaho 83616

Attorney for Respondent

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Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR CANYON COUNTY

JACK L. GARRETT,	**Case No: CV OC 09-8763-C**
Plaintiff,	**DEFENDANT/COUNTERCLAIMANT'S MOTION FOR SUMMARY JUDGMENT**
vs.	
THELMA V. GARRETT, An individual,	
Defendant.	

COMES NOW Defendant/Counterclaimant THELMA V. GARRETT, by and through her attorney of record, and moves this Court, pursuant to Rule 56 of the Idaho Rules of Civil Procedure, for entry of an order of summary judgment as follows:

1. Declaring that the quitclaim deed from Alva Garrett to Jack L. Garrett with respect to the real property that is the subject of this action is void as a matter of law because the real property was community real estate and Thelma V. Garrett did not join in executing the deed by which it was conveyed in violation of I.C. §32-912.

2. Declaring that the quitclaim deed from Alva Garrett to Jack L. Garrett was the product of undue influence and therefore did not convey an ownership interest in the real property that is the subject of this action.

3. Declaring that the quitclaim deed from Alva Garrett to Jack L. Garrett with respect to the real property that is the subject of this action did not convey an ownership interest in the real property because it was an incomplete inter vivos gift.

4. Declaring that the quitclaim deed from Alva Garrett to Jack L. Garrett with respect to the real property that is the subject of this action did not convey an ownership interest in the real property because it was a purported testamentary gift that was never completed during the decedent's life, and breached the contract for wills between Alva Garrett and Thelma V. Garrett.

5. Quieting title in the real property in Thelma V. Garrett as against Jack L. Garrett.

This motion is supported by the pleadings on file in this matter, the Memorandum in Support of Thelma V. Garrett's Motion for Summary Judgment, and the Affidavit of Christ T. Troupis filed concurrently herewith.

Defendant/Counterclaimant requests oral argument on this motion.

DATED: This 18th day of May, 2010.

Christ T. Troupis
Attorney for Defendant/Counterclaimant
Thelma V. Garrett

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of May, 2010, I caused to be served a true and correct copy of the foregoing Defendant/Counterclaimant's Motion for Summary Judgment by U.S. Mail, first class, postage prepaid, addressed to the following:

Nancy Jo Garrett
Rebecca A. Rainey
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
101 S. Capitol Blvd, 10th Floor
P.O. Box 829
Boise, Idaho 83701

Christ T. Troupis

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Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR CANYON COUNTY

JACK L. GARRETT,	**Case No: CV OC 09-8763-C**
Plaintiff,	**AFFIDAVIT OF CHRIST TROUPIS IN SUPPORT OF DEFENDANT/ COUNTERCLAIMANT'S MOTION FOR SUMMARY JUDGMENT**
vs.	
THELMA V. GARRETT, An individual,	
Defendant.	

State of Idaho)
) ss.
County of Ada)

Christ T. Troupis, being first duly sworn, deposes and states:

1. I am the attorney for the Defendant/Counterclaimant Thelma V. Garrett in this lawsuit. Each of the matters set forth herein are known to me of my own personal knowledge and if sworn as a witness in this matter, I could testify competently thereto. This Affidavit is submitted in support of Defendant/Counterclaimant's Motion for Summary Judgment.

2. Attached hereto as Exhibit A is a true and accurate copy of the deposition of Thelma V. Garrett, taken on May 5, 2010.

3. Attached hereto as Exhibit B is a true and accurate copy of the deposition of Jack L. Garret, taken on May 5, 2010.

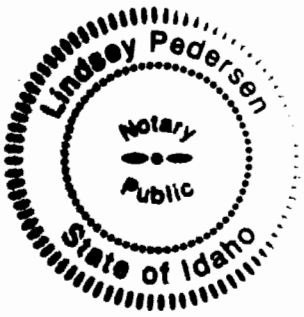
FURTHER, AFFIANT SAYETH NOT.

Dated: May 18, 2010

Christ T. Troupis

State of Idaho)
) ss.
County of Ada)

Subscribed and sworn to before me, a Notary Public in and for the State of Idaho and County of Ada on this 18th day of May, 2010.



Notary Public
My commission expires: 11-17-15

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of May, 2010, I caused to be served a true and correct copy of the foregoing Affidavit of Christ T. Troupis in Support of Defendant/Counterclaimant's Motion for Summary Judgment by hand delivery to the following:

Nancy Jo Garrett
Rebecca A. Rainey
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
101 S. Capitol Blvd, 10th Floor
P.O. Box 829
Boise, Idaho 83701

Christ T. Troupis

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JACK L. GARRETT,	)	
Plaintiff,	)	Case No. CV OC 09-8763-C
vs.	)	
THELMA V. GARRETT,	)	
Defendant.	)	
	)	

DEPOSITION OF THELMA V. GARRETT

MAY 5, 2010

REPORTED BY:

MARIA D. GLODOWSKI, CSR No. 725, RPR

Notary Public

Exhibit A

THE DEPOSITION OF THELMA V. GARRETT, was taken on behalf of the Plaintiff at Troupis Law Office, P.A., 1299 East Iron Eagle, Suite 130, Eagle, Idaho, commencing at 2:25 p.m. on Wednesday, May 5, 2010, before Maria D. Glodowski, Certified Shorthand Reporter and Notary Public within and for the State of Idaho, in the above-entitled matter.

APPEARANCES:

For Plaintiff: Moffatt, Thomas, Garrett, Rock & Fields, Chartered
BY: Rebecca A. Rainey
101 South Capitol Blvd.
10th Floor
Boise, Idaho 83701

For Defendant: Troupis Law Office, P.A.
BY: Christ T. Troupis
1299 East Iron Eagle
Suite 130
Eagle, Idaho 83616

Also Present: Jack Garrett

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THELMA V. GARRETT,
first duly sworn to tell the truth relating to said cause, testified as follows:

EXAMINATION

BY MS. RAINEY:

Q. Could you please state your name and your address for the record.

A. Thelma Garrett. 10338 East Willis, Middleton, Idaho.

Q. And, Thelma, how long have you lived at that address?

A. Thirty-four years.

Q. Okay. And have you -- who lives at that address with you?

A. No one.

Q. Do you live there alone currently?

A. In the house? Yes.

Q. Okay. And have you lived alone there at that address since your husband's death?

A. Yes.

Q. Okay. And when -- and your husband was Alva Garrett, correct?

A. Yes.

Q. And when did he pass away?

A. March 3rd, '08 -- 2008.

Q. Okay. Thelma, have you ever had your deposition taken before?

A. No.

Q. Okay. I'm sure that your attorney talked to you a little bit about how this process was going to occur, and what we're going to do. But I'm going to go over a few of those ground rules with you, again, simply so that we have them on the record, and that you and I make sure that we understand each other. Okay?

A. Okay.

Q. Okay. You understand that you've just taken the oath, which is the same oath that you would take if you were testifying in court, correct?

A. Yes.

Q. Okay. As we sit here today, is there anything that would prevent you from testifying truthfully and accurately?

A. No.

Q. Okay. Are you on any type of medication that affects your ability to remember things?

A. No.

Q. As we start moving through this deposition, you will begin to be able to anticipate what I'm going to ask you and you'll be inclined to answer before I finish my

questions. It's very important for the court reporter that we wait for each other to finish questions and finish answers so that we're not talking over each other. Can I get your agreement to try to do that with me?
A. Yes.
Q. Okay. The other thing that people tend to do in these depositions is to slip into the habit of nodding or giving nonverbal answers such as uh-huh or huh-uh. I'll try to remind you as we move through if that begins to happen that we need audible answers to the questions. Can I get your agreement to try to do that?
A. Yes.
Q. Okay. Thelma, prior to your marriage to Alva, were you married before?
A. Yes.
Q. How many times were you married previously?
A. Once.
Q. Okay. And what was your former husband's name?
A. James Longstreet.
Q. Okay. And how did that marriage end?
A. He died.
Q. In what year did James die?
A. I can't remember.
Q. That's fine. That's another rule. I don't want you to guess on anything. But if there's something

that you don't remember, it's perfectly fine to let me know that you don't remember --
A. Well, I just --
Q. -- and we'll just move on from there.
A. Yeah. Okay.
Q. And did you have any children with James?
A. Yes.
Q. How many children?
A. Three.
Q. Three. And what were their names?
A. Garrett Longstreet, and Tom Longstreet, and Cynthia Longstreet.
Q. And are all of those children still living today?
A. Yes.
Q. Where does Garrett live?
A. Boise.
Q. Okay. And approximately how old is Garrett?
A. Sixty-two.
Q. And where does Tom live?
A. Tom lives beside me in Willis Road.
Q. Is that on property that you own?
A. Yes.
Q. Okay. And how long has Tom lived on that property that you own?

A. About eight months.
Q. Okay. And where did he live prior to that?
A. He lives -- he lived on Blessinger Lane out at Star.
Q. Okay. And did he own that property?
A. Yes. And he sold it.
Q. Okay. Does he pay you rent to live on that property currently?
A. No.
Q. Did you say that you own that property, or Tom does?
A. I do.
Q. Okay. But he doesn't pay you rent?
A. No.
Q. Okay. Is Tom married?
A. Yes.
Q. Does he have children?
A. Yes.
Q. How many children does Tom have?
A. Six.
Q. And do they live at the Willis Road property with him?
A. No. They're all married or --
Q. Grown and gone?
A. They're grown and gone. One's in college.

Q. Okay.
A. Or the last one.
Q. But none of them live at home?
A. No.
Q. Okay. Does Tom's wife live at that property with him?
A. Yes.
Q. And where does Cynthia live?
A. In Nampa.
Q. And is she married?
A. Yes.
Q. Does she own the home that she lives in?
A. Yes.
Q. Prior to his marriage to you, was Alva married?
A. Yes.
Q. And did Alva have children from his former marriage?
A. Yes.
Q. And how many children did Alva have from his former marriage?
A. He had four. He had three, and then one adopted.
Q. Okay. And those children, it's my understanding, were Jack, John, Marilyn, and Eleanor --
A. Right.

Q. -- is that correct?
A. Yes. Yes.
Q. Who was adopted?
A. Marilyn.
Q. Marilyn. Do any of those children currently reside on property that you own?
A. No.
Q. At any time during your marriage to Alva -- or during your relationship with Alva, did you become divorced from him?
A. Yes.
Q. And when did you obtain a divorce from Alva?
A. I think it was in the '80s.
Q. In the '80s. And what were the circumstances of that divorce?
A. Well, I have to count my age back. It was when I applied for Social Security.
Q. Okay.
A. And then -- I was just drawing on what I had and his, which is very little. And I found out that by going to my first husband, then I would get a considerable sum more. And so I -- and they told me that I would have to divorce him and go through all that.
So I called the senators and everybody if this is what I had to do. And they said, yes, this is what I

had to do. I mean, the law has changed now, but at that time, that's the way it was. And so then they said, well, to wait a week and then we would get -- be remarried, and that's what happened.
Q. Okay. So you were divorced for approximately one week?
A. Right. Yeah.
Q. And you said you had to count back for your age. What was your age at that time?
A. Well, what I was thinking about was -- yeah, you draw at 65 -- 66.
Q. Okay.
A. It was -- I must have been about 66.
Q. Okay.
A. Or, no. I'm getting discombobulated. You draw at 62. And so it must have been at, you know, 63 or something like that.
Q. Okay.
A. It was -- you know, it was -- I just found out about it, you know, later.
Q. Right after you started drawing, within a year or so?
A. Yes.
Q. How old are you today?
A. Eighty-eight.

Q. And so just -- I think I confirmed this, but you were divorced for approximately one week from Alva?
A. Right.
Q. Okay. Was there any type of property settlement that you entered into with Alva at the time of that divorce?
A. No.
Q. And you remarried Alva, and you had been married to him from that time --
A. Yes.
Q. -- until his death; is that correct?
A. Yes.
Q. See, we're doing that thing where you knew what I was going to say.
A. Yeah. I'm sorry.
Q. That's okay. It's very easy to do that. At the time of his death, did Alva have any friends that he saw on a regular basis?
A. Yes.
Q. Okay. What were the names of some of the friends that he would see on a regular basis prior to his death?
A. Pete Peterson.
Q. And where did Pete live?
A. Well, he lives about a mile away, a mile and a

half.
Q. Okay. And is Pete still alive?
A. Yes.
Q. Any other friends that Alva saw regularly prior to his death?
A. Well, yes, it was Hammerbeck, but he lives in Montana now.
Q. What was the first name?
A. Hammerbeck.
Q. Hammerbeck.
A. That was his last name.
Q. Okay. What was his first name?
A. Warren.
Q. And did he live here in Idaho prior to Alva's death?
A. Yes.
Q. Okay. And when did he move to Montana?
A. Must have been several years before Alva's death.
Q. Okay.
A. But he would come and visit.
Q. Okay. Any other friends that Alva saw regularly?
A. Yeah, Pete Javinsky, but I don't know if he's alive yet.

Q. Okay.
A. Well, he had many friends.
Q. Do you know how to spell Pete's last name?
A. No.
Q. Okay. And does he live -- you said you didn't know if he was even still alive?
A. No, I don't.
Q. Okay. Thelma, do you understand what this lawsuit's about today?
A. Yes.
Q. Okay. Would you explain to me in your own words what you think it's about.
A. Well, I think that -- well, I guess maybe I don't.
Q. Okay. Do you understand that Jack believes that half of the property -- the Middleton property belongs to him?
A. Yes.
Q. Okay. And you understand that he's filed a lawsuit to partition the property so that you'll get a portion of it, and he'll get a portion of it?
A. Yes.
Q. Okay. And it's my understanding that you disagree with that position; is that correct?
A. Correct.

Q. Okay.
A. Yes.
Q. At the time you married Alva, did any of either of your children live with you in the home?
A. Yes.
Q. Which of the children lived with you and Alva?
A. Marilyn and Jack.
Q. Okay.
A. And Cindy. Marilyn, yeah, Jack, and Cindy.
Q. How old was Cindy at the time you and Alva married?
A. Sixteen.
Q. Okay. And did she live with you in the home until she graduated from high school?
A. She lived there a year-and-a-half.
Q. Okay. And when did she move out? What age was she when she moved out?
A. Well, she was 17 -- 17-1/2.
Q. Okay. And at the time she moved out -- or what were the circumstances of her moving out?
A. Oh, she moved in with a girlfriend and their family.
Q. And you said Jack lived in the home with you?
A. Yes.
Q. How old was he when he moved out?

A. Twelve. Oh, when he moved out?
Q. Yes.
A. Or was it -- when he left high school, but I don't remember the age.
Q. Okay. And where did he go to live at the time he left?
A. To Pete Peterson's.
Q. He lived with Pete Peterson after he left?
A. Yes.
Q. And what about Marilyn? How old was she when she left your home with Alva?
A. Well, she must have been -- I don't remember.
Q. What were the circumstance of her leaving the home?
A. Well, she had graduated from high school --
Q. Okay.
A. -- gotten a job and, you know --
Q. Ready to live on her own?
A. Right.
Q. Okay. At the time you married Alva the first time, what real property did he own?
A. He owned property -- at Willow Creek he owned a section.
Q. Okay.
A. And then he owned property at Round Valley.

Q. Did he own any other property at the time you were married?
A. Well, the home place.
Q. And when you say the home place, that's the place that's involved --
A. Yes.
Q. -- in this lawsuit --
A. Uh-huh.
Q. -- correct?
A. Yeah. There was 80 there.
Q. And that's in Middleton?
A. Yes. Well, it was a short 80.
Q. How large was the Willow Creek property at the time you were married?
A. A section.
Q. Okay. And what about the Round Valley property?
A. Well, that, I don't remember.
Q. Okay. Did he own any other real property at the time you were married?
A. No.
Q. Did you own any real property at the time you married Alva?
A. Yes.
Q. What real property did you own?

A. I owned a house in Middleton.
Q. And what was the address of that property?
A. 14 West Main -- or, wait a minute. No, I'm sorry, 11 West Main.
Q. 11 West Main?
A. Yeah, 11.
Q. Did you own any other real property at the time you married Alva?
A. No.
Q. Did you own a car at the time you married Alva?
A. Yes.
Q. Just one?
A. Yes.
Q. And what kind of car was it?
A. A Dodge, I think. No, I'm sorry. I think it was a Ford.
Q. Okay.
A. You know, I can't remember for sure.
Q. That's fine. At the time of his death, did Alva still own that section of property at Willow Creek?
A. No.
Q. What happened to it?
A. Well, his son John, he went into real estate, and he told his dad that, oh, he was going to invest it in Rexburg property and he was going to make a million

dollars or something like that and we'd never have to worry about anything. And then, I think, his son lost it.
Q. Do you recall when Alva -- when the property was lost, when he no longer was the owner of the Willow Creek property?
A. No, I don't remember the exact date.
Q. Okay. Does he still own any property in Rexburg that was exchanged for the Willow Creek property?
A. No. Who? Are you talking about --
Q. Your husband --
A. No.
Q. -- at the time of his death?
A. No.
Q. Okay. What about -- did you talk to Alva at the time he was going to do whatever was done with the Willow Creek property about the Rexburg transaction? Did you and Alva discuss that?
A. No. That was just between him and John.
Q. Did you know it was occurring?
A. Well, except he told me that, you know, he should -- you know, he said John thought he would be making money on it.
Q. All right. So he told you that he had planned -- he planned to do something with the Willow Creek property?

A. Yes.
Q. Okay. Did you object to him doing anything with that property?
A. No.
Q. The Round Valley property, did Alva own that at the time of his death?
A. No.
Q. And what happened to the Round Valley property?
A. Well, John was involved again.
Q. Okay.
A. And he just -- they sold lots. But I don't know, it just -- it seemed like the minute he was involved -- and most of the lots were his.
Q. Were --
A. John's.
Q. John's.
A. For like, I don't know, some expenses or something. I don't know. So we didn't get very many. We only had to -- sold very few, a couple or so.
Q. Now, was the Round Valley property turned into a subdivision?
A. Yes.
Q. Okay.
A. Yes, it was divided.
Q. Okay. And is it your understanding that John

took some of those lots as payment for the work he'd done on the development?
A. Well, yeah. Yes.
Q. Did Alva talk to you prior to doing the Round Valley subdivision about his intentions in doing that project?
A. No, not much.
Q. Were you aware that he was doing it?
A. I didn't really -- wasn't aware exactly what was happening, no.
Q. Were you aware that something was happening?
A. Well, yes, he said something about John subdividing it.
Q. Approximately what time frame was this subdivision development occurring?
A. I don't remember that.
Q. Okay. Was it -- do you recall whether or not it was before or after 1990?
A. No, I don't remember.
Q. Okay.
A. No, I think it was before.
Q. Before 1990?
A. Oh, wait a minute. I don't -- I just don't remember.
Q. That's fine. That's fine. And then the home

place, that Middleton place that you have now, it was approximately 80 acres at the time you were married?
A. Yes.
Q. And is it still 80 acres today?
A. No.
Q. How many acres is it today?
A. It's around 27.
Q. And what happened to the --
A. To that?
Q. -- other 53 acres?
A. Well, after -- we just didn't have any money from any of the properties that John had dealings with. And Alva had a loan at the bank, and they just said they were going to come and foreclose on us and that they were -- then they would take the property and sell it, and if they got enough out of it to pay the debt, then, you know, we'd be fine. But if they didn't, we'd still owe, and we wouldn't have a roof over our heads.
And so my husband and I, we talked -- we thought, well, we would just try selling some of it to pay the debt off so we would at least have a roof over our heads, you know. And so that's what happened to it, to pay the debt.
Q. What was the debt -- the loan of the bank for?
A. Oh, it was for taking -- for a car we had

purchased. And it was for going back and forth to Texas with horses and things like that.
Q. What was the amount of the loan at the bank?
A. Eighteen thousand.
Q. Was it for anything -- was it used for anything other than a car purchase and the trips to Texas for the horses?
A. Well, it probably -- no, I think that's what it was mostly for. Yes, that's what it was for.
Q. Okay. Do you still own the Middleton home that you had when you married Alva?
A. No.
Q. What happened to the Middleton home?
A. I signed it over to the children.
Q. To whose children?
A. To my children.
Q. Okay. And when did you do that?
A. Oh, shortly after we were married.
Q. And do those children own that home equally? Do they still own it?
A. No.
Q. Okay. Did they sell it?
A. I don't know what they did with it.
Q. All right. Did you give it to them in equal parts as equal owners?

A. Yes.
Q. And that was just to your three children, correct?
A. Yes. Well, Round Valley, Alva gave his children five acres -- he gave them the deed of five acres each at Round Valley.
Q. Was that before or after you married him?
A. Before.
Q. At the time you gave your children the Middleton home, did Alva give anything to his children of equal value?
A. At that time?
Q. Correct.
A. No.
Q. Okay. Did you give them the Middleton home because Alva had previously given his children part of that Round Valley property?
A. No.
Q. Okay. Do you know how Alva became the owner of the home place?
A. He purchased it I think from -- well, I'm not sure. I don't know.
Q. You don't know if he purchased it, or inherited it?
A. No. He purchased -- he said he purchased it.

I think it was from his mother-in-law. I'm not -- I'm not sure. I don't know.
Q. Did Alva work on the farm?
A. He was -- he rented it out.
Q. Was he renting it out in -- what year were you married, 1976?
A. Yes.
Q. Okay. When you were married in '76, was he renting the farm out at that time?
A. Yes.
Q. Okay. At what price was he renting it out?
A. I don't know. I don't remember.
Q. Do you recall to whom he was renting it?
A. Pete Peterson.
Q. Do you recall when he stopped renting the farm to Pete Peterson?
A. No.
Q. I understand that at some point Jack began renting the farm?
A. Yes, and I can't remember when.
Q. Okay. Was there a renter between Pete Peterson and Jack? Was there somebody that rented it --
A. No.
Q. So it went from Pete renting it to Jack renting it?

A. Yes.
Q. Okay. When Jack started renting the farm, do you know whether he was paying more or less than what Pete was paying for rent?
A. I don't know.
Q. Okay. What was the done with the money that Alva received for rents on the farm from Pete?
A. Well, for expenses, for insurances, and living and so forth.
Q. It just went into your bank account?
A. Yes.
Q. Did Alva treat that income as his separate income that was not to be shared with you at all?
A. No. We just shared both our incomes.
Q. Okay. Did Alva work at the time you were married?
A. No. Well, he was running horses.
Q. Okay. He didn't have a 9:00 to 5:00 job?
A. No.
Q. Did he do anything other than running horses for income?
A. No.
Q. Okay. Did you work at the time you were married?
A. Yes.

Q. And what did you do?
A. I worked at a drapery shop.
Q. Doing what?
A. Making drapes.
Q. Okay. Were you a sewer or you --
A. A tabler.
Q. Okay.
A. Well, I did -- we did -- we took turns --
Q. Okay.
A. -- but mostly I tabled.
Q. Okay. And how long had you been at that job?
A. Oh, gosh. I don't remember.
Q. In addition to the rents that Pete Peterson paid, did Alva get any other income from the farm? Did he share in profits from crops or anything of that sort?
A. Not to my knowledge, no.
Q. You said Alva was running horses at the time you married him. Was he doing anything else for income?
A. No.
Q. Can you estimate approximately how much income he was making off the horses at that time?
A. Breaking even.
Q. Okay. I've heard that about the horse business.
A. Yeah.

Q. Was he engaged in the horse business with anybody else?
A. No. How do you -- what do you mean?
Q. Well, did any -- did he have a partner in the horse business?
A. No.
Q. Okay.
A. He trained.
Q. Who owned the horses that he trained?
A. He did.
Q. Okay. Did he train horses owned by anyone else?
A. Yes, at times for his son, for Jack.
Q. Okay. All right. Did he train horses for anybody other than Jack?
A. Yes.
Q. And do you recall the names of any other horse owners that --
A. Hammerbeck.
Q. Okay.
A. Warren Hammerbeck.
Q. Any others?
A. No.
Q. When did Alva stop running horses?
A. About four or five years before he passed away.

Q. All right. So 2002, 2003?
A. I can't really remember.
Q. Okay. What caused him to stop?
A. The horses were dragging him instead of him dragging the horses.
Q. Okay.
A. He just couldn't handle them anymore.
MS. RAINEY: Can we get from the prior deposition exhibit -- the promissory note?
MR. MR. MR. TROUPIS: 3.
MS. RAINEY: I think it was 3.
Q. (BY MS. RAINEY) Thelma, the court reporter has just handed you what was marked during Jack's deposition. Do you recognize this Exhibit 3?
A. No.
Q. Okay. If you look to the bottom of it, it appears that it was signed by Alva Garrett and Thelma Garrett. Do you recognize your signature on the bottom of that document?
A. Yes.
Q. Okay. Do you believe that that is your signature?
A. Yes.
Q. Okay. This appears to me to be a promissory note, it's in the amount of $2,000, and it's dated

March 21, 1990. Do you recall the circumstances under which --
A. No, I don't.
MR. TROUPIS: Wait till she finishes her question.
THE WITNESS: Okay. I'm sorry.
Q. (BY MS. RAINEY) Okay. I'm going to ask it again just so we have the full thing.
A. Okay.
Q. Do you recall the circumstances under which this promissory note was made?
A. No.
Q. Do you recall that Jack ever loaned you and Alva any money?
A. No.
Q. So following from that, you wouldn't recall whether or not any of that money had been paid back, correct?
A. Correct.
MS. RAINEY: Okay. Did you do five exhibits?
MR. TROUPIS: Huh?
MS. RAINEY: This is going to be --
MR. TROUPIS: Yeah, five.
MS. RAINEY: If anybody has a better copy of that particular document, I'd be happy to see it. That's

the cleanest one I have.
MR. TROUPIS: I might have. Let me see.
MS. RAINEY: The one you produced was worse.
MR. TROUPIS: Was it?
MS. RAINEY: Yeah.
MR. TROUPIS: Well, maybe it's my copier.
THE WITNESS: I should go get me a drink.
MS. RAINEY: Oh, that's fine. We can take a little break.
(Deposition Exhibit No. 6 was marked for identification.)
MS. RAINEY: Back on the record.
Q. (BY MS. RAINEY) I'm handing you, Thelma, what's been marked as Exhibit No. 6. Do you recognize that document?
A. Yes.
Q. Okay. And what do you recognize that Exhibit No. 6 as?
A. The Quitclaim Deed.
Q. And it's a Quitclaim Deed granting, I believe, the home place, that Middleton property, from Alva L. Garrett to Alva L. Garrett and Thelma V. Garrett --
A. Yes.
Q. -- is that correct?
A. Yes.

Q. Can you tell me the circumstances that led to the making of this Quitclaim Deed?
A. Well, after the property at Willow Creek and the Round Valley was all cleared and everything and John took over and we didn't have any money and then -- you know, he talked his dad into all that. And then we -- and we had to sell the property to pay our debts.
Alva, you know, was afraid that John might talk him into doing something with the little property that was left. So he thought by putting my name on the deed then, you know, I would have to sign it first and we would at least have a roof over our head. We were worried about losing the roof over our head.
Q. Because of stuff that John had done in the past?
A. Yeah. All this -- because all -- the other property that Alva had owned when we were married, you know, just disappeared. And we just didn't even have enough money to pay -- you know, we had to sell 50 acres of it to pay our debt.
Q. Okay. In looking at this Quitclaim Deed -- and granted my copy is very poor, but I don't see that your signature is on this document anywhere. Do you see your signature on there?
A. No.

Q. Do you know whether you ever signed this Quitclaim Deed?
A. No.
Q. Are you aware of a copy that has your signature on it?
A. I don't know.
Q. Okay. Do you think you signed it at any time?
A. I do not remember.
Q. Okay. Do you know whether or not you have a copy that wasn't recorded? This one was recorded in the land records. Do you know whether there's a copy that was not recorded?
A. No.
Q. Okay. No, you're not aware of one?
A. Yes.
Q. Okay. At the time this Quitclaim Deed was executed, had there been any talk between yourself and Alva about possibly giving this property to Jack?
A. No.
Q. Do you recall any time when you discussed with Alva the possibility of giving the home place to Jack?
A. No.
Q. When you married Alva, did you enter into a premarital agreement at all?
A. I don't remember.

Q. Okay. You know what I mean when I say a premarital agreement? Or it's sometimes referred to as a prenuptial agreement.
A. Yes, I don't remember.
Q. Okay. Did you -- do you recall having those discussions with Alva, discussions regarding whether you should enter into a prenuptial agreement?
A. No, I don't remember.
Q. As we sit here today, are you aware of a prenuptial agreement between yourself and Alva?
A. I don't remember -- no.
Q. Did you ever have a power of attorney for Alva?
A. I don't remember.
Q. Prior to his death, did he execute -- or did he grant you a power of attorney for anything?
A. No, I don't remember.
Q. Okay. Do you know whether he granted anybody a power of attorney for anything?
A. I don't remember.
Q. Did you and Alva ever prepare any sort of agreement where it discussed how your property would be owned, like community property, or separate property?
A. Well, we -- yes, we had a will.
Q. Okay. Other than the will, did you have any agreements to --

A. No.
Q. -- and you have to let me finish my question.
A. Oh, sorry.
Q. Other than the will, did you have any other agreements discussing how the property would be owned between the two of you?
A. No.
Q. Okay. Let's talk about that will. Tell me the circumstances that led to you and Alva going to have this will prepared.
A. Well, we just wanted to have a will.
Q. Okay. Do you recall when you went to have it prepared?
A. Isn't the will dated?
Q. Yes.
A. Yeah, I don't remember.
Q. Okay. Let's look -- we actually used that in a -- exhibit in the last deposition.
MR. TROUPIS: Yeah, it was No. 2.
MS. RAINEY: I just don't want to duplicate exhibits if we don't have to.
MR. TROUPIS: Good idea.
Q. (BY MS. RAINEY) The court reporter is handing you what was marked Exhibit No. 2 in the last deposition. Do you recognize this document?

A. Yes.
Q. Okay. And Exhibit No. 2 is actually a Contract For Wills, and then it's got the Last Will and Testament of Alva Garrett, and the Last Will and Testament of Thelma Garrett. Do you see all those documents there before you?
A. Uh-huh. Yes.
Q. What made you and Alva do a Contract For Wills as opposed to just doing each your own individual will?
A. I don't know.
Q. Was it recommended to you by an estate planning attorney?
A. I don't know.
Q. Do you understand what a Contract For Wills is?
A. No.
Q. You do not?
A. Not exactly, no.
Q. Okay. At the time you and Alva did your will -- it appears to me that the will that you prepared, and the will that Alva prepared are substantially similar. Is that your understanding?
A. Yes.
Q. Okay. And can you explain to me why you prepared similar wills.
A. Well, that was the way we wanted it.
Q. Okay. Did you have a will prior to the one

you executed -- the one that you had prepared in 1995?
A. No.
Q. Do you know whether Alva had a will prepared?
A. No, I don't.
Q. You don't know whether he did?
A. Huh-uh.
Q. Is that a no?
A. No.
Q. Okay. Did you have any conversations with any of your children about going to have these wills prepared?
A. No.
Q. Did you have any conversations with any of Alva's children about having the wills prepared?
A. No.
Q. At the time you had these wills prepared, did Alva indicate to you that he wanted to leave the home place to Jack?
A. No.
Q. In the interrogatory responses -- do you recall that earlier in this lawsuit I provided your attorney with a bunch of questions -- written questions that you assisted him in answering and then sent back? They're called interrogatories.
A. I don't remember.
Q. Okay. Well, earlier in this lawsuit I did send

a list of questions to your attorney, and I believe that he probably went through those -- and I don't want to get into any of your discussions, but I want to talk to you about some of the answers that you provided.

One of the questions that I asked was for you to give me the name and address and numbers of people who would have knowledge of information that's relevant to this lawsuit. And one of the responses that you provided was that Garrett Longstreet and Tom Longstreet will testify that they helped their mother and stepfather arrange for estate planning through Mr. Gigray's office. Do you recall -- does that -- is that an accurate statement?

A. Run that by me again.

Q. My question for you is: Did Garrett and Tom help you and Alva arrange for estate planning through Mr. Gigray's office?

A. No.

Q. They did not?

A. No.

Q. Okay. Were they aware that you were going to Mr. Gigray's office to do your wills?

A. No.

Q. Okay. You didn't discuss it with any of your children at all?

A. No.

MR. TROUPIS: You know, just to clarify, Counsel. The prior attorney, who was Mr. Lord, he prepared the draft answers to those, and then I finished them up. And I did talk to you about those. But -- so if there is some confusion, I'll clarify that with Tom and Garrett.

MS. RAINEY: Okay.

MR. TROUPIS: Because, to tell you the truth, I didn't even remember that that was in there.

MS. RAINEY: Okay.

MR. TROUPIS: And I just want to find out what conversations they may have had with Stephen Lord beforehand --

MS. RAINEY: Okay.

MR. TROUPIS: -- and I'll clarify it for you.

MS. RAINEY: Okay.

MR. TROUPIS: 'Cause I don't know what -- it doesn't ring a bell with me.

MS. RAINEY: Okay.

MR. TROUPIS: Sorry.

Q. (BY MS. RAINEY) Thelma, when I -- a lot of the discussion in this case centers around whether or not the home place was community property, or separate property. Do you understand what those terms mean, community

property and --

A. Yes.

Q. Okay. What is your understanding of the term community property?

A. That it was husband's and wife's together.

Q. Okay. Did you have discussions with Alva -- or what's your understanding of separate property?

A. Well, that what's his is his, and what's mine is mine.

Q. Okay. Did you have discussions with Alva regarding whether or not the farm was community property, or separate property?

A. Community.

Q. Okay. At the time you were married to Alva, was it your understanding that it was community property even at the time you first married him?

A. I don't remember.

Q. Okay. And my question for you is: Recall that Quitclaim Deed that we were just looking at?

A. Yes.

Q. Did you discuss with Alva, or was it your intention with Alva by him executing that document to change the property from his separate property to community property?

A. He wanted to provide for me.

Q. Okay.

A. And this is what we did.

Q. Okay. We've talked a little bit earlier today about what happened to some of the real property that you had, and that Alva had at the time you were married, and where that is now. At the time that Alva died, did he have any significant items of personal property?

A. Like what?

Q. Perhaps bank accounts? Life insurance?

A. No.

Q. Stocks and bonds?

A. No.

Q. Did he have any assets other than the real property assets?

A. No.

Q. Did he have any retirement accounts?

A. No.

Q. Did you have any -- or do you today have any personal property, anything other than that --

A. No.

Q. -- home place? Wait till I finish.

A. I'm sorry.

Q. That's okay. Do you have any assets other than that home place that will be passed on to your children through your will?

A. No.
Q. Is it fair to say that the home place compromises substantially all of yours and Alva's estate?
A. Yes.
Q. What was the cause of Alva's death?
A. I think -- I guess just old age.
Q. How old was he when he passed?
A. Eighty-six.
Q. Okay. Was he hospitalized prior to his death?
A. Yes.
Q. For how long?
A. Well, he was in the hospital. Then he was in, I think it was four separate -- well, like the last place -- one of the last was at the Behavior Place in Boise. And then he was in Nampa. He was in, you know, these places where they take care of people that can't take care of themselves anymore.
Q. Where was he at the time he died?
A. In Caldwell -- well, at -- there by -- at the Karcher Mall Estates.
Q. Okay.
A. Wait a minute. Wait a minute. That's wrong -- that's not right either. He was there. But he was over in Nampa -- I forgot the name of the place -- 'cause he was just there such a short time.

Q. And prior to that he had been at the Karcher Estates?
A. Well, no. I think it was prior to that he was at the Behavior Place. 'Cause the Karcher -- he was getting too violent at the Karcher. He had to go to the Behavior Place in Boise there.
Q. Okay.
A. It's called the Behavior Place. I have the name at home, but -- in fact, I just -- I'm still paying on that bill.
Q. Could you get the name of that place and provide it to your attorney for me?
A. Sure.
Q. Okay. And then he went from that Behavior Place in --
A. Yeah.
Q. -- Boise to somewhere in Nampa?
A. Yeah, to Nampa.
Q. Okay. And then he passed away while he was at that place in Nampa?
A. Yes.
Q. And do you recall the name of the place in Nampa?
A. No, I can't. Sorry.
Q. When did Alva stop living at the home place with you?
A. When he went to the hospital.
Q. Do you recall when that was?
A. No.
Q. Okay.
A. Not the exact date, no.
Q. Was it one year prior to his death?
A. No.
Q. Six months prior to his death?
A. I don't remember exactly.
Q. Okay. I really do need to get a time frame. Do you recall whether or not it was more or less than a year prior to his death?
A. Well, it was -- it was less than a year.
Q. Okay. Less than a year. Can you state with any degree of certainty whether it was less than six months?
A. I don't -- I don't remember.
Q. Okay. And that's fine. But you are certain that it was less than a year prior to his death?
A. Yes.
Q. Okay. Do you recall what types of treatment Alva was undergoing after he left -- after he stopped living at the home place and started living in various treatment facilities? Was he under medication?

A. Yes.
Q. Do you recall what types of medication?
A. No.
Q. Prior to going into the treatment centers, was he taking care of your finances?
A. No.
Q. Who was taking care of your finances?
A. I was.
Q. Okay. How long had you been taking care of financial matters?
A. I don't remember.
Q. Was there a point where he stopped taking care of financial matters and you took over?
A. What do you mean?
Q. Let me ask this a different way. During the time that you were married from 1976 on, did you share responsibility for handling the family finances, or did one or the other of you sort of take charge of that?
A. Well, we kind of shared it.
Q. Okay. Was there a point where he stopped being involved with the family finances altogether?
A. I don't quite understand your question because I -- I mean, like when we would train horses, I kept the books and things like that.
Q. Okay.

A. Yes.
Q. Okay. Right up until the time that he passed away, was he able to write checks on your checking account?
A. Well, no, not after he'd gone to the hospital, no.
Q. Immediately prior to the time he had gone to the hospital, could he write checks on the checking account?
A. Yes.
Q. Okay. Did you trust him to write checks on the checking account at that time?
A. Yes.
Q. Okay. Right before he went into the hospital, was Alva able to drive?
A. Well, he -- yes, I think so.
Q. Okay.
A. It was --
Q. Did he drive himself during that time?
A. No.
Q. Okay.
A. Most of the time I did.
Q. Okay. Was there other people that he would rely on to take him from place to place?
A. No.

Q. It was generally you?
A. Yes.
Q. Okay. Do you recall how long it had been that he hadn't been driving himself?
A. No, I -- no.
Q. Okay. Do you recall when he stopped driving himself and you sort of took over driving responsibilities?
A. No.
Q. Prior to the time he went into the hospital, did you have to help Alva take care of himself, bathe himself, for example?
A. No.
Q. Could he feed himself?
A. Yes.
Q. Okay. How was his memory prior to the time he went into the hospital?
A. Well, he could remember real well when he was younger and things he did, but he would kind of forget, you know, the present.
Q. Okay. Was he ever diagnosed with Alzheimer's?
A. No.
Q. Okay. Was he ever diagnosed with dementia?
A. I didn't even really ask the doctor about that.
Q. Okay. Did he take any medications to help his

mental functioning?
A. No.
Q. He did not?
A. No. I don't think -- no. At least I don't think -- I don't know.
Q. Not that you're aware of?
A. That's correct.
Q. I'm going to go back to these interrogatory answers and questions that we talked about briefly before and ask you some questions about some of the responses that you had provided. And I understand that was -- there might have been some confusion in those responses. So we'll just talk through these statements.
One of the questions that I had asked was -- well, I'm just going to discuss the answer. You state that Jack Garrett and others working with Jack Garrett secretly and improperly obtained a Quitclaim Deed from their father, Alva Garrett, without the knowledge or consent of Thelma Garrett. Is it your testimony today that you did not have any knowledge that Alva was executing that Quitclaim Deed leaving the home place to Jack?
A. Yes.
Q. Okay. It also states that Alva Garrett did not have the opportunity to consult with and obtain the advice

of independent counsel. How do you know -- or do you know that Alva did not see an attorney with regard to that Quitclaim Deed?
A. I don't.
Q. You don't know?
A. (Nonverbal response.)
Q. So if Alva had seen an attorney, you would not be aware of that?
A. No.
Q. Okay. Alva didn't say anything to you about seeing an attorney?
A. No.
Q. And, in fact, Alva didn't say anything to you about the fact that he was doing it --
A. No.
Q. -- in the first place?
A. No.
Q. Okay. What was your relationship like with Jack at the time you -- during the time he lived in the house with you and Alva right after you were married?
A. Fine.
Q. Okay. Did your relationship with Jack ever change to where it wasn't fine, or was it always relatively normal?
A. Normal.

Q. Okay. Did you have a difficult relationship with any of Alva's children?
A. No.
Q. Did Alva have a difficult relationship with any of your children?
A. What?
Q. Did Alva have a difficult relationship with any of your children?
A. Oh, no. Huh-uh.
Q. Okay.
A. No.
Q. The Quitclaim Deed that we've been talking about was executed on February 14th of 2006. Was Alva living in the home with you at that time?
A. Yes.
Q. Was anybody else living in the house with the two of you?
A. No.
Q. Was Alva working with Jack at that time? Did they work together?
A. No.
Q. Okay. Did they have any more involvement with each other during that time frame than they had in past years?
A. No.

Q. Were you and Alva together handling the family's finances in February of 2006?
A. Yes.
Q. Okay. Do you know whether Jack had control over any aspect at all of Alva's life at that time?
A. No.
Q. Can you tell me what Alva's mental condition was in February of 2006?
A. No.
Q. Why not?
A. Well, I -- he was -- I don't know quite how to answer that. He would kind of not remember sometimes.
Q. What kind of things would he not remember? Did he always --
A. Well, we --
Q. Oh.
A. We would go play pinochle and then he couldn't remember quite -- the cards, you know, and things like that.
Q. Okay. Did he always know who you were?
A. Yes.
Q. Okay.
A. Yes. He wasn't that bad, no.
Q. Okay. And he always knew who his children were?

A. Yes.
Q. Okay.
A. Yes.
Q. How was he physically at that time?
A. Well, he was -- he was getting tired, you know.
Q. Right.
A. He was fine.
Q. I know it's difficult to put this -- that specifically into a time frame, but do you recall whether or not he was driving then in 2006?
A. Yes. I think -- yes.
Q. You think he was still driving?
A. Yes. But I know people were complaining about that he was kind of all over the road.
Q. So he might not have been driving well?
A. Something like that.
Q. Okay. How did you find out about the Quitclaim Deed?
A. When we went into probate and then Bill Gigray found -- announced it -- found it.
Q. Okay. And were you surprised?
A. Shocked.
Q. Have you talked with any of your children about the Quitclaim Deed since you found it?
A. Yes.

Q. Okay. And which of your children have you discussed it with?
A. All.
Q. Okay. Have you discussed it with any of Alva's children?
A. No.
Q. Why haven't you discussed it with Alva's children?
A. Well, I don't know.
Q. Okay. Do you still keep in touch with Alva's children?
A. Yes.
Q. When you and Alva did the Quitclaim Deed where he granted property to himself and you --
A. Yes.
Q. -- did you see an attorney in conjunction with that?
A. No.
Q. He just did that on his own?
A. Yes.
Q. Do you know who prepared it? Did he prepare it?
A. We prepared it.
Q. You prepared it together?
A. Yes.

Q. In your opinion, do you believe that Jack coerced Alva into executing that Quitclaim Deed?
A. I don't know.
Q. All right. Do you have any specific examples of things that Jack had done in the past that would indicate to you that he might coerce Alva into doing something like that?
A. No.
Q. Would you be surprised if Jack coerced him?
A. Yes.
Q. One of the things that's been recommended at some point in this lawsuit is that the property be partitioned so that Jack has the land that he's been farming and you have the home place and a few acres with the outbuildings. Are you familiar with that proposal?
A. No.
Q. Has it ever been discussed with you that the property be divided in that manner?
A. No.
MS. RAINEY: Okay. Would you mark this as Exhibit 7, please.
(Deposition Exhibit No. 7 was marked for identification.)
Q. (BY MS. RAINEY) Okay. I'm showing you what has just been marked as Exhibit 7. Do you recognize this

document?
A. Yes. I think I -- didn't you send it to me or something?
Q. Well, one of your former attorneys, I believe, should have given this --
A. Yeah.
Q. So you have seen this document before?
A. Yes.
Q. Okay. And you -- it appears to me as though it's been signed by John, Eleanor, and Marilyn; is that correct? Do you recognize those signatures that are at the bottom of that document, John A. Garrett --
A. Well, I don't know their signatures that well.
Q. Okay. So you wouldn't know if that was their signatures or not?
A. No.
Q. Okay. And the proposal here is -- it says, number one, farmland to Jack Garrett. Do you see where I'm reading that from at the bottom?
A. Yes, this number one?
Q. Yes.
A. Yeah.
Q. And number two it says, house, outbuildings, horse barn to Thelma Garrett. Do you see that?
A. Yes. Uh-huh.

Q. And you said you have seen this document before?
A. Yes.
Q. Okay. Do you have -- I was told from one of your former attorneys that you would not agree to this type of separation of the property; is that accurate?
A. Yes.
Q. And why don't you agree with this type of separation of the property?
A. Well, it doesn't -- it doesn't seem fair.
Q. And it doesn't seem fair to who?
A. Well, all of it doesn't seem fair. I mean, I like the way we had -- Alva and I had made out the will, that everybody would share, not just one person.
Q. Okay. And so to you it doesn't seem fair because it's not what you and Alva had done in your will?
A. Right.
MS. RAINEY: I don't think I've got anything else. Do you have anything?
MR. TROUPIS: No, I don't have anything.
MS. RAINEY: All right. Thelma, that's all I have for you today.
THE WITNESS: Thank you.
(The deposition was concluded at 3:33 p.m.)
(Signature requested.)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JACK L. GARRETT,	)	
Plaintiff,	)	Case No. CV OC 09-8763-C
vs.	)	
THELMA V. GARRETT,	)	
Defendant.	)	
	)	

DEPOSITION OF JACK GARRETT

MAY 5, 2010

REPORTED BY:

MARIA D. GLODOWSKI, CSR No. 725, RPR

Notary Public

Exhibit B

THE DEPOSITION OF JACK GARRETT, was taken on behalf of the Defendant at Troupis Law Office, P.A., 1299 East Iron Eagle, Suite 130, Eagle, Idaho, commencing at 12:53 p.m. on Wednesday, May 5, 2010, before Maria D. Glodowski, Certified Shorthand Reporter and Notary Public within and for the State of Idaho, in the above-entitled matter.

APPEARANCES:

For Defendant: Troupis Law Office, P.A.
BY: Christ T. Troupis
1299 East Iron Eagle
Suite 130
Eagle, Idaho 83616

For Plaintiff: Moffatt, Thomas, Garrett, Rock & Fields, Chartered
BY: Rebecca A. Rainey
101 South Capitol Blvd.
10th Floor
Boise, Idaho 83701

INDEX

JACK GARRETT, first duly sworn to tell the truth relating to said cause, testified as follows:

(Deposition Exhibit Nos. 1, 2, 3, 4, and 5 were marked for identification.)

EXAMINATION

BY MR. TROUPIS:

Q. Could you please state your name and your address for the record.

A. Jack L. Garrett, at 10231 Purple Sage Road, Middleton, 83644. Idaho, I guess. Yeah.

Q. Right. I think I figured that out. Okay. Jack, have you ever had your deposition taken before?

A. No.

Q. Okay. I'm sure you've talked to your attorney and she's explained to you what we're doing here today. But just so that we have it on the record, I'd like to just give you a few of the ground rules so that we're all on the same page.

A. Okay.

Q. The court reporter has just given you the same oath that you would be taking if you were to testify in court. And today I'm going ask you some questions pertaining to the lawsuit that we're involved in between

you and Thelma Garrett.

And I'll ask you to give me your best recollection -- or answers. I don't want you to guess. So if I ask a question that you don't know the answer to, it's perfectly acceptable to tell me you don't know --

A. Okay.

Q. -- or I don't recall.

A. Okay.

Q. At the same time I also don't want you to guess at what my question is. Sometimes I get a little convoluted in asking questions. If I ask a confusing question or ambiguous question and you don't understand it, please ask me to clarify it as opposed to trying to guess at what I'm meaning.

A. Okay.

Q. The court reporter is taking everything that we're saying down in a form of shorthand. It will be put in a booklet. You'll be given an opportunity to read it and to sign it under penalty of perjury. And that testimony can then be used in court in this proceeding. So it's important that you give me your best answers today and that you fully understand what I'm asking.

In addition, the court reporter can only take down one person speaking at a time. So please wait till I finish my question before you answer, and I'm going to try

to not ask another question over the top of your answer. Okay?
A. Okay.
Q. Also, if you have any need to talk to your attorney at any time, you're free to do that. But if there's a question pending, I'd ask that you answer that question before we take a break to do that.
A. Okay.
Q. But we can take as many breaks as you want. I don't think it's going to be that long. But if you need a break for any reason, just say so.
A. Okay.
Q. Let's see. Have we covered most everything? I don't think there's much more. Is there any -- are you under any medication or anything today --
A. No.
Q. -- that would prevent you from testifying?
A. No.
Q. Okay. Very good. Like I said, you'll be given the opportunity to review this and make any corrections to this testimony before signing it. But if you make any major changes, I can comment on those. So please try to just give me your best answers today.
A. How long do I got to make any changes?
Q. Oh, 30 days or more.

A. Oh, okay.
Q. So you'll have plenty of time to --
A. To read it and --
Q. -- read it and --
A. I don't have to do it today?
Q. No, no, no. No, not today.
A. Okay.
Q. Heaven forbid.
A. Okay.
Q. Okay. I'd like you to take a look at what I've marked as Exhibit 1, which is the notice of deposition. And this deposition is being taken pursuant to notice under the Idaho Rules of Civil Procedure. And I had included in the notice a request that you provide certain records.
Now, for your information, these records are pretty much the same things that I had asked for in the discovery requests that I had submitted before. So you've already provided me some documents. In fact, some of them are attached here.
Do you have any additional documents that you didn't previously produce in response to discovery that you would like to produce today in response to this request? Did you find any additional records?
A. No.

Q. Okay. Very good. So can I then take that as meaning that -- and I noted that -- and we'll talk about the notes -- there were some notes that you provided to me about work done for your father and for Thelma on the ranch property and the value of that work, and a promissory note, and then some -- and I think there were some references to some checks in that writing.
Do you have any other records of payments other than that document that relate to the real property that's at issue in the case?
MS. RAINEY: You referenced a number of documents.
MR. TROUPIS: Yeah. You provided -- if you'll take the stack of papers that I gave you there. Take a look at No. 3 and 4. That's No. 3, is the promissory note, and then No. 4. Now, those are the two documents that you provided and attached to your discovery responses.
MS. RAINEY: I'm going to object. Misstates facts.
MR. TROUPIS: I'm sorry?
MS. RAINEY: I think we attached more than two documents.
MR. TROUPIS: Oh. No, I mean those are the two --

MS. RAINEY: Two of them.
MR. TROUPIS: -- that refer to -- two that refer to payments. I'm sorry.
MS. RAINEY: Okay.
MR. TROUPIS: I don't think there's any other documents attached that refer to --
MS. RAINEY: Which discovery request are you referring to?
MR. TROUPIS: Let me just --
MS. RAINEY: Okay. A specific answer?
MR. TROUPIS: Yeah. No. See, the documents that were attached, what I had -- I asked for records of payments that relate to the real property. And the records that I had here was the note and then this list. I don't think there were any other records.
MS. RAINEY: Okay. Do you understand the question?
THE WITNESS: Yeah.
MR. TROUPIS: I'm sorry, it's a little --
THE WITNESS: Let me look and see -- if that's okay?
MR. TROUPIS: Oh, sure. You know --
THE WITNESS: 'Cause I don't know what's all been passed through, if that's --
Q. (BY MR. TROUPIS) Can you explain to me what

you mean by passed through? Maybe we can get -- I don't want to --
A. I sent those --
Q. -- spend a lot of time on it.
A. -- to her and she sent it to you guys or --
Q. Okay.
A. See, there's a tax assessment.
MS. RAINEY: Yeah. I don't know --
THE WITNESS: I don't know if that got passed through.
MS. RAINEY: Let's go ahead and just give him these. Okay?
THE WITNESS: Okay.
MR. TROUPIS: Okay.
THE WITNESS: I think that's part of the repair and this is part of --
MS. RAINEY: These pages, too.
THE WITNESS: Okay. Three, four pages. These are bills and stuff that I paid the companies.
MR. TROUPIS: Okay.
THE WITNESS: I believe that whole pile.
Q. (BY MR. TROUPIS) Well, before we get -- okay. Would it be fair to say -- before we go through all this. Would it be fair to say that the other documents which you're looking through now is backup material that relates

to payments that are referred to on what I've marked as Exhibit 4?
A. I don't believe so.
Q. Okay.
A. I believe this is -- that's more stuff.
Q. Additional?
A. Additional stuff.
Q. Okay. You know, rather than spend a lot of time today -- 'cause I did want to get to some other issues, you know -- what I'd ask you to do is go through that, and if you want to just supplement the response and attach -- and send me copies of additional documents that show additional payments, that would be perfectly acceptable.
MS. RAINEY: We can do that.
MR. TROUPIS: I think that's --
MS. RAINEY: Okay.
MR. TROUPIS: Yeah. Rather than go through a lot of this stuff, I think that we --
THE WITNESS: Okay.
MR. TROUPIS: -- I'd rather get to other issues and --
THE WITNESS: Okay.
MR. TROUPIS: -- and this is not a big issue. You can just provide me additional documents --

THE WITNESS: Okay.
MR. TROUPIS: -- and we'll be fine.
THE WITNESS: Sure.
MS. RAINEY: Okay.
THE WITNESS: I guess the answer was no.
Q. (BY MR. TROUPIS) Well, I'm sorry to start out with an ambiguous question. All right. Okay. We'll deal with the -- I'll deal with the other listed areas on this during deposition questions. And if we come upon anything else, we'll just deal with it at the time. Okay. Let's get to the easier stuff.
A. Okay.
Q. So tell me, what's your birth date?
A. [redacted].
Q. Okay. And were you born in Idaho?
A. Caldwell.
Q. Okay. Oh, that's Idaho. And your father was Alva Garrett?
A. Yes.
Q. Who was your mother?
A. Edith.
Q. Edith.
A. [redacted] I guess, is her maiden name. If you'd call that one.
Q. And your mother passed away?

A. Yes.
Q. And when was that, what year?
A. '74, I believe.
Q. Have you lived in Idaho your whole life?
A. Yes.
Q. What's the highest level of education that you've had?
A. High school.
Q. And you have three -- what, two sisters, and a brother?
A. Yes.
Q. And what are their names and ages?
A. Eleanor Martin.
Q. And you can be approximate on the age. That's fine. Not that important. Well, just tell me this: Is she older or younger than you?
A. She's older than me.
Q. That's fine. And then --
A. John Garrett, and he's older. And Marilyn Garrett, and she's younger.
Q. And is John married?
A. Yes.
Q. And what's his wife's name?
A. Gail.
Q. And do you know where he lives, just town?

A. I think his mailing address is Meridian.
Q. Okay.
A. His phone number is Star. It's right on the line. I don't know -- can't remember exactly.
Q. And then Eleanor, is she married?
A. Yes.
Q. And what's her husband's name?
A. Don Martin.
Q. And where do they live?
A. Caldwell.
Q. And then Marilyn, is she married?
A. No. And she lives in Nampa.
Q. And then, Jack, do you have any children?
A. No.
Q. Are you married?
A. No.
Q. And where are you employed?
A. I'm self-employed.
Q. What's the type of business?
A. Agricultural.
Q. Now, apart from the property that is the subject of this case, do you have another farm that you farm?
A. Yes.
Q. Okay. And is that at the 10231 Purple Sage

Road address?
A. Yes, one of them.
Q. Okay. How many total acres do you farm? Just roughly.
A. Three hundred.
Q. Okay. Your brother, John, does he have children?
A. Yes.
Q. And how many?
A. Two.
Q. And Eleanor?
A. One.
Q. And Marilyn?
A. One.
Q. So this case involves -- it's your partition claim against your -- I don't know whether you -- do you call Thelma a stepmother, or just Thelma, or how do you --
A. Usually, just Thelma.
Q. Okay. And I represent Thelma. And so I'm going to ask you some questions, both pertaining to this lawsuit and basically the family relationship, because that has some bearing on it. So I'd like to start with, my understanding is that Alva, your father, married Thelma in about 1976; is that right?
A. Yes.

Q. Okay. And in 1976 you would have been 12 -- no, 14?
A. Fourteen.
Q. Fourteen. So were you living at home then?
A. Yes.
Q. And your sister, Marilyn, was she living there, too?
A. Yes.
Q. So did you live with Alva and Thelma for some period of time?
A. Yes.
Q. About how long?
A. Four, five years.
Q. Could you tell me just in general terms what kind of relationship you had with Thelma during that four- or five-year period?
A. Probably the regular stepmom relation.
Q. Okay. Nothing unusual about it?
A. Nothing unusual.
Q. Okay. Did Thelma -- she has three children, right?
A. Yes.
Q. And the youngest, Cindy Swartz -- do you know Cindy?
A. Yes.

Q. And was she living with Thelma when she moved in with Alva when you were 14, if you remember?
A. For a short period of time.
Q. Okay. Since you moved out, you know, after the four or five years and before this -- let's say before Alva died -- in general terms, could you tell me what kind of -- how you would characterize your relationship with Thelma.
A. Oh, I don't know. Just the regular relationship, I guess.
Q. I guess what I'm asking, just to clarify --
A. Yeah.
Q. -- is, you know, sometimes people just have a real strained relationship where they don't speak to each other, or they're angry, they just don't have -- I mean, have you just had a normal relationship, nothing out of the ordinary? That's what I'm getting from your testimony. Is that about right?
A. Yeah.
Q. Okay. And how would you characterize your relationship with dad.
A. Probably the same, normal.
Q. Okay. Right up to the time he died?
A. Yeah.
Q. Now, during the 34 years that Alva and -- Alva

and Thelma -- let me it ask this way: Alva and Thelma were married in 1976 and Alva died in 2008, correct?
A. Yes.
Q. Okay. So that's about 32 years, something like that?
A. Probably.
Q. During that period of time, do you ever remember Alva and Thelma having big arguments or problems between them?
A. Yes.
Q. Okay. Frequently? Infrequently?
MS. RAINEY: Objection, vague.
Q. (BY MR. TROUPIS) Okay. Can you just give me an example of one big argument, if there was one, that you can recall between Alva and Thelma? Just an example.
A. I really wasn't involved, you know, to --
Q. Okay.
A. -- you know, in any of their arguments.
Q. Okay. That's fine. Did Alva ever talk to you about problems that he had in his marriage at any time?
A. No.
Q. Okay. Are you acquainted with Thelma's children?
A. Yes.
Q. Do you know her son Garrett?

A. Yes.
Q. And how long have you known him?
A. Probably about 37 years.
Q. Do you have a good relationship with him?
A. I guess, yes.
Q. Have you ever done any business with him?
A. No, not to my recall.
Q. Okay. And Tom Longstreet, you've known him about the same time?
A. I knew him probably 32 years.
Q. Okay. Have you ever done any business with him?
A. Yes.
Q. Okay. What kind?
A. He bought some cows from me.
Q. Okay. And Cynthia Swartz, I guess you've never known her since you were living in the same home for that period of time?
A. And I don't believe I've done any business with her.
Q. Okay. Now, when -- in 1976, do you remember how many pieces of real estate that your father owned?
A. He had three ranches, basically.
Q. Okay. Could you tell me -- or describe them by name.

A. The one was the Middleton place, which was 80 acres at that time.
Q. Okay.
A. One called the Willow Creek place. And it was, I think, rented and deeded ground. It was 1500, 2,000 acres maybe. And then he had the -- what we call Round Valley property.
Q. Okay.
A. And it was 80 or a hundred acres.
Q. Okay. And when Alva died, he had the -- he had 27 acres on the Middleton property; is that right?
A. Yes.
Q. All right. Now, I understand that -- it's my understanding that your brother John had various business dealings with your father over the years having to do with these parcels of real estate, is that correct, or not?
A. Yeah.
Q. Okay. So could you tell me what happened first to the Willow Creek property. That's that 1500 to 2,000-acre piece you just mentioned.
A. They traded it -- or my dad traded it for a motel.
Q. Okay.
A. And I'm not sure of the exact details. He put -- he got -- put up the property and got a share of

the motel. My brother put up some property, and he got a smaller share. And then they had another partner that put up some property, and he got another small share.
Q. So your brother John was involved in this trade with your father of the Willow Creek property and then some of John's property for an interest in a motel. Was that in Rexburg?
A. Yes.
Q. Okay. And then, do you know any of the other -- apart from what you've told me, do you know any details of that transaction?
A. Some of them.
Q. Okay. What do you know?
A. Well, they got -- like I said, I'm not sure of the shares. But he got the motel -- there was two motels and a restaurant, and he got four lots, I believe -- three or four lots free and clear, and the motel, and they had -- they owed money on -- they had to make payments on the motel.
Q. Okay. So was he a -- were he and John partners in this deal, if you know?
A. Yeah. I believe he owned like three-fourths of it or two-thirds, something like that, and the other two guys owned whatever the rest was.
Q. Okay. Now, you weren't involved in that

transaction, correct?
A. No.
Q. Okay. So if I ask John, I'd probably be better to get the details?
A. Yeah.
Q. Okay. Do you know whatever happened to that motel and the other -- the restaurant and the other properties in Rexburg?
A. They sold it to another guy -- well, the one partner and another -- to my understanding, the one partner and another guy bought my brother and my dad out and gave them a note and some other property, and then he lost it. And they lost -- they lost the note and -- but they had -- they got some other property.
Q. Okay. Sounds pretty complicated.
A. Yeah.
Q. All right. The property in Round Valley, can you tell me what happened to that?
A. My father, he subdivided it -- or my brother did the work.
Q. Okay.
A. And they sold it off and my father got the money off of it.
Q. Okay.
A. My father and Thelma, I guess.

Q. All right. Was there 20 acres of that split off into five-acre parcels?
A. Yes.
Q. Okay. And were those given to -- did you receive one of those five-acre parcels?
A. Yes.
Q. And did John?
A. Yes.
Q. And Eleanor?
A. Yes.
Q. And Marilyn?
A. Yes.
Q. Okay. And did Thelma's children receive any part of -- any parcels of property off the Round Valley property?
A. That was -- that property was split in about 1970.
Q. Okay. So this was --
A. Done before -- it was when my mother was still alive.
Q. Okay. And then the rest -- was the -- when the four parcels were split off, the 20 acres and provided to each of the four children, was that the time that the rest of the property, the other 60 or 80 acres was subdivided, or was it later?

A. It was later on.
Q. Okay.
A. I don't know. Maybe in the '80s.
Q. Okay.
A. Early '80s. I don't know for sure.
Q. All right. Did John handle the subdividing of it?
A. Yes.
Q. And then the properties -- the land was sold -- the subdivided properties were sold off?
A. Yes.
Q. Did John handle the sale of those?
A. I believe so.
Q. Okay. Then with respect to the Middleton property, at one -- in 1976, at least, it was about 80 acres; is that right?
A. Yes.
Q. And it's now 27; is that right?
A. Yes.
Q. So 53 acres has been split off. Can you tell me what happened to that 53 acres?
A. They sold it.
Q. Okay.
A. Or -- yeah.
Q. Okay. Do you know when? Well, let me ask it

this way: Was it before 1990?
A. I'll tell you in a second.
Q. Okay.
A. Where's that promissory note?
Q. Oh, it's No. 4 on the stack there.
A. Oh.
Q. Oh, I'm sorry, it's No. 3.
A. It was done about 1990, yeah.
Q. Okay.
A. Around in this time of the year.
Q. All right. And did Alva ever tell you why they were selling off -- or got rid of 53 acres?
A. He got into trouble -- or he had borrowed -- he'd borrow money against it --
Q. Okay.
A. -- and was unable -- or getting to the point where he couldn't make the payments.
Q. Okay. Do you know whether or not the money that they borrowed had anything to do with the debt on the Rexburg property?
A. No.
Q. Okay.
A. As far as to my knowledge.
Q. Okay. Do you know how he got himself in trouble or how -- this is just whatever you know?

A. I know one deal he borrowed, I believe -- and I don't know the exact number -- I believe it was $20,000 and bought cattle. Thelma's son got into trouble. She borrowed money against the cattle without my dad's knowing about it.
Q. Okay.
A. When he sold the cows, there was a lien on them at the sale yard, and they grabbed the money.
Q. Okay. All right. And was that about 1990?
A. It was probably in the late '80s.
Q. Okay. Were there any other financial difficulties that you can recall your father being in?
A. No.
Q. Okay. Now, your brother John, was he a realtor?
A. Yes.
Q. Okay. And was he actively -- was that his profession when he was involved in the Willow Creek trade? Was he acting as a realtor in the -- when the Willow Creek property was traded for the motel in Rexburg?
A. I believe so.
Q. Okay. And when he subdivided the Round Valley property, was he a realtor then?
A. I believe so.
Q. Okay. Did John have anything to do with the

sale of the 53 acres of the Middleton property? Again, if you know. You don't -- please don't guess at it.
A. I believe -- I don't know.
Q. Okay.
A. I mean, he was -- I think it was listed through a couple offices -- or Thelma's boy had sent people out, and I believe the sale was through another office that was not --
Q. Okay.
A. -- connected with either one of them.
Q. Okay.
A. I believe.
Q. All right. Did John -- was John also an insurance broker?
A. Early on.
Q. Okay. And did he sell your dad insurance?
A. I believe so.
Q. Okay. You watched these transactions from 1976 through -- basically all of your life through -- up to the time your father died. And I'm wondering, do you have a personal opinion as to whether or not your father placed trust and confidence in John with respect to financial decisions, real estate decisions? Just asking for your personal opinion, if you have one.
A. Yeah. I think he trusted him with his -- yeah,

with his decisions.
Q. Okay. And that's not unusual between a father and son?
A. Yeah.
Q. Okay. We've talked about John -- and I know this is your deposition, Jack. But did you ever have any -- or make any financial decisions for your father?
MS. RAINEY: Object to form. You can answer it.
THE WITNESS: Go ahead --
MS. RAINEY: Go ahead and answer it, yeah.
THE WITNESS: Oh.
MR. TROUPIS: Yeah, if you can. If the question is too vague, then, you know --
THE WITNESS: I'm pretty vague.
Q. (BY MR. TROUPIS) Okay. So, for instance, we've talked a little bit about John being involved in real estate transactions with your dad. Were you ever involved in a business transaction with your father?
A. Yes.
Q. Okay. Could you tell me what business decision -- business transaction you were involved in with your father?
A. Well, with the livestock -- the racehorses. I guess livestock. Probably, you know, stuff relating to

the property, small purchases or something, you know.
Q. Okay. With the racehorses or the livestock, can you explain a little bit to me. What were you doing -- what kind of business were you doing?
A. He had a cow/calf operation and I was helping him feed and, you know, everyday duties or whatever.
Q. So did you share in the expenses and the profits from that? I mean, was it a business together?
A. No. I just -- I just basically helping him.
Q. Okay.
A. I mean, he -- his cows were on his own.
Q. Okay. So did you ever have a business relationship with your dad where you both owned the same -- like the same cows, or the same horses, or something of that sort?
A. Yeah. We had the same horses together.
Q. All right. And so you worked together with respect to those horses?
A. Yes.
Q. And what did you do, you bought and sold them, or what kind business was it?
A. His racehorses -- you know, all the duties that were involved with race horsing, entering them -- or he was training them.
Q. Okay.

A. You know, enter them in races. All the duties that go along with it.
Q. Okay. So you owned the horses together?
A. Yes.
Q. And you'd enter them in races together?
A. Yes.
Q. And then you'd share in the profits, if there were profits?
A. Yeah.
Q. All right. And I'm assuming you bought and sold horses together?
A. Mainly we raised them.
Q. Okay.
A. I don't believe we -- I don't think I ever bought one with him.
Q. Okay. So what period of time are we talking about that you were involved with your dad in the racehorse business?
A. I believe I had horses around 1970 to probably the mid-'90s.
Q. Okay.
A. And had -- I didn't -- I just had a few horses.
Q. Okay.
A. And not continuously. Off and on.
Q. Okay. So the last time that you owned horses

together with your dad would have been about what year?
A. I don't -- late -- I don't know.
Q. Okay. That's fine. It's been a long time.
A. Yeah.
Q. Okay. I may have these a little out of order. Could you take a look at what I've marked Exhibit 3, which is the promissory note? No. 3. There we go. And could you identify this -- it appears to be a promissory note signed by Alva and Thelma Garrett dated December 31 -- or, no, dated March 21, 1990, payable to you; is that right?
A. Yes.
Q. And could you tell me a little bit about the circumstances. How did this note get -- you know, what was the purpose of this note?
A. He needed money to make a payment. And the actual amount I gave him -- yeah, I'm not sure -- 8 to 10,000.
Q. Okay.
A. I believe it was around $10,000. And the breakdown of that would have been approximately 8,000 for rent and then 2,000 --
Q. Two thousand loan?
A. Two thousand loan.
Q. Okay.
A. The rent was advanced on the -- on the rent.

That was the first year I started renting.
Q. Okay.
A. And that was to make the payment on the place because he was behind.
Q. All right. So was this note done before the 53 acres was sold off?
A. Yes.
Q. So at this point in time there was 80 acres, correct?
A. Correct.
Q. And so the $8,000 rent was for 80 acres?
A. Yeah.
Q. So that's roughly a hundred dollars an acre?
A. Yeah. It's actually about 75 acres, 'cause you got the house, yeah.
Q. Okay. And you were renting the -- so you were doing the farming -- you were farming this 80 acres -- or the 75 acres from 1990 -- or in 1990, right?
A. Correct.
Q. Did you continue to farm it from 1990 right up until now?
A. No.
Q. Okay.
A. Not the 80.
Q. Okay. Well, the 80 was sold off at some

point --
A. Yeah.
Q. -- around then, '90, '91, something like that, correct?
A. Yes.
Q. Once the 80 was sold off, did you continue to farm the remaining tillable property?
A. Yes.
Q. All right. Which is 23 -- 20 --
A. Two or three acres.
Q. -- 2 or 3 acres. And have you done that since -- I mean, continuously every year since 1990?
A. Yes.
Q. And going back to this promissory note. Was it paid back?
A. No.
Q. Okay. I notice there's a note handwritten on here that says 12/16/91, $1758 paid, with a JG. Are those your initials?
A. Yes.
Q. All right. So did you -- do you -- I know this is way long ago, but do you remember receiving that back?
A. What that was -- yes, it came back to me.
Q. Okay.
A. That was a -- we raised sugar beets and I told

him anything above the rent we'd split. And that was a sugar sale, and it came back from -- so that's what...
Q. Okay. So are you saying that that was not a payment on the note?
A. Yes, it was a payment on the note.
Q. Okay.
A. But it was not from them, it was from the sugar company.
Q. Oh, you credited it from the profits on the sale of sugar beets?
A. Yeah.
Q. Okay. So what's the status of this note? Was it paid off in full? Was it written off? Was it -- you know, what's the current status of this note?
A. It was not paid off. My understanding of a promissory note, after five years, they're void.
Q. Okay. Did you ever discuss it with Alva, your father, about getting payment on the rest of this note?
A. I don't recall.
Q. Okay. Now, you've -- take a look, please, at Exhibit 4.
MS. RAINEY: It's this one.
MR. TROUPIS: That's this one.
THE WITNESS: Okay.
MR. TROUPIS: And you can actually pull the

note out of there and put it away, that way you're -- it's not --
THE WITNESS: Oh, okay.
MR. TROUPIS: Just -- yeah, that's fine.
Q. (BY MR. TROUPIS) Could you explain to me -- this is a document -- now, this is a document that you produced in discovery, and it's handwritten, and then it's got a fax notation from Lindbloom Realty on the top. First, could you explain to me what is this document?
A. It's expenses and stuff I've done to the property.
Q. Okay. And did you -- when was this compiled? When did you put this together?
A. Probably when it was requested from the attorneys.
Q. Okay. So the list was put together. Do you have a -- I mean, this year? Last year?
A. Probably last year.
Q. Last year sometime. Okay. Did you put this together from some other documents that -- I mean, this is a list of a lot of different things.
A. No.
Q. Okay. So when were these items provided -- when did you provide these various items that are listed? I mean, is it over a period of time?

A. Over a period of time.
Q. And can you tell me kind of what the range of time we're talking about?
A. Probably from, say, '85 to 2006.
Q. Okay. And did you put this together from your memory, or do you have any kind of notes to refer back to?
A. I believe mainly it was from my memory.
Q. Okay. The values that you've listed -- over here on the right-hand column you have estimated values. Is that your estimate? I mean, is that just from your personal opinion, or do you have any other basis to make an estimate of the values?
A. From my opinion. And there were some other --
Q. Okay.
A. -- stuff probably.
Q. Okay. Well, for instance -- let me just pick one here. You've got spray -- about the first page about eight items down you got spray weeds. You see that, 1700?
MR. TROUPIS: Let's take one moment.
(Off the record.)
Q. (BY MR. TROUPIS) Could you tell me kind of how you estimated the 1700?
A. That was probably so much an acre.
Q. Okay.
A. And I probably guesstimated the acres over the

period of time.
Q. Okay. That's fair. Now, if you'll take a look at the -- well, page 3 first. You've got purchases for farm, 2003 to 2008, and you've got a number, 39,318.
A. Yeah.
Q. I'm assuming you must have some documents that helped you to come up with that number?
A. I believe that was -- all this stuff added up.
Q. That's all this?
A. I believe.
Q. Okay. That's good. Okay. Then on page 4, this appears to be a series of checks. And, again, now, did you actually have a -- do you still have copies of these checks that you referenced when you made this list out?
A. I must have at the time.
Q. Okay.
A. I don't -- I don't recall.
Q. Do you know whether you still have the checks?
A. I don't recall.
Q. Okay. And these checks -- let's take the first one here. 10/31/07, you've got -- rent says 2875, and then less water 1246. Could you kind of explain to me what this is, this check, 2578 dated 10/31/07? Just explain the entry to me. What does it mean?

A. I believe the rent was $2875. I paid them 1246, I think, which is less the water bill.
Q. Okay. So did you pay the water bill yourself?
A. Yes.
Q. So you basically paid -- was it your agreement that you paid so much per acre less whatever the water bill was?
A. Yes.
Q. Okay. And that's what this check in October 31, '07, was for?
A. Yes.
Q. And so the check would be payable to Alva --
A. Yes.
Q. -- or Alva and Thelma?
A. Yes.
Q. Okay. Which one, Alva, or Alva and Thelma?
A. Alva.
Q. Okay. And then the same on check number 2512 dated 10/26/06, would that have been a rent check as well of 1422?
A. Yeah. Yes, I believe so.
Q. Okay. And then with the check for 10/23/05, that 2941 it looks -- or 2951 for 1,095, that would have been a rent check?
A. I believe so.

Q. And we're talking about rent for your rental of the farm acreage that you're farming, right, on the Middleton property?
A. Yes.
Q. You testified already that you did -- you had business with your dad with respect to the horses to training -- training and racing horses, right?
A. Yes.
Q. And then you had -- you farmed this property -- you basically rented the farm from your father; is that right?
A. Yes.
Q. And we've previously talked about -- you gave me an opinion you thought your father had trust and confidence in John with respect to some financial affairs. Would you have the same opinion -- what do you think your father's opinion was of you with respect to financial affairs? Did he have trust and confidence in you?
A. Yes.
Q. Okay. Did he ever ask you for advice about the racing business -- I mean, horse racing business, or anything dealing with agriculture business?
MS. RAINEY: Object to form.
Q. (BY MR. TROUPIS) Let's just start with the horse racing business. During the time that you were

racing horses together, did your father ever ask you for advice?
A. Probably.
Q. Okay. Okay. So now I'd like you to take a look at -- actually, I haven't marked it yet. You don't have to take a look at it yet. That's fine. We'll look at that in a minute. In about 1990 Alva deeded the Middleton property to himself and Thelma. Are you aware of that in about 1990? The property -- before 1990 --
A. Be specific.
Q. Okay. Before 1990 the Middleton property was titled only in Alva's name; is that right?
A. Yes.
Q. Okay. And about 1990 -- and this is at least with respect to the 27 acres that remained -- it's my understanding that Alva deeded the property that he owned separately to himself and Thelma; is that right?
A. Yeah.
Q. Okay. So my question is: When did you first become aware of that fact, that the property -- that the 27 remaining acres had been deeded from Alva to Alva and Thelma?
A. Probably around 2000.
Q. Okay. And how did you become aware of it?
A. He was wanting to sign the property over to me

at that time.
Q. Okay.
A. And we -- anyhow we looked -- or I believe John looked at the records or something. I don't -- I don't recall how it -- I found out.
Q. Okay. When you say that Alva wanted -- in 2000 Alva wanted to sign over the property to you, can you be a little more specific? What did -- how did this come about? What did Alva tell you?
A. He just came over, said he's wanting to sign it over to me.
Q. Okay. And how was John involved in that?
A. He wasn't.
Q. Okay. But did -- somehow John got involved in looking at the property to determine how it was held -- how title was held?
A. Yeah. We went -- seemed -- seems like we went to Thelma and she wouldn't sign it over or something -- or wouldn't sign her interest over.
Q. Okay. Did he tell you why he wanted it signed over?
A. At that time, or in the future?
Q. Yeah, in 2000. When you first -- when you had the first conversation with Alva and he said that he wanted to sign over the property, did he give you an

explanation?
A. He said I've been farming it and that I'd helped him make payments on it.
Q. Okay. Did he intend to move off of the property?
A. No.
Q. So he intended to stay on it?
A. Yes.
Q. Even though he wanted to give it to you?
A. Basically, he wanted to give me like 25 acres or 24 acres and Thelma could have the house and an acre or so.
Q. Okay. Did he want it to take effect immediately?
A. We didn't get that far.
Q. Okay. So you don't know whether he wanted it to -- you to have it now, or when he died? Do you know that?
A. I believe he wanted me to have it then.
Q. All right. Did he tell you that?
MS. RAINEY: Can you clarify the time frame?
MR. TROUPIS: We're talking in 2000.
MS. RAINEY: Okay.
MR. TROUPIS: This is in 2000, 'cause this is the first conversation.

MS. RAINEY: Okay.
THE WITNESS: What was the question again?
Q. (BY MR. TROUPIS) In 2000, did your father tell you that he wanted you to have that 24 acres right then?
A. Yes.
Q. Okay. Now, for some reason that didn't -- it never got completed in 2000, right?
A. Correct.
Q. And it wasn't until 2006, six years later, that you actually got a deed from your father, right?
A. Correct.
Q. So what happened in the intervening six years that delayed you getting that deed?
A. Thelma basically wouldn't let him do anything.
Q. Okay. So were you -- did Alva tell you that he and Thelma talked about this?
A. Yes.
Q. Okay. And on more than one occasion did he tell you that?
A. Yes.
Q. Could you tell me how many times Alva told you that he and Thelma talked about him deeding away 24 acres to you?
A. I imagine he talked to her eight, ten times.
Q. Okay. Were you present?

A. Only on, I believe, two times I was present.
Q. Okay. Could you tell me when the first of those was?
A. First time was in about 1990.
Q. Okay. And can you describe for me -- was anybody else there? You and Alva and Thelma, and anybody else?
A. Yes. I believe it was just us.
Q. Okay. And where did that take place?
A. At their home.
Q. All right. And how did -- tell me what conversation you had -- or they had.
A. That's when it was in 80 acres and they owed -- they owed on it.
Q. Okay.
A. And I was to pick -- to take over the debt.
Q. Okay.
A. And they're going to have like a life estate in the property.
Q. Okay.
A. In the home.
Q. And then you would get it -- get everything when they died?
A. Yes, I guess.
Q. Okay. What happened after that conversation?

A. Thelma didn't want me to have it.
Q. Okay. Now, that was when they had the 80 acres. And you said that you -- said there were two times that you had -- that they had a conversation regarding the property in your presence. So when was the second one?
A. The other one was in about -- was in the 2000 --
Q. Okay.
A. -- or around 2000.
Q. All right. And did that happen at their home?
A. Yes.
Q. Was anyone else present besides you and Thelma and Alva?
A. Just us three, I believe.
Q. Okay. And what was the substance of that conversation?
A. He said that -- let's see. He said that he wanted me to have the property.
Q. Okay. The entire property?
A. I believe it's just -- I believe it was just the 25 acres, and she was to have the house.
Q. And you had this discussion with her present?
A. Yes.
Q. And I'm assuming she said no?

A. Yes.
Q. Okay. So in the intervening six years from 2000 to 2006 when the quitclaim deed was signed, did you have any other conversations with Alva about this property?
A. Numerous times.
Q. Okay. Did he initiate those, or did you initiate those?
A. He initiated them.
Q. Okay. And can you remember any of those?
A. He just said he wanted me to have the place.
Q. Okay.
A. And I knew Thelma would say no.
Q. All right. Now, could you take a look at what I've marked as Exhibit 2. Have you ever seen this document before?
A. Yes.
Q. And when was the first time you saw it?
A. About probably January 2008.
Q. Okay. So you didn't see this before -- well, January '08. Was that before Alva died?
A. Yeah.
Q. All right. And how did -- who showed it to you?
A. Bill Gigray gave my brother a copy of it.

Q. And did he do that for any particular reason?
A. There was something on the power of attorney -- they asked him if they had power of attorney.
Q. Did your father need some help with his -- handling of his affairs? Is that the question?
A. At that time.
Q. Okay. When you -- did you have any conversation with Mr. Gigray or John about this document when you first saw it?
A. No.
Q. Did you ever have a conversation with your father about it?
A. No.
Q. Okay. And he died in March of '08, a few months later, right?
A. Yes.
Q. Okay. Did your father ever tell you that he had entered into a Contract For Wills with Thelma?
A. I don't recall.
Q. Okay. When you had the conversation in 2000 when your father and Thelma and you were present, did your father make any mention that he had entered into any kind of contract with Thelma about the property, or about the wills?
MS. RAINEY: Objection, misstates evidence.

Q. (BY MR. TROUPIS) Did your father have any -- make any conversation -- or have any -- did your father mention having any -- did he make any reference to this document, or any other agreement that he had with Thelma?
A. Not to this, no.
Q. Okay. When your father in 2000 -- in 2000 -- or take a look -- I'm sorry. Take a look at Exhibit 5, which is the Quitclaim Deed. Now -- and you've seen this document before, right?
A. Yes.
Q. And is it signed by your father, Alva Garrett?
A. Looks like it.
Q. Was it signed on or about February 14, 2006?
A. To the best of my knowledge.
Q. And is this the Quitclaim Deed that John, your brother, prepared?
A. I wasn't there.
Q. Okay. Do you know whether or not -- do you know who prepared it?
A. I believe it was John.
Q. Okay. Would you recognize his printing?
A. No.
Q. Okay. When your father signed this -- were you present when he signed this instrument?
A. No.

Q. No. Who was, if you know?
A. I wasn't there.
Q. Okay. When did you first learn that your father had signed a Quitclaim Deed to you -- signed this Quitclaim Deed to you?
A. Shortly after it was signed.
Q. Okay. So sometime in February of 2006 you found out about it?
A. I believe it was longer than that, but I don't recall the date.
Q. Sometime in 2006?
A. Yes.
Q. And did you find out -- who did you find it out from?
A. First it was from John.
Q. Okay. Did you ever -- when did you -- were you ever given the actual original Quitclaim Deed by your brother John?
A. No.
Q. Did your father ever give you the Quitclaim Deed?
A. No.
Q. So was it ever in your possession?
A. Kind of.
Q. Could you explain.

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A. It was in this file.
Q. Okay.
A. And the file was at my brother's house.
Q. Okay.
A. And it had been at my house. And then it was -- he had it.
Q. Okay. So it was in your brother's possession?
A. Yes.
Q. All right. You never asked your brother for it while your father was living?
A. No.
Q. Okay. And my understanding is it was -- it bears a recording date of March 5, 2008; is that right? It's right down here.
A. March -- yes.
Q. And your father died two days earlier, March 3, 2008?
A. Correct.
Q. Okay. So it was recorded two days after your father died?
A. Correct.
Q. Did you take it in for recording?
A. No.
Q. Do you know whether your brother John did?
A. Yes, I believe it was him.

Q. Okay. Do you think -- do you have an opinion as to whether or not in 2006 when your father signed this Quitclaim Deed, that he had the ability to think clearly and make up his own mind about important decisions?
A. Yes, I believe it.
Q. Okay. At that time, was he still handling the horse racing business?
A. No.
Q. Okay. When was the -- when did he quit doing the horse racing business?
A. I believe it was in about -- I'm not sure.
Q. A couple years earlier?
A. A couple years earlier.
Q. All right. Was your father -- in 2006, did your -- were you acquainted with your father's mental and physical condition?
A. Yes.
Q. How would you describe it?
A. He was still -- mentally, he was still good. Physically, he was -- his legs was giving him problems and stuff.
Q. Okay.
A. He couldn't travel.
Q. Okay.
A. Or as well -- as well as a 40-year-old.

Q. Well, that's normal. Okay. Is it fair to say that when this Quitclaim Deed was signed, there was no money changing hand between you and your father?
A. That's correct.
Q. Okay. You didn't make any payment to him to get this deed, correct?
A. No.
Q. And the monies that are referred to on Exhibit 4, the value of work that you did on the farm, did you provide this work with the expectation that you would get the farm?
A. Yes.
Q. Okay. So did you have an agreement with your father that in exchange for doing this work you're going to give me this farm?
A. Yes.
Q. Okay. Could you -- was that in writing?
A. No.
Q. Was it a verbal agreement with your dad?
A. Yes.
Q. Okay. And do you know when you entered into that agreement?
A. Probably around 1990.
Q. Okay. Would you characterize that as a firm agreement, or kind of a loose understanding that you had

between you and your dad, or something else?
A. I'd say it was a firm understanding.
Q. Okay. But he didn't set a specific price, I want this much in exchange for this property? Did you agree on a price?
A. No.
Q. Okay. When this deed was -- well, you didn't have this deed prepared. Did you ever meet with your father at an attorney's office to discuss the transfer of the property to you?
A. No.
Q. In the answer to interrogatory number five you said that there was an appointment made at the Deford Law Office in Nampa?
A. That's correct.
Q. And was your father -- were the Defords representing your father in any other matters?
A. No.
Q. Were they representing you in any matters?
A. No.
Q. John?
A. No.
Q. Did any of you have any prior relationship with the Defords -- Deford Law Office?
A. No.

Q. Somebody made this appointment, do you know who?
A. The recommendation?
Q. Yes.
A. Was made -- Dr. Kerrick -- or attorney -- Kerrick's Law Office.
Q. Okay.
A. I called him when he come -- when he approached me to sign the property -- or I called Kerrick and he said he was too busy. So he recommended this Deford gal.
Q. Okay. So you made the appointment?
A. I made the appointment.
Q. Okay. As it turns out, nobody saw an attorney to have a deed prepared?
A. This is correct.
Q. Okay. And when this deed was prepared, you didn't discuss -- when you had the conversation in 2006 that resulted in the deed being prepared, you didn't discuss that with Thelma, correct?
A. Correct.
Q. And to your knowledge, did John discuss it with Thelma?
A. Not to my knowledge.
Q. And do you know whether Alva discussed it with Thelma?

A. I do not know.
Q. Okay. So as far as you know, Thelma didn't consent to Alva signing this deed as far as you know?
A. That's correct.
Q. Okay. Now, when you became aware of the fact that the -- that this deed had been signed, which was sometime in 2006, you didn't ask Alva and Thelma to move out of the farm property, right?
A. That's correct.
Q. And you continued to pay rent for farming the property through 2007; isn't that right?
A. That's correct.
Q. And you didn't collect any rent from either Thelma or Alva for their continued possession of the farm, correct?
A. That's correct.
Q. Would you agree with me that you felt that as long as Alva was living he was entitled to continue to treat the land as his own regardless of this deed being in existence?
A. Yes, I guess.
Q. Okay. I mean, you weren't trying to take Alva's property, you were trying to keep Thelma from getting this 24 acres when Alva died; is that fair?
MS. RAINEY: Object to form.

MR. TROUPIS: I mean, if that's your understanding. Well, I'll withdraw the question. It's a little bit argumentative.
Q. (BY MR. TROUPIS) Okay. Did you ever get a chance -- you said that you saw this Contract For Wills, which was Exhibit 2, in January of 2008, a couple months before your father died. And attached to it as exhibits are wills. They're not the signed ones, but they're a form of the will of Alva Garrett and Thelma Garrett. Did you read through that before -- or when you saw the document, if you remember?
A. I only seen part of the document.
Q. Okay.
A. And that was my father's -- just my father's will.
Q. Okay.
A. I never seen the Contract Of Wills till -- or let's see -- till it came out in litigation.
Q. Okay. Well, my question then is, in looking at Alva's will -- and this is the 1995 will -- this will in paragraph 6 -- well, in paragraph fifth it says that everything at the time of his death goes to his wife Thelma. And then in paragraph 6 it says: In the event that Thelma predeceases or dies as a result of a common accident, everything appears to go to all seven children

in equal shares. Do you see that?
A. Yes.
Q. And my question is -- a couple of questions. First, do you know of any reason that Alva would give you the property in the Quitclaim Deed that in his earlier will he said he wanted to divide up among all seven of his children -- seven children equally, that is, Thelma's children and his children? Do you know of any reason that Alva would make that distribution?
MS. RAINEY: Object to form.
MR. TROUPIS: Just asking for your knowledge, if you have any, from whatever source.
THE WITNESS: I don't really have any knowledge of it.
Q. (BY MR. TROUPIS) Did Alva ever explain to you -- or did he ever talk about what his earlier will said?
A. He never talked to me about the will.
Q. Okay. Do you know whether Alva was estranged from any of these seven children? I mean, did he have a bad relationship with any of the other -- your other siblings, or Thelma's children?
A. I know he had a problem with Garrett a time or two.
Q. Okay. Anything else -- any of the others?

A. I don't believe the others.

MR. TROUPIS: Okay. Okey-doke. I don't have any further questions. I would like you to take a look through your file, and if you have other documents that show payments, or that we talked about earlier that you'd like to supplement your response with, if you could do that, I'd appreciate that, and otherwise, I have no other questions. Do you have any?

MS. RAINEY: I don't have any questions for him.

MR. TROUPIS: Very good.

(The deposition was concluded at 2:15 p.m.)

(Signature requested.)

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR CANYON COUNTY

JACK L. GARRETT,	**Case No: CV OC 09-8763-C**
Plaintiff,	**MEMORANDUM IN SUPPORT OF DEFENDANT/COUNTERCLAIMANT'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF/ COUNTERDEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
vs.	
THELMA V. GARRETT, An individual,	
Defendant.	

I.

STATEMENT OF UNDISPUTED FACTS

1. Alva and Thelma Garrett were married in 1976. They remained married for 32 years, until Alva's death on March 3, 2008. Affidavit of Christ T. Troupis ("Troupis Aff."), Ex. A.(Deposition of Thelma V. Garrett, May 5, 2010 ("Thelma Depo.") at 25:5-7; 4:9 – 5:1.

2. Thelma Garrett and Alva Garrett were both married prior to their marriage to each other. Each of them had children of a prior marriage. Alva had four

children from a prior marriage, and Thelma had three children from her prior marriage. Troupis Aff., Ex A (Thelma Depo at 6:13-15; 7:6-12; 9:14-22).

3. The members of the combined family had a normal and cordial step-family relationship. Troupis Aff., Ex A (Thelma Depo at 49:22 – 50:11).

4. At the time that Alva and Thelma were married, Alva held title to three significant parcels of real property: (1) the Middleton property, comprised at that time of approximately 80 acres (the subject real property in this action); (2) the Willow Creek property, comprised of between 640 – 2000 acres; and (3) the Round Valley property, consisting of 80-100 acres. He owned all of these properties free and clear. Troupis Aff., Ex A (Thelma Depo at 16:20 – 17:21); Troupis Aff., Ex B (Deposition of Jack Garrett, May 5, 2010 ("Jack Depo.") at 19:21 – 20:12).

5. Alva and Thelma lived in a home on the Middleton property during their entire 32 year marriage, and Thelma continues to reside there. Troupis Aff., Ex A (Thelma Depo at 4:9 – 5:1).

6. Prior to 1990, Alva entered into business transactions with his son John Garrett, who was a real estate broker, with respect to the Willow Creek and Round Valley properties. John Garrett traded Alva's Willow Creek property for an interest in a motel in Rexburg. John ran the motel which was eventually lost through foreclosure. Troupis Aff., Ex A (Thelma Depo at 18:9 – 22:23); Troupis Aff., Ex B ("Jack Depo.") at 20:13 – 24:13).

7. Prior to 1990, John subdivided Alva's Round Valley property into residential lots. Alva conveyed four five-acre parcels to each of his four children,

John, Jack. Eleanor, and Marilyn. John sold the remaining 60 subdivided acres. Troupis Aff., Ex B ("Jack Depo.") at 23:1 – 12).

8. John took some of the Round Valley lots as payment for his development work. Troupis Aff., Ex A (Thelma Depo at 20:25 – 21:3);

9. In 1990, following his various business transactions with John Garrett, Alva Garrett had borrowed on the Middleton property. He was unable to make his payments and threatened with foreclosure. Troupis Aff., Ex A (Thelma Depo at 21:25 – 22:23).

10. In order to pay off his debts, Alva sold approximately 53 acres of the Middleton property, leaving the 26 2/3 acres that are the subject of this lawsuit. Troupis Aff., Ex A (Thelma Depo at 21:25 – 22:23).

11. On June 20, 1990, after selling a portion of the Middleton property, Alva deeded the remaining property to himself and his wife, Thelma. Troupis Aff., Ex A (Thelma Depo at 32:1 – 32:20); Rainey Aff. Ex. C.

12. Alva deeded the remaining Middleton property to himself and Thelma because he was afraid that John might talk him into doing something with it and they would lose the little property they had left. Troupis Aff., Ex A (Thelma Depo., 32:1-20).

13. When Alva deeded the Middleton property to himself and his wife, Thelma, in 1990, he intended to change the property from separate to community property. Troupis Aff., Ex A (Thelma Depo., 40:3-41:2).

14. In 1995, Alva and Thelma entered into a contract for wills and executed wills containing mutual provisions leaving their entire estate to the

surviving spouse, and upon the death of the survivor, in equal shares to all seven (7) children of their combined family. At the time that these instruments were executed, the only real property owned by Alva and Thelma was the remaining 26 2/3 acres of the Middleton property. Troupis Aff., Ex A (Thelma Depo., 35:4-36:24).

15. On February 14, 2006, Alva executed a quitclaim deed purportedly conveying his interest in the Middleton property to his son, Jack Garrett. Rainey Aff., Ex. E.

16. Jack had a conversation with his father, Alva, that resulted in the preparation of the quitclaim deed. Troupis Aff., Ex B (Jack Depo., 54:6-20).

17. Jack made an appointment at the Deford Law Office for his father Alva to sign the quitclaim deed, but the appointment was not kep. Troupis Aff., Ex B (Jack Depo., 53:12 – 54:14).

18. In addition to renting the farm from his father, Jack was involved in business with his father training and racing horses. Troupis Aff., Ex B (Jack Depo., 28:16 – 30:20; 39:1-12).

19. Alva had trust and confidence in both of his sons, John and Jack, with respect to his financial affairs. Troupis Aff., Ex B (Jack Depo., 27:18-28:1; 39:13-40:3).

20. The quitclaim deed that Alva signed was prepared by Alva's son, John Garrett. Troupis Aff., Ex B (Jack Depo., 48:18 –20).

21. Jack did not provide Alva any present consideration for the quitclaim deed. He claimed he had an agreement to receive the farm in exchange for past work

he did for him in 1990, although there was no written agreement and they never agreed on a price. Troupis Aff., Ex B (Jack Depo., 52:1 – 53:6).

22. As early as 2000, Jack Garrett knew that the property was titled in the names of both Alva and Thelma. Troupis Aff., Ex. B, (Jack's Depo., 40:14 – 41: 19)

23. Neither Jack nor John Garrett discussed Alva's execution of the quitclaim deed with Thelma, and she did not consent to Alva's execution of the quitclaim deed. Troupis Aff., Ex B (Jack Depo., 54:16 – 55:4).

24. Thelma Garrett did not have any knowledge of the quitclaim deed until after it was recorded after Alva died. Troupis Aff., Ex A (Thelma Depo., 48:14 23; 52:17-22).

25. Jack Garrett never took possession of the quitclaim deed while Alva Garrett was living. John Garrett kept the deed in a file at his home. Troupis Aff., Ex B (Jack Depo., 49:16 – 50:11).

26. Jack Garrett did not take possession of the Middleton property after Alva executed the quitclaim deed. Troupis Aff., Ex B (Jack Depo., 55:5 – 10).

27. After Alva executed the quitclaim deed, Jack continued to pay Alva and Thelma annual rent in October for farming the Middleton property. He made these payments in October, 2006 and October, 2007. Alva died in March, 2008. Troupis Aff., Ex B (Jack Depo., 37:21 – 39:4).

28. Jack never collected rent from either Thelma or Alva for their continued possession of the Middleton property. Troupis Aff., Ex B (Jack Depo., 55:13 – 16).

29. The quitclaim deed from Alva to Jack was not recorded until March 5, 2008, two days after Alva's death. Troupis Aff., Ex B (Jack Depo., 50:12 – 21).

30. Jack did not record the quitclaim deed. John Garrett took the deed in for recording. Troupis Aff., Ex B (Jack Depo., 50:22 – 25).

31. Jack felt that as long as Alva was living he was entitled to continue to treat the Middleton property as his own notwithstanding the quitclaim deed. Troupis Aff., Ex B (Jack Depo., 55:17 – 21).

32. In a conversation with Jack about the property, Alva told him he would deed 24 acres to Jack, with Alva and Thelma retaining a life estate in the property. Troupis Aff., Ex B (Jack Depo., 43:21 – 44:24).

II.

ANALYSIS

A. Standard of Review

Summary judgment is appropriate where the record shows no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c). The principal purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims. *Sparks v. St. Luke's Regional Medical Center,* 115 Idaho 505, 768 P.2d 768 (1988). Once a moving party submits evidence in support of its motion for summary judgment, the burden shifts to the nonmoving party to come forward with its own evidence to show that there is a genuine issue as to a material fact. I.R.C.P. 56(e) "[A] mere scintilla of evidence or only slight doubt as to the facts" is not sufficient to create a genuine issue for purposes of summary judgment. *Harpole v. State,* 131 Idaho 437, 439, 958 P.2d 594,

596 (1998). The nonmoving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Samuel v. Hepworth, Nungester, and Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303 (2000). The nonmoving party "must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment." *Jenkins v. Boise Cascade,* 141 Idaho 233, 238, 108 P.3d 380, 385 (2005); *Blickenstaff v. Clegg,* 140 Idaho 572, 577, 97 P.3d 439, 444 (2004). "Summary judgment is appropriate where a nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case when it bears the burden of proof." Id.

B. Alva and Thelma held title to the Middleton Property as Community Property.

I.C. § 32-903 provides that: "(1) All other property acquired after marriage by either husband or wife is community property." The conveyance of real property during marriage from one spouse to both spouses constitutes the acquisition of property by one of the spouses during the marriage and transmutes the property from separate to community property. On June 20, 1990, Alva Garrett quitclaimed his interest in the Middleton property to himself and his wife, Thelma Garrett. Thelma Garrett acquired her interest in the property during the marriage.

In *Dunagan v. Dunagan*, 147 Idaho 599, 213 P.3d 384 (2009), the Idaho Supreme Court held that when Kelly Dunagan (Kircher) and her husband Chris Dunagan kept all of their finances and property separate during their marriage. However, the bank required Kircher to quitclaim her interest in her home as a condition of refinancing. In the subsequent divorce proceeding, the Court ruled

that the house had become part of the marital community by Kircher's quitclaim deed. Kircher argued that the only reason she executed the quitclaim deed was to comply with the bank's financing condition. Dunagan argued that "when Kircher executed the quitclaim deed, she transmuted the house from separate to community property; the transmutation complied with the statutory requirements of the Idaho Code and therefore the district court properly affirmed the magistrate's decision to treat the house as an asset of the community rather than as Kircher's separate property."

The Idaho Supreme Court cited I.C. §32-906 noting:

> "All property that is acquired after marriage by either husband or wife is community property, including property that is owned separately by one spouse who then deeds such property to the marital community." Id at 387.

The Court further noted that:

> "Here the deed is unambiguous and transmuted Kircher's separate property to community property..." Id at 388.

In his motion for summary judgment, Jack Garrett admits that a husband or wife may transmute property from separate to community at any time during the marriage, so long as they conform with statutory formalities in doing so, citing *Reed v. Reed,* 137 Idaho 53, 59, 44 P.3d 1108 (2002). The deed from Alva to Thelma and Alva did comply with all statutory formalities for such a conveyance. It described the real property, named the grantor and grantees, was signed, notarized and recorded in the County in which the property was situated.

The Plaintiff argues erroneously that the only means of transmuting separate property to community property is by execution of a formal marriage settlement agreement. The statute he cites, I.C. §32-916, does not support his argument. It states:

> 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. (emphasis added)

Alva and Thelma did not have a marriage settlement agreement. Therefore, their rights are governed by the provisions of Title 32, Chapter 9, Idaho Code, and as set out above, the Idaho Supreme Court has held that a deed from one spouse of his separate property to both spouses during the marriage transmutes that property to community. IC §32-906. Moreover, the quitclaim deed executed by Alva would satisfy the formality requirements for a marital settlement agreement. Those requirements were listed in *Reed v. Reed, supra, at* 59:

> The formalities required of a valid marriage settlement are that it be in writing, that it be executed and acknowledged in the same manner as conveyances of land, and if it affects real property, that it be recorded in the county in which any affected real property is located. I.C. §§ 32-917 and 32-918.

In his summary judgment motion, Jack Garrett also incorrectly asserts that I.C. §32-906(2) creates a presumption that Alva's deed to himself and Thelma created a separate estate in each of them. That is a clear misreading of the statute, which applies only to a deed from one spouse to the other, and not a deed from one spouse to both spouses. It states:

> "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 or other instrument of conveyance notwithstanding the provisions of section 32-912, Idaho Code;" (emphasis added)

Alva did not convey his property from himself to Thelma as her sole and separate property. He did not divest himself of his interest in the property. Instead, he conveyed his property to himself and Thelma, his wife.

Mr. Garrett's contention that the "default rules" in Title 55 govern this conveyance conflicts with I.C. §32-916, which provides that the property rights of a husband and wife are governed by that chapter. Moreover, I.C. §55-104 specifically excludes property acquired as community property from the presumption of a tenancy in common. It states:

> "Every interest created in favor of several persons in their own right is an interest in common...unless acquired as community property."

Mr. Garrett's arguments also ignore the additional evidence in the record that the conveyance was intended to create community property. The only evidence in the record about this conveyance apart from the deed itself is Thelma Garrett's testimony. She testified that her husband intended by this conveyance to change this property from separate to community. Troupis Aff., Ex A (Thelma Depo., 40:3-41:2).

She also testified that Alva intended to provide her with a community interest in the property so that she would be protected from the influence of John Garrett on Alva to deed away the property. Troupis Aff., Ex A (Thelma Depo., 32:1-20).

The specific provisions of Idaho's Community Property law govern this conveyance. Alva intended to create a community interest in his real property by conveying it to himself and his wife during their marriage.

C. Alva's purported conveyance of his interest in community property is void because it was in violation of IC §32-912.

I.C. §32-912 states:

> "Either the husband or the wife shall have the right to manage and control the community property, and either may bind the community property by contract, except that neither the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing the sale agreement, deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered,..."

The Court declared in *Lovelass v. Sword*, 140 Idaho 105, 90 P.3d 330, 333 (Idaho 2004):

> "I.C. §32-912 provides the general rule that an attempted conveyance of community real estate by one spouse, without the written consent of the other, is void. *See* I.C. § 32-912; *Fuchs v. Lloyd,* 80 Idaho 114, 120, 326 P.2d 381, 384 (1958) (citations omitted)."

As early as 2000, Jack Garrett knew that the property was titled in the names of both Alva and Thelma. Troupis Aff., Ex. B, (Jack's Depo., 40:14 – 41: 19) Thelma Garrett did not consent to Alva's conveyance to Jack of his interest in the Middleton property. No one even talked to her about it, and Jack admitted that when it was discussed on prior occasions, she wouldn't consent to it. Troupis Aff. Ex. B, ("Jack's Depo., 44:25 – 45:1).

D. Both Jack and John were in a confidential relationship with Alva when he executed the quitclaim deed, and therefore must prove clearly and unequivocally that he intended a complete inter vivos gift of his property.

Jack testified that both he and his brother John had business relationships with their father, Alva, and that Alva reposed trust and confidence in both of them with respect to financial decisions. Troupis Aff., Ex B (Jack Depo., 27:18-28:1; 39:13-40:3). John was a real estate broker and was involved in extensive transactions with Alva resulting in the loss of all of his real estate holdings except a portion of his homestead property. In fact, to

protect this last property from John's influence, Alva deeded it into the names of himself and his wife, Thelma.

In *Stearns v. Williams,* 72 Idaho 276, 240 P.2d 833, 840, (1952) this court said:

> "A fiduciary relationship does not depend upon some technical relation created by or defined in law, but it exists in cases where there has been a special confidence imposed in another who, in equity and good conscience, is bound to act in good faith and with due regard to the interest of one reposing the confidence."

Jack and John were fiduciaries with respect to their father's execution of a quitclaim deed to Jack. Therefore, as the Court declared in *Claunch v. Whyte*, 73 Idaho 243, 249, 249 P.2d 915, 917 (Idaho 1952):

> "...where the gift is to executrices who are shown to be fiduciaries the burden of proof is upon such donees to clearly and unequivocally prove a gift in the first instance, and to so prove it that there would be no uncertainty as to the intent (and other requisite concomitants) on the part of the donor nor any question of undue influence exerted by the donee upon or over the donor or advantage taken of the confidential relationship existing between the parties.' *In re Estate of Randall,* 64 Idaho 629, at page 640, 132 P.2d 763, 768, 135 P.2d 299.
>
> And in Blake v. Blake, 69 Idaho 214, 205 P.2d 495, 498, where the respondents were found to be fiduciaries, it was said:
> '...the burden of proof was on respondents to prove a gift or transfer of appellant's one-sixth share in the estate to Mrs. Jessie M. Blake by clear, satisfactory, convincing and unequivocal evidence.'"

In his summary judgment motion, Jack Garrett argues that he did not have the ability to exert undue influence over Alva, and that there are no indicia of fraud or undue influence in the facts of the conveyance. But we only know Jack's story as to how this transpired. Moreover, we have circumstantial evidence to support the inference of undue influence. This includes the fact that Jack and his brother John willfully concealed the existence of the deed from Thelma until after Alva died. Jack continued to rent the farm from Alva and Thelma until it was safe to record the deed once Alva passed away and was no longer able to cancel it. In addition, John had a long history of real estate and

financial transactions with Alva, all of which resulted in financial gains for John and disastrous losses for Alva. Jack was involved in financial dealings with his father as well. John also prepared the deed. He had Alva execute it secretly, without the advice of an attorney, or the counsel of his wife. Jack said he made an appointment with an attorney to have a deed executed, but that appointment was never kept or rescheduled. Although Jack claims that he didn't personally oversee the preparation and execution of the deed, he did attempt to procure it by making an appointment for Alva to meet with an attorney. He also attempted to obtain such a deed over the course of many years. He spoke to Alva about it repeatedly from 1990 through 2006.

In 2000, Jack had John obtain title information on the Middleton property, ostensibly so that he would have the legal description to prepare a deed for his father to sign. In the process, he learned that Alva and Thelma held title to the property together. Jack knew that Alva and Thelma were happily married for many years, and that John had dissipated all of his father's other assets by convincing him to give John control over his other real estate holdings. Jack also knew that Thelma objected to transfer of the property. Notwithstanding all of these facts, Jack allowed and facilitated John's actions in obtaining a deed and then concealing its existence from his step-mother. Jack may have allowed John to obtain the deed and keep it in his file rather than give it to Jack during his father's life precisely in order to distance himself from a questionable transaction that he knew would result in a dispute following his father's death.

These facts raise serious questions as to the fairness of the transaction and whether it was the product of undue influence. It is Jack's burden to dispel all of the questions and doubts by clear, convincing and unequivocal evidence. He could have met

this burden if the issue had been raised during Alva's life. That was entirely within John and Jack's control since they alone knew of the existence of the deed. This could have been sorted out with Alva able to support or disaffirm the conveyance. But Jack and John chose to wait until after Alva died to reveal the conveyance, perhaps because they knew he would disavow it. Now, since Alva's testimony is no longer available, Jack cannot sustain his evidentiary burden to overcome the presumption of undue influence, and the deed must be set aside. This burden was discussed in *Krebs v. Krebs*, 114 Idaho 571, 575, 759 P.2d 77 (Idaho App. 1988):

> "If a grantor is unduly influenced, he or she does not have the requisite intent to execute a deed. The deed is voidable. See generally 23 AM.JUR.2D, Deeds § 203 (1983). A prima facie case of undue influence consists of four elements: (1) a grantor who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence. *Gmeiner v. Yacte,* 100 Idaho 1, 592 P.2d 57 (1979). Whether improper influence has been exercised must usually be inferred from circumstantial evidence. Id. Factors to be considered include the age and physical and mental condition of the grantor, whether he or she received disinterested advice in the transaction, the providence or improvidence of the decision, the amount or adequacy of consideration for any contract made, distress of the person influenced, his or her predisposition to make the transfer in question, the extent of the transfer in relation to his or her whole worth, failure to provide for one's children in the event of a transfer, active solicitation by the grantee, and the relationship of the parties. Id.
>
> Normally, the party asserting that a deed was procured by means of undue influence has the burden of proving such influence. *McNabb v. Brewster,* 75 Idaho 313, 272 P.2d 298 (1954). However, if the person alleging undue influence can first produce evidence that the parties to the transaction occupied a confidential relationship, and that the grantee was the dominant spirit in the transfer, a rebuttable presumption of undue influence arises, which the proponent of the transaction must refute. *Bongiovi v. Jamison,* 110 Idaho 734, 718 P.2d 1172 (1986). This principle is consonant with the general rule regarding presumptions enunciated in I.R.E. 301."

There are sufficient facts surrounding Alva's execution of the quitclaim deed to raise an inference of undue influence against Jack Garrett.

E. The quitclaim deed is void because it was an incomplete inter vivos gift.

In 2006, Alva Garrett executed a quitclaim deed to his son, Jack Garrett. No consideration was given for the deed. According to Jack, Alva wanted him to have this property when he died. Troupis Aff., Ex B, ("Jack's Depo., 44:11 – 44:24). Jack believed that when Alva executed the quitclaim deed in 2006, he intended for it to take effect only when he died. Troupis Aff., Ex B, ("Jack's Depo., 55:17 – 21).

Five elements must be present in order for a valid inter vivos gift to exist. These were set out in Estate of Lewis 97 Idaho 299, 302, 543 P.2d 852 (Idaho 1975):

> "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 immediate and absolute effect.'
>
> Elements (4) and (5) are missing in the present case.
>
> **(4) delivery and acceptance of the property**:
>
> As the Court held in *Estate of Courtright*, 99 Idaho 575, 579, 586 P.2d 265, 269 (1978):
>
> > This court has consistently held that in order for a deed to be adequately delivered it must be voluntarily "surrendered" by the grantor, *Bowers v. Cottrell,* 15 Idaho 221, 96 P. 936 (1908), with an intent to pass immediate and present title. *Hartley v. Stibor,* 96 Idaho 157, 525 P.2d 352 (1974); *Williams v. Williams,* 82 Idaho 451, 354 P.2d 747 (1960); *Brett v. Dooley,* 80 Idaho 237, 327 P.2d 355 (1958); *Claunch v. Whyte,* 73 Idaho 243, 249 P.2d 915 (1952); *Crenshaw v. Crenshaw,* 68 Idaho 470, 199 P.2d 264 (1948). This intent is indispensable to valid delivery. Id."

The property was not delivered to and accepted by Jack. In fact, he admits that he never received the quitclaim deed while Alva was alive. John procured the deed from his father and kept it in his file at his home until after Alva died in 2008. At that time, John

had it recorded. The deed was never delivered to Jack and was not recorded until after Alva died.

(5) the gift must go into immediate and absolute effect.

Neither Alva nor Jack intended that the purported gift of Alva's interest in the Middleton real property go into effect until Alva died. Jack's testimony and his actions confirm this fact overwhelmingly. These undisputed facts include the following:

1. Jack Garrett did not take possession of the Middleton property after Alva executed the quitclaim deed. Alva and Thelma continued to live on the property. Troupis Aff., Ex B (Jack Depo., 55:5 – 10).

2. After Alva executed the quitclaim deed, Jack continued to pay Alva and Thelma annual rent in October for farming the Middleton property. He made these payments in October, 2006 and October, 2007. Alva died in March, 2008. Troupis Aff., Ex B (Jack Depo., 37:21 – 39:4).

3. Jack never collected rent from either Thelma or Alva for their continued possession of the Middleton property. Troupis Aff., Ex B (Jack Depo., 55:13 – 16).

4. During Alva's life, Jack never told Thelma about the existence of the quitclaim deed. Troupis Aff., Ex A (Thelma Depo., 48:14 23; 52:17-22).

5. The quitclaim deed from Alva to Jack was not recorded until March 5, 2008, two days after Alva's death. Troupis Aff., Ex B (Jack Depo., 50:12 – 21).

6. Jack did not record the quitclaim deed. John Garrett took the deed in for recording. Troupis Aff., Ex B (Jack Depo., 50:22 – 25).

7. Jack felt that as long as Alva was living he was entitled to continue to treat the Middleton property as his own notwithstanding the quitclaim deed. Troupis Aff., Ex B (Jack Depo., 55:17 – 21).

8. In a conversation with Jack about the property, Alva told him he would deed 24 acres to Jack, with Alva and Thelma retaining a life estate in the property. Troupis Aff., Ex B (Jack Depo., 43:21 – 44:24).

The Court held in *Claunch v. Whyte*, 73 Idaho 243,249-250, 249 P.2d 915, 917 (Idaho 1952):

This court has held that 'The intention of the parties, particularly the grantor, is an essential and controlling element of delivery of a deed. It has been called 'the essence of delivery". *Crenshaw v. Crenshaw,* 68 Idaho 470, 199 P.2d 264, 266. This is the generally accepted rule. *Flynn v. Flynn,* 17 Idaho 147, 104 P. 1030; *In re McConkey's Estate,* 33 Cal.App.2d 554, 92 P.2d 456; *Dinneen v. Younger,* 57 Cal.App.2d 200, 134 P.2d 323; *Huth v. Katz,* 30 Cal.2d 605, 184 P.2d 521; *Szekeres v. Reed,* 96 Cal.App.2d 348, 215 P.2d 522; *Seibert v. Seibert,* 379 Ill. 470, 41 N.E.2d 544, 141 A.L.R. 299, note 305; 56 A.L.R. note 746; 16 Am.Jur., Deeds, § 115."

"Manual delivery of a deed by the grantor to the grantee with the understanding that it is not to become effective until the death of the grantor is not such a delivery as will pass the title. Crenshaw v. Crenshaw, supra; *Zimmerman v. Fawkes,* 70 Idaho 389, 219 P.2d 951; *Counter v. Counter,* 104 Cal.App.2d 786, 232 P.2d 551; *Cavett v. Pettigrew,* 182 Ark. 806, 32 S.W.2d 808; *Basket v. Hassell,* 107 U.S. 602, 2 S.Ct. 415, 27 L.Ed. 500."

In addition, because the grantee in *Claunch* was in a confidential relationship with the grantor, the Court stated:

"The grantee stood in a confidential relationship to the grantor. Hence, the finding must be supported by 'clear, satisfactory, convincing and unequivocal evidence' that the deed was delivered with the present intention on the part of the grantor to divest herself of the title and transfer it irrevocably to the grantee.

Actual transfer of the possession of the subject of the gift is an important and often controlling factor in establishing the intent of the donor. *Maynard v. Taylor,* 185 Okl. 268, 91 P.2d 649; *Johnson v. Hilliard,* 113 Colo. 548, 160 P.2d 386; *Yarbrough v. Bellamy,* 197 Okl. 493, 172 P.2d 801; *In re Hamilton's Estate,* 26 Wash.2d 363, 174 P.2d 301; *Gulley v. Christian,* 198 Okl. 167, 176 P.2d 812; *Stenwall v. Bergstrom,* 405 Ill. 281, 90 N.E.2d 778; *Cavett v. Pettigrew,* 182 Ark. 806, 32 S.W.2d 808; 129 A.L.R., note 35; 16 Am.Jur., Deeds, §§ 132, 133. Here the respondents, being in possession of the property as tenants, continued to attorn to the donor and on their own volition terminated the relationship and relinquished possession of the property before recording the deed or by any other word or act asserting their claimed title. Nor did they during the year 1950 claim any right to control the property or any of the proceeds therefrom. So far as the record shows, both parties continued to treat the land as the property of the plaintiff until February, 1950.

The clear weight of the evidence is against the finding. It follows that the finding is not supported by the evidence and will not support the judgment.

The judgment is reversed with directions to cancel the deed and quiet title in the plaintiff."

F. If the quitclaim deed was an attempted testamentary devise, it should be declared void because it violates the terms of Alva's Contract for Wills.

In 1995, Alva and Thelma Garrett entered into a Contract for Wills and executed wills with mutual provisions disposing of all of their property first to the surviving spouse, and thereafter, in equal shares to all seven (7) children of their combined family. A contract to make a mutual will is enforceable. *Ohms v. Church of Nazarene,* 64 Idaho 262, 130 P.2d 679 (Idaho 1942)

As noted above, the quitclaim deed was not an enforceable inter vivos transfer and it should be cancelled by this Court pursuant to its equitable jurisdiction over the real property. But if the Court finds that it was intended to be a testamentary devise, it clearly violated the contract between Alva and Thelma to dispose of their combined estate through their mutual wills. The Court has the equitable power to set aside the instrument in that event.

CONCLUSION

For the reasons set out above, Defendant/Counterclaimant Thelma Garrett's Motion for Summary Judgment should be granted and Plaintiff/Counterdefendant's Motion for Summary Judgment should be denied.

Dated: May 17, 2010

TROUPIS LAW OFFICE, P.A.

Christ T. Troupis
Attorney for Defendant/Counterclaimant

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of May, 2010, I caused to be served a true and correct copy of the foregoing Defendant/Counterclaimant's Memorandum in support of Motion for Summary Judgment by hand delivery to the following:

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JACK L. GARRETT, an individual,

Plaintiff,

vs.

THELMA V. GARRETT, an individual,

Defendant.

THELMA V. GARRETT,

Counterclaimant,

vs.

JACK L. GARRETT,

Counterdefendant.

Case No. CV-09-8763-C

REPLY MEMORANDUM IN SUPPORT OF JACK L. GARRETT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO THELMA V. GARRETT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff/Counterdefendant Jack L. Garrett ("Jack"), by and through undersigned counsel of record, and hereby files this combined reply memorandum in support of Jack L. Garrett's motion for summary judgment and in opposition to Thelma V. Garrett's motion for summary judgment.

I. INTRODUCTION

In response to Jack's motion for summary judgment, defendant/counterclaimant Thelma V. Garrett ("Thelma") has brought her own motion for summary judgment on the grounds that (i) Thelma and Alva Garrett ("Alva") held title to the Middleton Property as a community property asset, (ii) that the Quitclaim Deed executed by Alva granting his interest in the Middleton Property to Jack (the "2006 Quitclaim Deed") is invalid as it was the product of undue influence, (iii) that the 2006 Quitclaim Deed is invalid because it constituted an incomplete intervivos gift, and (iv) that the 2006 Quitclaim Deed is invalid as a purported testamentary gift because it violated the contract for wills between Alva and Thelma. None of these theories invalidates the 2006 Quitclaim Deed whereby Alva conveyed his interest in the Middleton Property to his son, Jack. Accordingly, Thelma's motion for summary judgment should be denied and this Court should enter summary judgment in favor of Jack declaring that Jack and Thelma hold title to the property as tenants in common and appoint a referee to conduct an equitable partition of such property.

II. STATEMENT OF DISPUTED FACTS

Jack offers the following statement of disputed facts in opposition to Thelma's motion for summary judgment ("Jack's SDF"):

1. In the years preceding his death, Alva spoke openly on numerous occasions about his desire to transfer his interest in the Middleton Property to his son, Jack Garrett. Affidavit of John Garrett in Support of Plaintiff/Counterdefendant's Response to Defendant/Counterdefendant's Motion for Summary Judgment ("John Aff.") ¶ 4; Affidavit of Christ Troupis in Support of Defendant/Counterclaimant's Motion for Summary Judgment ("Troupis Aff."), Ex. B (Deposition of Jack L. Garrett, taken on May 5, 2010 ("Jack Depo."), 45:2 – 46:13).

2. Prior to the time Alva executed the 2006 Quitclaim Deed conveying his interest in the Middleton Property to Jack, Alva made representations that he already considered the property to belong to Jack because Jack had been farming and tending to the upkeep of the Middleton Property for so long. John Aff., ¶ 5; Troupis Aff., Ex. B (Jack Depo., 52:1 – 53:6).

3. Alva's intent in executing the 2006 Quitclaim Deed was to make the transfer of his interest in the Middleton Property to Jack official. John Aff., ¶ 6.

4. At Alva's request, John assisted Alva in the preparation of the 2006 Quitclaim Deed. John Aff., ¶ 6.

5. Thelma was aware that Alva intended to convey his interest in the Middleton Property to Jack. John Aff., ¶¶ 7-8; Troupis Aff., Ex. B (Jack Depo. 45:2 – 46:13).

6. Despite Thelma's objections to Alva's decision to transfer his interest in the Middleton Property to Jack, Alva went forward with the execution of the 2006 Quitclaim Deed. John Aff., ¶¶ 8-10.

7. Alva delivered the 2006 Quitclaim Deed to John and placed no restrictions on the delivery of the quitclaim deed to Jack. John Aff., ¶¶ 11-13.

8. Alva asked that John not have the 2006 Quitclaim Deed recorded prior to his death because he knew that Thelma would be upset with him for having executed it. John Aff., ¶ 11.

9. Alva intended for the 2006 Quitclaim Deed to have immediate effect. John Aff., ¶ 13.

III. ARGUMENT

A. Thelma and Alva Held Title to the Middleton Property as Tenants in Common.

Both parties recognize that the critical question regarding whether the Middleton Property was held by Alva and Thelma as community property (Thelma's characterization) or as separate property as tenants in common (Jack's characterization) depends entirely on the effect of the deed whereby Alva conveyed his sole and separate property interest in the Middleton Property to "Alva L. Garrett and Thelma V. Garrett." It is well settled under Idaho law that the only two inquires relevant to this determination are (i) when the property was acquired and (ii) how the property was acquired. *See Kraly v. Kraly*, 208 P.3d 281, 285, 147 Idaho 299, 303 (2009). There are no disputed issues of material fact regarding either of these two inquires.

1. When was the Middleton Property acquired.

Alva acquired his interest in the Middleton Property prior to his marriage to Thelma. Memorandum in Support of Plaintiff/Counterdefendant's Motion for Summary Judgment, Statement of Undisputed Facts ("Jack's SOF") ¶ 6. Accordingly, Alva's interest in the property at the time of his marriage to Thelma was his sole and separate property. IDAHO CODE § 32-903 ("All property of either the husband or the wife owned by him or her before marriage ... shall remain his or her sole and separate property").

Thelma acquired her interest in the Middleton Property during her marriage to Alva, when Alva quitclaimed the Middleton Property to himself and Thelma. Jack's SOF ¶ 16. While Thelma asks this Court to stop there and declare the Middleton Property to be a community asset, such request ignores the rest of the story: i.e., how was the property acquired.

2. Thelma's interest in the Middleton Property was acquired as a gift.

The question of how property was acquired looks to whether property was acquired by gift, bequest, devise or descent, in which case it is separate property (Idaho Code Section 32-903) or, if consideration was paid, what was the source of funds used to purchase the property. If separate property funds were used to purchase property, then such property (though acquired during the marriage), will remain separate property of the spouse whose funds were used to purchase it. IDAHO CODE § 32-903 (" ... 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 sole and separate property.") Alva's interest in the 1990 Quitclaim Deed came either as a gift to himself or should be considered as an interest in property acquired with the proceeds of his separate property. Under either characterization, Alva's interest in the 1990 Quitclaim Deed is properly characterized as his sole and separate property.

The only possible characterization for how Thelma obtained her interest in the 1990 Quitclaim Deed is that it was a gift to her from Alva. There is no statutory authority for the proposition that a gift from a husband to a wife changes the operation of Idaho Code Section 32-903. To the contrary, Idaho Code Section 32-906(2)[1] expressly provides that

[1] This code provision was improperly cited as Idaho Code Section 32-902(2) in the Memorandum in Support of Plaintiff/Counterdefendant's Motion for Summary Judgment. The proper reference is, and should be, 32-906(2).

"Property conveyed by one spouse to the other shall be presumed to be the sole and separate estate of the grantee ...." This is consistent with the statutory mandate in Idaho Code Section 32-903 that provides all gifts (whether they come from a spouse or an unrelated third party) are properly characterized as the sole and separate property of the recipient. Accordingly, because Thelma acquired her interest in the 1990 Quitclaim Deed as a gift—even though such gift came from her husband—such interest is properly characterized as her sole and separate property.

3. The form of the 1990 Quitclaim Deed does not control the characterization of the Middleton Property.

Thelma relies heavily on the case of *Dunagan v. Dunagan*, 147 Idaho 599, 213 P.3d 384 (2009), for the proposition that a deed conveying one spouse's separate property interest to both spouses necessarily creates a community property interest. Memorandum in Support of Defendant/Counterclaimant's Motion for Summary Judgment and in Opposition to Plaintiff/Counterdefendant's Motion for Summary Judgment ("Thelma's Combined Brief") at 8. In so doing, Thelma reads too much into the *Dunagan* decision and overlooks statutory authority directly contradicting such proposition.

First, it must be noted that the passage upon which Thelma relies is merely dicta. The community/separate property characterization of the residence at issue in *Dunagan* was made at the magistrate court level. It was not an issue on appeal to the district court and it was not an issue on appeal to the Supreme Court. *Barrett v. Barrett*, 2010 WL 1632871, *4 (Idaho S. Ct. Apr. 23, 2010) ("In *Dunagan*, there was no challenge on appeal to this Court from the determination that the execution of a quitclaim deed in favor of husband and wife during refinancing transmuted the wife's separate property."). Accordingly, the statement that "All property that is acquired after marriage by either husband or wife is community property,

including property that is owned separately by one spouse who then deeds such property to the marital community" is dictum. Second, it must be noted that in the present case, Alva did not deed the property to the marital community; he deeded it to "Alva L. Garrett and Thelma V. Garrett." There is no express language in the deed showing that the grant was intended to create any interest other than that of tenants in common. *Accord* IDAHO CODE § 55-508 ("Every interest in real estate granted or devised to two (2) or more persons ... constitutes a tenancy in common, **unless expressly declared in the grant or devise to be otherwise**.") (emphasis added).

If the Idaho Supreme Court had engaged in an analysis regarding whether the community/separate property characterization was correct, it would likely have come to the same conclusion, but on facts that are consistent with Idaho's statutory authority and on facts which are distinguishable from this case. The facts in *Dunagan* are similar to this case only with respect to the timing of the quitclaim deed: it was executed during the marriage. The similarities end there.

The question of how the interest was acquired unearths materially different facts. In *Dunagan*, the husband acquired his interest in the property because the couple was refinancing the house, and the bank looked to the community (i.e., both the husband and the wife) for repayment obligations on the loan. *Dunagan* at 603, 213 P.3d at 388 ("The only reason that Dunagan has a community interest in the home is because the bank required Dunagan to be on the loan."). While the home was clearly the wife's separate property prior to the refinance, the fact that the community was obligated to repay the debt meant that the husband's interest was not acquired as a gift. Rather, it was acquired as a community asset because the community gave

good and valuable consideration (in the form of its obligation on the loan) for its interest in the property. *Accord Winn v. Winn*, 105 Idaho 811, 673 P.2d 411 (1983). Conversely, in this case the transfer of the property from Alva L. Garrett to "Alva L. Garrett and Thelma V. Garrett" was not supported by any consideration and, therefore, constitutes a gift bringing the interest acquired squarely within the provisions of Idaho Code Sections 32-903 and 32-906(2); i.e., the sole and separate property of each spouse, holding their respective undivided one-half interests as tenants in common.

The community's obligation on the note that refinanced the property gave the *Dunagan* court sufficient bases to characterize the home as a community asset (as well as the fact that neither party challenged that characterization on appeal). However, the *Dunagan* court could also rely on the form of the deed itself as additional evidence to support the community property characterization of that home. In *Dunagan,* the quitclaim deed identified the grantees as "Kelly Dunagan and Chris Dunagan, wife and husband." *Id.* at 600, 213 P.3d at 385. Given this express language, the *Dunagan* court had a basis to look to Idaho Code Section 55-508, which provides, "Every interest in real estate granted or devised to two or more persons ... constitutes a tenancy in common, **unless expressly declared in the grant or devise to be otherwise.**" Accordingly, the quitclaim deed in *Dunagan*, which expressly identified the parties as "wife and husband" provided some basis for not treating them as tenants in common. Conversely, in this matter, there is no designation in the 1990 Quitclaim Deed of Alva and Thelma as husband and wife and there is no indication that the deed intended to create a community property interest.

Absent such express declaration, as required by Idaho Code Section 55-508,[2] there is no basis for this Court to characterize the property interest created by the 1990 Quitclaim Deed as anything other than the interests of tenants in common, which interests were held by Alva and Thelma as their respective sole and separate property.

B. Thelma Has Not Introduced Any Admissible Evidence to Support Her Defense of Undue Influence.

In the First Amended Answer, Affirmative Defenses, and Counterclaim ("Thelma's Pleadings"), Thelma raised a number of equitable defenses to Jack's interest in the Middleton Property. These defenses included fraud, duress, undue influence, unclean hands and other alleged inequitable conduct. In his motion for summary judgment, Jack argued that Thelma did not have sufficient evidence to support any of these equitable defenses. In her opposition, Thelma argues only that the 2006 Quitclaim Deed is a product of undue influence, apparently abandoning her other equitable defenses. Accordingly, the only remaining equitable defense is that of undue influence. With respect to such defense, Thelma has failed to raise a genuine issue of material fact sufficient to withstand Jack's motion for summary judgment.

A party responding to a motion for summary judgment is required to "respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 996 P.2d 303, 307 (2000). Thelma has simply failed to meet that burden. Thelma's Combined Brief does not cite a single

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[2] While the *Barrett* Court held that parol evidence could be used to alter or vary the terms of an unambiguous deed, the holding in that case was limited to divorce actions: "[W]e conclude that the language of a deed executed in the course of refinancing does not conclusively determine the character of property for purposes of a divorce action." *Barrett v. Barrett*, 2010 WL 1632871, *3 (Idaho S. Ct. Apr. 23, 2010).

fact to support any of the elements of undue influence. Rather, without factual basis or legal authority, Thelma conclusory asserts that Jack and his brother, John Garrett, were "fiduciaries with respect to their father's execution of a quitclaim deed to Jack." Thelma's Combined Brief at 12. From that unsubstantiated premises, she goes on to speculate that Jack and John "willfully concealed the existence of the deed from Thelma" until after Alva died, that Jack's continued rental payments on the farm were a ruse to trick Thelma into believing no transfer had been made, and that the brothers refrained from recording the deed so that Alva would not be able to cancel it.[3] Thelma's Combined Brief at 12. These unsubstantiated speculations are belied by Thelma's own testimony wherein she stated, under oath, that she had no specific facts indicating that Jack had the disposition to exert undue influence and that she'd be surprised if Jack had coerced Alva in any way. Jack's SOF ¶ 30.

Thelma goes on to speculate that suspicion should be drawn from Alva's failure to consult an attorney or his wife regarding the execution of the 2006 Quitclaim Deed. Thelma's Combined Brief at 13. However, evidence shows that when Alva executed the 1990 Quitclaim Deed he did not consult an attorney (Jack's SOF ¶¶ 16-18) (interestingly, Thelma has no objection to Alva's failure to consult an attorney in that instance), and the evidence is conflicting regarding whether Alva consulted Thelma in connection with the execution of the 2006 Quitclaim Deed. While Thelma denies any knowledge of the plan to convey the property to Jack (Thelma's Combined Brief, Statement of Facts ("Thelma's SOF" ¶ 24), both Jack and John have

[3] Not only is this fact mere speculation, it is legally incorrect. After having executed the 2006 Quitclaim Deed and delivered the same to John with no restrictive instructions, Alva divested himself of any interest in the Middleton Property and would have had no legal basis to cancel the deed.

offered testimony that Thelma was aware of the plan and strenuously objected to the same and Alva elected to go forward with the transfer despite her objections (Jack's SDF ¶¶ 5 and 6), despite the fact that the couple still lived together and—by all accounts—had a happy marriage (Jack's SOF ¶ 27), and despite the fact that the both Alva and Thelma were involved in the management of the couple's finances at that time (Jack's SOF at 25). These undisputed facts do not give rise to a presumption of undue influence; to the contrary, they conclusively establish that Alva had a mind of his own and, despite his wife's protestations, elected to convey his interest in the Middleton Property to his son, Jack. These undisputed facts also show that Alva was of sufficient mind to know that Thelma would not be happy about the transfer and had the presence of mind to request that John not record it until after Alva passed.

Based on the undisputed facts of this case, one could just as easily make unsubstantiated speculations that Alva was under the undue influence of Thelma. However, a motion for summary judgment cannot survive on unsubstantiated speculation. The undisputed facts evidence that Alva sought advice from multiple people—including his sons and his wife—and that he independently reached decisions regarding important matters. When Thelma herself has testified that she never witnessed Jack do anything to coerce Alva into taking actions Alva did not want to take and that she would be surprised if Jack exercised undue influence over Alva (Jack's SOF ¶ 30), it is too much of a stretch to think that reasonable jurors could conclude otherwise. Accordingly, based on the undisputed facts of this case, it is appropriate for this Court to deny Thelma's motion for summary judgment on the issue of undue influence.

C. Thelma Failed to Plead Incomplete Intervivos Gift and the Issue Is Not Properly Before This Court on Her Motion for Summary Judgment.

As Thelma's third attempt to attack the transfer of Alva's interest in the Middleton Property to Jack by the 2006 Quitclaim Deed, Thelma asserts and argues that the 2006 Quitclaim Deed was an incomplete intervivos gift. Thelma's Combined Brief at 15-17. This Court should disregard this theory because it was not raised by the pleadings. It is well settled in the law that "[a] court does not have jurisdiction to grant relief beyond the issues tendered by the pleadings." *Martin v. Soden*, 81 Idaho 274, 281, 340 P.2d 848, 852 (1959) ("It is, of course, fundamental that a judgment must be responsive, not only to the prayer, but to the issues tendered by the pleadings. This idea underlies all litigation.") (citations omitted). The sum and substance of Thelma's Pleadings is that the Middleton Property was community property of Alva and Thelma and that Alva had no right to convey his interest in the property to Jack. There is no indication in Thelma's Pleadings regarding the claim or defense that the 2006 Quitclaim Deed was an incomplete intervivos gift. Accordingly, this Court does not have authority to grant summary judgment on this theory and should refuse to consider Thelma's arguments regarding the same.

D. Thelma Has Not Met Her Burden of Proof Regarding Incomplete Intervivos Gift.

Even if this Court elects to consider the theory of incomplete intervivos gift, Thelma's motion for summary judgment regarding the same should be denied because genuine issues of material fact exist regarding (i) whether the transfer of property was, indeed, a gift and (ii) if the transfer was a gift, whether such transfer was complete prior to Alva's death.

First, Thelma has failed to conclusively prove that the transfer from Alva to Jack was a gift. While Thelma characterizes the facts of the case as establishing that no "present consideration" was given for the transfer (Thelma's SOF ¶ 21), the testimony of both Jack and John demonstrate that the consideration given for the farm was the years of maintenance, upkeep, rental or lease payments, and other expenditures that Jack put towards the Middleton Property during all of the years that he was farming the property (Jack's SDF ¶ 2). The evidence suggests, therefore, that there was substantial consideration given for Alva's transfer of his interest in the farm property to Jack.

Assuming, *arguendo*, that the transfer from Alva to Jack is properly characterized as a gift, genuine issues of material fact exist regarding whether the transfer was complete prior to Alva's death and whether Alva intended the transfer to take immediate effect. The facts presented by Thelma—that John held the 2006 Quitclaim Deed and refrained from recording it until after Alva's death—are not relevant or material to the inquiry of whether delivery of the deed was complete. Under Idaho law, it is not required that the grantor deliver the deed to the grantee. Unconditional delivery to a third party will satisfy the delivery element.

> What constitutes delivery of a deed, and when title passes by deed, has often been before the courts of this country, and the decisions are quite uniform on this question. "As no particular form of delivery is required, the question whether there was a delivery of a deed or not so as to pass title must, in a great measure, where it is not clear that an actual delivery has been effected, depend upon the peculiar circumstances of each particular case. 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." 1 Devlin on Deeds, § 262.

Bowers v. Cottrell, 15 Idaho 221, 96 P. 936 (1908). "In order to constitute a sufficient delivery of a deed, the grantor must part with control over it and not retain a right to reclaim it." *Williams v. Williams*, 82 Idaho 451, 455, 354 P.2d 747, 749 (1960). Parol evidence is admissible regarding the issue of the grantor to deliver the deed. "It is a settled principle of law that the evidence of delivery of a deed must come from without the deed. In other words, a deed does not upon its face show delivery, and therefore parol evidence is admissible to show such fact." *Bowes v. Cottrell,* 15 Idaho 221, 96 P. 936 (1908). "Where the issue is whether or not the grantor delivered the deed with the intent that it should convey title, declarations and acts of the grantor made and done either before or after the alleged delivery are admissible to show the grantor's intention." *Crenshaw v. Crenshaw,* 68 Idaho 470, 477, 199 P.2d 264, 268 (1948).

In this matter, the undisputed evidence shows that Alva delivered the deed to John for Jack's benefit. Jack's SDF ¶ 7. John was not given any limiting instructions regarding the deed and Alva did not retain a right to reclaim the 2006 Quitclaim Deed. Jack's SDF ¶ 7. John called Jack and informed him of the execution of the deed, John's possession of the deed, and informed Jack where the deed was located – with no limitations restricting Jack's right to take physical possession of the deed. Jack's SOF ¶ 21; Jack's SDF ¶ 7. These acts are sufficient to constitute both delivery and acceptance of the 2006 Quitclaim Deed and nothing more was required.

Additionally, the fact that Alva and Thelma remained in possession of the property is not conclusive evidence that Alva did not intend title to pass nor that the gift did not go into immediate and absolute effect. "Where there is a valid delivery of the deed, with the requisite intent on the part of the grantor, the fact that the grantor retains possession of the

premises does not necessarily invalidate the deed." *Hartley v. Stibor*, 96 Idaho 157, 160, 525 P.2d 352, 355 (1974) (citations omitted).

> It is not, of course, inconsistent with the passage of a present title, particularly in a father-son relationship, that the incidents of management be retained by a grantor. While such facts are material to our consideration, they are not conclusive and must be weighed with all others pertinent to the problem. Such constitute the 'circumstances surrounding the transaction.'

Id. Indeed, the circumstances surrounding the transaction in this case are consistent with the transfer of present title. First, John has testified that, prior to executing the 2006 Quitclaim Deed, Alva already considered the Middleton Property to belong to John and the 2006 Quitclaim Deed was executed to "make it official." Jack's SDF ¶ 3. Second, in prior discussions between John and Alva, Alva mentioned that, in transferring his interest in the property to John, he wanted to retain a life estate for himself. Thelma's SOF ¶ 32. Jack's testimony that as long as Alva was living, he was entitled to treat the Middleton Property as his own is consistent with an informal agreement that Alva retained a life estate. While the retention of a life estate was not expressly provided for in the deed, the parties' conduct was consistent with Alva's desires; this is not evidence of no present intent to transfer the property. The fact that Jack continued to pay "rent" on the farm (Thelma's SOF ¶ 27) does not necessarily mean that there was no intent for a present transfer. Rather, conflicting evidence shows that part of the consideration for the farm was all of the expenditures—including rents—that Jack had paid on the farm dating back to 1990. Jack's SDF ¶ 2. It was neither unreasonable nor inconsistent for Jack to continue making

such payments to Alva until Alva's death as additional consideration for Alva's interest in the property.[4]

E. Jack Does Not Maintain That the 2006 Quitclaim Deed Was a Testamentary Gift.

Jack does not maintain that the 2006 Quitclaim Deed was intended to be a testamentary gift. Rather, as explained above, Jack and Alva both had the understanding and intent that the 2006 Quitclaim Deed passed present title of Alva's interest in the property from Alva to Jack. Accordingly, Thelma's argument that, if the 2006 Quitclaim Deed was intended to be a testamentary gift it was made in violation of Alva and Thelma's contract for wills, is irrelevant.

IV. CONCLUSION

For the foregoing reasons, Jack respectfully requests that this Court find that the 2006 Quitclaim Deed effectively conveyed Alva's one-half separate property interest in the Middleton Property to Jack and that Jack and Thelma now hold the Middleton Property as tenants in common. Jack further requests that this Court appoint a referee for the purposes of causing a just and equitable partition of the Middleton Property.

DATED this 4th day of June, 2010.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Rebecca A. Rainey – Of the Firm
Attorneys for Plaintiff/Counterdefendant

[4] Indeed, this evidence supports Jack's contention that the transfer of Alva's interest in the Middleton Property to him was not a gift.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of June, 2010, I caused a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF JACK L. GARRETT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO THELMA V. GARRETT'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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Attorneys for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JACK L. GARRETT, an individual,

Plaintiff,

vs.

THELMA V. GARRETT, an individual,

Defendant.

THELMA V. GARRETT,

Counterclaimant,

vs.

JACK L. GARRETT,

Counterdefendant.

Case No. CV-09-8763-C

AFFIDAVIT OF JOHN GARRETT IN SUPPORT OF PLAINTIFF/COUNTER-DEFENDANT'S RESPONSE TO DEFENDANT/COUNTERCLAIMANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

John Garrett, having been duly sworn upon oath, deposes and states as follows:

1. I am the son of the decedent, Alva Garrett and the brother of the Plaintiff/Counterdefendant, Jack Garrett, in the above-captioned matter and, as such, have personal knowledge of the facts contained herein.

2. Prior to his death, Alva Garrett and his wife, my step-mother, Thelma Garrett lived on property consisting of approximately 26 2/3 acres located in Middleton, Idaho (the "Middleton Property").

3. Prior to my father's death, my brother, Jack Garrett, had farmed several acres of the Middleton Property for several years.

4. In the years proceeding Alva's death, and while Jack Garrett was farming the Middleton Property, Alva Garrett indicated to me that he intended to give the Middleton property to Jack Garrett. He spoke openly about the same on numerous occasions.

5. Prior to the time Alva Garrett executed the Quitclaim Deed conveying his interest in the Middleton Property to my brother, Jack Garrett, Alva represented to me that he already considered the property to belong to Jack because Jack had been farming and tending to the upkeep of the Middleton Property for so long.

6. Alva also represented to me that it was important to him that he put Jack's name on the Middleton Property to make Jack's ownership of the property official. To that end, Alva asked me to assist him in preparing a Quitclaim Deed conveying Alva's interest in the Middleton Property to Jack.

7. I arrived at the home of Alva and Thelma Garrett on the morning of February 14, 2006.

8. Thelma Garrett acted as though she knew and was informed that I was taking Alva to execute a Quitclaim Deed conveying Alva's interest in the Middleton Property to

Jack. Specifically, Thelma asked Alva and me what we were doing and stated that there was no need for Alva to take any action regarding the Middleton Property because Alva and Thelma had wills in place that would take care of everything and that any additional actions regarding the Middleton Property was unnecessary.

9. Alva Garrett represented to me that he knew and understood that Thelma did not approve of his transfer of his interest in the Middleton Property to Jack. However, Alva wanted to make it official that his interest in the Middleton Property would be conveyed to Jack before Alva's death.

10. I witnessed Alva execute the Quitclaim Deed conveying his interest in the Middleton Property to Jack and took Alva to have the Quitclaim Deed notarized.

11. After the Quitclaim Deed was executed and notarized, Alva asked that I not record it until after his death so that Thelma would not become upset with him for executing the same.

12. Alva did not place any other restrictions on my handling of the Quitclaim Deed and did not instruct me to refrain from delivering it to Jack.

13. Alva intended for the Quitclaim Deed to have immediate effect.

Further your affiant sayeth not.

DATED this 3 day of June, 2010.

John Garrett

SUBSCRIBED AND SWORN to before me this 3 day of June, 2010.

CHARLES L. LAPRATH
Notary Public
State of Idaho

NOTARY PUBLIC FOR IDAHO
Residing at Middleton, ID
My Commission Expires May 30, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of June, 2010, I caused a true and correct copy of the foregoing **AFFIDAVIT OF JOHN GARRETT IN SUPPORT OF PLAINTIFF/COUNTER-DEFENDANT'S RESPONSE TO DEFENDANT/ COUNTERCLAIMANTS' MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR CANYON COUNTY

JACK L. GARRETT,	) **Case No: CV OC 09-8763-C**
	)
	) **DEFENDANT'S REPLY**
Plaintiff,	) **MEMORANDUM IN SUPPORT OF**
	) **DEFENDANT/COUNTERCLAIMANT'S**
vs.	) **MOTION FOR SUMMARY JUDGMENT**
	) **AND IN OPPOSITION TO PLAINTIFF/**
	) **COUNTERDEFENDANT'S MOTION**
	) **FOR SUMMARY JUDGMENT**
THELMA V. GARRETT,	)
An individual,	)
	)
Defendant.	)
	)

I.

ANALYSIS

A. Alva and Thelma held title to the Middleton Property as Community Property.

The 1990 deed from Alva Garrett to himself and his wife, Thelma Garrett, transmuted his separate real property to their community property. It did not create a tenancy in common. The Plaintiff cited *Kraly v. Kraly,* 147 Idaho 299, 208 P.3d 281 (2009), for the proposition that the only two factors relevant to the issue whether the property is separate or community are (1) when the property was acquired and (2)

how the property was acquired. As to the first, the 1990 deed vested title in Alva and his wife, Thelma, during their marriage. The Court in *Kraly* declared that:

> Property acquired during a marriage is presumed to be community property. *Reed v. Reed,* 137 Idaho 53, 58, 44 P.3d 1108, 1113 (2002). The presumption can be overcome if the party asserting the separate character of the property carries his burden of proving with reasonable certainty and particularity that the property acquired during marriage is separate property. *Id.* at 59-60, 44 P.3d at 1114-15.

Idaho law has a public policy in favor of community property. This was pointed out by the Court in *Winn v. Winn,* 105 Idaho 811, 815, 673 P.2d 411, 415 (1983):

> Principally, we remain mindful of the overarching policy in favor of community property, as evidenced by the general presumption and the strong standard of proof necessary to rebut the presumption.

The Plaintiff, Jack Garrett, has the burden to overcome this general presumption that Alva and Thelma held title to their real property as community property and not tenants in common. "...[T]he determination whether property has been transmuted is a question of fact turning on intent. In making this factual determination, trial courts are free to consider all relevant evidence regarding that intent." *Barrett v. Barrett,* 2010 WL 1632871 (Idaho S. Ct., Opinion No. 43, 4/23/10).

The second factor cited from *Kraly* by the Plaintiff is "how the property was acquired." (Plaintiff's Reply Memo, p. 4) Thelma Garrett testified that Alva made a gift of the property to the community. She testified:

"Q: Did you discuss with Alva, or was it your intention with Alva by him executing that document to change the property from his separate property to community property?
A: He wanted to provide for me.
Q: Okay.
A: And this is what we did."

(Troupis Aff., Ex. A ("Thelma Depo" 40:21 – 41:2)

The fact that Alva gave his separate property to the marital community distinguishes our case from *Kraly.* In that case, the Court noted:

> The magistrate court additionally found that **Stan did not gift any part of the property to Susan.** Therefore, the district court properly reversed the magistrate court's determination that the property was community property and correctly held that the Lightning Creek property was Stan's separate property. *Id at 285.*

Alva's subsequent act of entering into a contract for wills (Exhibit B to Defendant's Answer; ("Thelma Depo." 35:8 – 36:24) and executing a will (Rainey Aff., Exh. D) that bequeathed all of the real property to Thelma further confirms his intention to gift this real property to the community.

The Plaintiff seems to argue that the absence of the phrase 'husband and wife as community property' is dispositive of the title issue, and that this court need look no further than the absence of that phrase in the 1990 deed to reach a conclusion. That position is untenable.

We need to make this crucial observation. In all of the cases in which the Court was asked to determine whether the addition of a spouse's name to the title transmuted the property from separate to community, none of the deeds or other instruments of title could have included the statement that Mr. Garrett claims is conclusive on the issue, the recitation that the property was to be held "by husband and wife, as community property." If that phrase was included in the deeds or documents of title in any of those cases, the Court's inquiry would have abruptly ended. *See Bliss v. Bliss*, 127 Idaho 170, 174, 898 P.2d 1081 (Idaho 1995) ("...where a deed is plain and unambiguous, the intention of the parties must be determined from the deed itself.")

Because this language is missing from the deed, the deed is ambiguous. It is ambiguous because it is subject to more than one interpretation. If the language of the deed is ambiguous, the court will consider relevant evidence to determine the actual intent of the parties. Thus, the Court declared in *Porter v. Bassett,* 146 Idaho 399, 195 P.2d 1212 (2008):

> "In interpreting and construing deeds of conveyance, the primary goal is to seek and give effect to the real intention of the parties." *Benninger v. Derifield,* 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006). When an instrument conveying land is unambiguous, the intention of the parties can be settled as a matter of law using the plain language of the document. *Read v. Harvey,* 141 Idaho 497, 499, 112 P.3d 785, 787 (2005). However, if the language of the deed is ambiguous, ascertaining the parties' intent is a question of fact and may therefore only be settled by a trier of fact. *See Neider v. Shaw,* 138 Idaho 503, 508, 65 P.3d 525, 530 (2003). " Ambiguity may be found where the language of the deed is subject to conflicting interpretations." *Read,* 141 Idaho at 499, 112 P.3d at 787. The trier of fact must then determine the intent of the parties according to the language of the conveyance and the circumstances surrounding the transaction. *Neider,* 138 Idaho at 508, 65 P.3d at 530.

In each of the divorce cases or estate proceedings involving the issue of transmutation, the deeds or other documents of title could not have included unambiguous language declaring that title was held by husband and wife as community property. Instead, the transmutation dispute arose because title was held by a husband and a wife in the absence of that unambiguous written statement.

The deed from Alva to Alva and Thelma is ambiguous because it does not include that same statement, "husband and wife, as community property." This makes the 1990 Garrett deed no different than the deeds or documents of title in the other cases in which the courts have been asked to determine if there was a

transmutation. In each of those cases, the Courts have considered relevant evidence to determine the actual intent of the parties.

Mr. Garrett carries his erroneous assumption further by arguing that under Idaho Code §55-508, the 1990 quitclaim deed from Alva to Alva and Thelma must have created a tenancy in common because the deed did not recite that title was to be held by husband and wife as community property. That conclusion is not sustainable, both because it conflicts with the general presumption for community property, and because it is at odds with our court's reasoning in all of the prior cases in which the court has looked at the same wording on deeds or documents of title, and then considered other relevant evidence to determine the "intent of the parties" and rule on whether a transmutation had occurred.

In the present case, the claim that Alva gifted his separate property to the marital community is uncontradicted. Moreover, there is strong additional evidence of Alva's intent to transmute this parcel of separate property into community property. This evidence includes the following facts:

1. Alva was clearly aware of the separate nature of his real property. He retained as separate three other parcels of real property, which he sold, traded or gifted to his children with the participation of his son, John Garrett. He did not add Thelma to the title on any of these properties, or to the properties and business interests he acquired through his investment dealings with his son, John. (Def. Statement of Undisputed Facts, #'s 4, 6-8)

2. Alva only changed the title to this real property after he lost his other properties and got in financial trouble due to his son John's real estate investment decisions. (Def. Statement of Undisputed Facts, #'s 10-12)

3. Alva drafted the quitclaim deed and did not state in that deed that he intended to take title as tenants in common, or as separate property. (Answer, Ex. A; "Thelma Depo" 31:13 – 32:20; Ex. 6)

4. Alva made the decision to add Thelma's name to the deed. Thelma testified that he did it because he "wanted to provide for her." The Plaintiff has not presented any evidence to challenge the fact this was Alva's intentional and voluntary act. (Troupis Aff., Ex. A ("Thelma Depo" 40:21 – 41:2)

5. Alva did not have any financial reason or requirement for adding Thelma's name to the title. He was not required by a third party lender to add her name to the title. He was not refinancing the property when the deed was signed and recorded. In fact, he had previously refinanced the property without adding her name to the title. (Troupis Aff., Ex. A ("Thelma Depo" 32:1 – 20[1])

6. Five years after recording the 1990 quitclaim deed, Alva and Thelma executed mutual wills and a contract for wills in which they both dealt with this property as their community property. It was included in their joint estate, with a provision that on Alva's death, the entire estate would pass to Thelma, and vice versa. (Def. Statement of Undisputed Facts, #'s 14)

7. Alva did not deal with this property in his will as his separate property, nor did he attempt to bequeath any interest in the property as a 'tenant in common.' (Def. Statement of Undisputed Facts, #'s 14)

8. Alva did not revoke the will prior to his death. The Court may take judicial notice of the probate proceeding filed by Thelma Garrett. (Def. Answer, Ex. D, Canyon County Probate Case No. CV 08-3732 C; Complaint, ¶ 7)

The Plaintiff has not presented any evidence to rebut these compelling facts that support of Thelma Garrett's community property interest in this real property.

B. Thelma did not acquire a separate property interest from Alva.

The Plaintiff argues that Thelma's interest in the real property is her separate property because she acquired it as a gift from her husband. That claim is based on a misapplication of Idaho Code §32-906(2). That statute, which states "property conveyed

[1] "Q: Can you tell me the circumstances that led to the making of this Quitclaim Deed?
A: Well, after the property at Willow Creek and the Round Valley was all cleared and everything and John took over and we didn't have any money and then – you know, he talked his dad into all that. And then we – and we had to sell the property to pay our debts.
Alva, you know, was afraid that John might talk him into doing something with the little property that was left. So he thought by putting my name on the deed then, you know, I would have to sign it first and we would at least have a roof over our head. We were worried about losing the roof over our head.
Q: Because of stuff that John had done in the past?
A: Yeah. All this – because all – the other property that Alva had owned when we were married, you know, just disappeared. And we just didn't even have enough money to pay – you know, we had to sell 50 acres of it to pay our debt."

by one spouse to the other...," applies only to a deed that divests one spouse's interest in real property in order to vest it in the other spouse. It does not apply to a deed from one spouse to both spouses, the marital community. *For the application of this statute, see Bliss v. Bliss*, 127 Idaho 170, 174, 898 P.2d 1081 (Idaho 1995)

C. Alva's purported conveyance to Jack of his interest in community property is void because it was in violation of IC §32-912.

Alva and Thelma Garrett held title to their real property as community property, and therefore the purported conveyance by Alva to his son, Jack, of a one-half interest in that property should be declared void because it violated Idaho Code §32-912.

D. Jack Garrett concedes the fact that both he and his brother, John, were in a confidential relationship with Alva when he executed the quitclaim deed. He therefore must prove clearly and unequivocally that his father intended a complete inter vivos gift of his property and the transaction was free from undue influence by Jack or John Garrett.

In his reply brief, Jack Garrett argues that no evidence has been introduced on the defense of undue influence. (Plaintiff's Reply Brief, p. 9) That is not true. As we pointed out from *Krebs v. Krebs*, 114 Idaho 571, 575, 759 P.2d 77 (Idaho App. 1988):

> A prima facie case of undue influence consists of four elements: (1) a grantor who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence. *Gmeiner v. Yacte,* 100 Idaho 1, 592 P.2d 57 (1979).

Thelma Garrett has presented evidence supporting all of these elements. (1) Alva was subject to his son, John's influence. (Def. St. of Facts, #6-12; "Thelma Depo. 32:1-20). (2) John had the opportunity to exert undue influence and acted on behalf of his brother, Jack, in procuring the quitclaim deed from Alva. (Aff. of John Garrett, ¶7-11; Troupis Aff. Ex B. "Jack Depo. 48:18 – 20). (3) John and Jack both had a disposition to

exert undue influence because they were aware of the fact that Alva had deeded the property to the marital community and left all of his property under wills that Alva and Thelma had signed. (Aff. of John Garrett, ¶ 8; Def. St. of Facts, #22 – 23.) Moreover, Jack's prior business dealings with his father demonstrated Jack's disposition to take control of all of his father's properties. (Def. St. of Facts, #'s 6-12). (4) The result of the quitclaim deed to Jack is a disproportionate disposition of the community estate. Under Alva and Thelma's mutual wills, all of their property eventually is distributed in equal shares to all seven (7) children of the combined family. The quitclaim deed divests Thelma of ½ of the property immediately and vests it in Jack. The remaining ½ would be divided among the seven (7) children of the combined family pursuant to the mutual wills on Thelma's death. If the quitclaim deed is upheld, Jack would eventually receive 8/14ths of the estate and the other six (6) children would each receive 1/14th of the estate. This result indicates undue influence because it is undisputed that Alva was not estranged from any of the seven (7) children, and only had a problem with Garrett, a time or two. (Troupis Aff. Ex. B "Jack Depo. 56:19 – 58:1)

Mr. Garrett has not responded to any of these facts. What is also noticeably absent from the reply brief is any refutation of the fact that Jack and his brother were in a confidential relationship with their father when the deed was executed.

Jack testified that both he and his brother John had business relationships with their father, Alva, and that Alva reposed trust and confidence in both of them with respect to financial decisions. Troupis Aff., Ex B (Jack Depo., 27:18-28:1; 39:13-40:3). John was a real estate broker and was involved in extensive transactions with Alva resulting in the loss of all of his real estate holdings except a portion of his homestead property. In fact, to

protect this last property from John's influence, Alva deeded it into the names of himself and his wife, Thelma. (Defendant's Combined Brief, Statement of Undisputed Facts, #'s 6-12, 16-20)

In the presence of this admitted confidential relationship, and Jack and John's mutual involvement in procuring the deed from his father, the burden of proof shifts to him to prove that the deed was not the result of undue influence. We cited *Krebs v. Krebs*, *supra, at 515*, for this proposition:

> Normally, the party asserting that a deed was procured by means of undue influence has the burden of proving such influence. *McNabb v. Brewster,* 75 Idaho 313, 272 P.2d 298 (1954). However, if the person alleging undue influence can first produce evidence that the parties to the transaction occupied a confidential relationship, and that the grantee was the dominant spirit in the transfer, a rebuttable presumption of undue influence arises, which the proponent of the transaction must refute. *Bongiovi v. Jamison,* 110 Idaho 734, 718 P.2d 1172 (1986). This principle is consonant with the general rule regarding presumptions enunciated in I.R.E. 301."

Mr. Garrett claims that the consideration for his father's agreement to deed the farm to him in 2006 was Jack's work on the family farm from 1985 – 2006. He admitted however, that he only came up with a statement of his estimated value of his alleged services when his attorney requested it from him during this lawsuit, long after his father died. Troupis Aff., Ex B, ("Jack's Depo., 35:5 – 36:7 Past consideration in the form of a family member's services rendered gratuitously at the time is not consideration for a future promise to convey real property. *See Collord v. Cooley*, 92 Idaho 789, 451 P.2d 535 (1969)

E. The quitclaim deed is void because it was an incomplete inter vivos gift.

1. This Court has jurisdiction to set aside the 2006 quitclaim deed as an inter vivos gift.

Mr. Garrett argues that this court doesn't have jurisdiction to set aside the 2006 quitclaim deed as an incomplete inter vivos gift because that "defense" was not specifically pleaded, citing *Martin v. Soden,* 81 Idaho 274, 340 P.2d 848 (1959). That claim has no merit. Jack Garrett sued under Idaho Code §6-501 for partition of property he claims is jointly owned by himself and his step-mother, Thelma Garrett. One of the required elements of proof of Jack Garrett's partition claim is his ownership of the real property. The issue of Jack's ownership by virtue of the 2006 quitclaim deed was raised by the allegations in his complaint and Thelma Garrett's denial of those allegations. *See* ¶ 4 of Defendant's Answer, Affirmative Defenses and Counterclaim.[2] Proof of the invalidity of the deed, for whatever reason, is encompassed within the denial, and is not an affirmative defense that must be separately pleaded.

As the Supreme Court declared in *Troupis v. Summer,* 148 Idaho 77, 218 P.3d 1138, 1142 (2009) (a case brought for the partition of partnership business property), in a partition suit brought under Idaho Code §6-501, the Court exercises subject matter jurisdiction over the entire case that provides the Court with equitable power to grant full relief to the parties, whether or not set out in the pleadings or prayer for relief. The Court stated:

> This Court has long recognized " that equity having obtained jurisdiction of the subject matter of a dispute, will retain it for the settlement of all controversies between the parties with respect thereto and will grant all proper relief whether prayed for or not." *Boesiger v. Freer,* 85 Idaho 551, 563, 381 P.2d 802, 809 (1963); *see also Kessler v. Tortoise Dev., Inc.,* 134 Idaho 264, 270, 1 P.3d 292, 298 (2000); *Carpenter v. Double R Cattle Co.,* 108 Idaho 602, 606, 701 P.2d 222, 226 (1985). This principle allows the court flexibility in adjudicating cases, which is necessary because not all cases are presented in precisely the same fashion.

[2] "4. With respect to the allegations of Paragraph 7 of the Complaint, Defendant admits that the deed referred to was recorded, but denies the remaining allegations, including the purported legal effect of the deed."

In *State v. Armstrong,* 195 P.3d 731, 733 - 734 (2008), the Idaho Supreme Court defined subject matter jurisdiction. The Court stated:

> "Jurisdiction over the subject-matter is the right of the court to exercise judicial power over that class of cases, not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial.
> ...
> Such jurisdiction the court acquires by the act of its creation, and possesses inherently by its constitution; and it is not dependent upon the sufficiency of the bill or complaint, the validity of the demand set forth in the complaint, or plaintiff's right to the relief demanded, the regularity of the proceedings, or the correctness of the decision rendered. Citing *Boughton v. Price,* 70 Idaho 243, 249, 215 P.2d 286, 289 (1950)

In addition to the Court's inherent equity jurisdiction to adjudicate the property rights of the parties in a partition action, in this case, Thelma Garrett filed a Counterclaim to quiet title as against the 2006 quitclaim deed. This Court's equitable jurisdiction in the quiet title action is also sufficient to rule upon the validity of the 2006 quitclaim deed, no matter what legal theory is argued. The Court's equitable jurisdiction in a partition action, together with a Counterclaim for Quiet Title provide subject matter jurisdiction over the entire title dispute. *Martin* is distinguished from our facts because in the *Martin* case, "[t]he answer contained no prayer for affirmative relief and no counterclaim or cross complaint was filed by the husband in response to the wife's action for separate maintenance." For that reason, "[t]he court had only such jurisdiction of the property as was incident to its jurisdiction in a separate-maintenance action." *Id at 282*

2. The purported conveyance from Alva to Jack was an incomplete inter vivos gift because there was no intent to make a present complete gift and there was no delivery.

Contrary to Mr. Garrett's contention, the undisputed evidence proves that the purported conveyance from Alva to Jack Garrett was an incomplete inter vivos gift. First, there was no intent to make a present gift that took immediate and absolute effect. By his own admission, Jack believed that when Alva executed the quitclaim deed in 2006, he intended for it to take effect only when he died. Troupis Aff., Ex B, ("Jack's Depo., 55:17 – 21). John Garrett's affidavit corroborates this fact. He testifies that Alva did not want this deed to take effect until after he died. (Aff. of John Garrett, ¶11. "After the Quitclaim Deed was executed and notarized, Alva asked that I not record it until after his death so that Thelma would not become upset with him for executing the same." Until Alva died, he could have voided the unrecorded quitclaim deed by executing a deed transferring the property out of his name, or he could have asked John to give the deed back to him. John has testified that he was doing what his father wanted him to do. Consistent with that testimony, if Alva had asked for the deed to be destroyed or returned to him unrecorded, John would have done what his father wanted.

Nor was there delivery and acceptance of the property by Jack. The testimony of John Garrett does not alter the undisputed fact that Jack Garrett never took possession of the property or the deed until after his father died. (Def. St. of Facts, #25-31) Moreover, John basically admits in his Affidavit that he acted as his brother's agent or surrogate in procuring and holding the quitclaim deed unrecorded until their father died. This admission bolsters the evidence of undue influence because it shows that Jack and John acted in concert in procuring the deed, with knowledge that Thelma not only opposed it, but that Thelma and

Alva had already dealt with their property by wills, and kept the execution of the deed a secret until after Alva died "so that Thelma would not become upset." (John Garrett Aff. ¶ 11) All of these elements of a complete inter vivos gift are absent -- the intent to make a present gift, immediate and absolute effect of the gift, and present delivery of the property to the donee. The absence of any one of these elements is fatal to Jack Garrett's title claim.

CONCLUSION

The real property that is the subject of this lawsuit was the community property of the decedent Alva Garrett and his wife, Thelma Garrett. The deed to Jack Garrett is void as violative of Idaho Code §32-912. In addition, the deed was the product of undue influence by Jack and John Garrett. Finally, the deed is void because it was an incomplete inter vivos gift.

For the reasons set out above and in Defendant/Counterclaimant Thelma Garrett's Motion for Summary Judgment, the Defendant/Counterclaimant's Motion for Summary Jugdment should be granted and Plaintiff/Counterdefendant's Motion for Summary Judgment should be denied.

Dated: June 8, 2010

TROUPIS LAW OFFICE, P.A.

Christ T. Troupis
Attorney for Defendant/Counterclaimant

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of June, 2010, I caused to be served a true and correct copy of the foregoing Defendant/Counterclaimant's Reply Memorandum in support of Motion for Summary Judgment by U.S. Mail, first class postage prepaid, addressed to the following:

Nancy Jo Garrett
Rebecca A. Rainey
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
101 S. Capitol Blvd, 10th Floor
P.O. Box 829
Boise, Idaho 83701

Christ T. Troupis

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JACK L. GARRETT, an individual,

Plaintiff,

vs.

THELMA V. GARRETT, an individual,

Defendant.

THELMA V. GARRETT,

Counterclaimant,

vs.

JACK L. GARRETT,

Counterdefendant.

Case No. CV-09-8763-C

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROCEDURAL BACKGROUND

1. Plaintiff filed a Complaint for Partition on August 21, 2009, seeking a partition of real property located in Canyon County, Idaho, more particularly described as follows:

> The West Twenty-six and two-thirds (26 2/3) Acres of and located in the Southwest Quarter of the South East Quarter, (SW 1/4 of SE 1/4) Township Five North, Range Two West, Section 32, Boise Meridian, Canyon County, Idaho.
>
> Described more fully, as follows: Commencing at the Southwest Corner of the Southeast Quarter, Section 32, Township Five North, Range Two West, Canyon County, Idaho: 53 1/3 Rods East, 80 Rods North, 53 1/3 Rods West, 80 Rods South, in above described land, together with their appurtenances.

Hereinafter referred to as the "Middleton" property.

2. Defendant answered the Complaint for Partition on September 21, 2009. Such Answer constituted a general denial of the allegations set forth in the complaint for partition and asserted affirmative defenses of (i) fraud, duress, undue influence or other inequitable means; (ii) violation of the contract for wills; (iii) inequity; and (iv) unclean hands.

3. By leave of the court, Defendant filed a First Amended Answer, Affirmative Defenses, and Counterclaim (the "Amended Answer"). The Amended Answer asserted the affirmative defenses of (i) fraud, duress, and undue influence; (ii) unclean hands; and (iii) statutory invalidity of quitclaim deed, based on Idaho Code Section 32-912. The Amended Answer also set forth a counterclaim for Quiet Title.

ISSUES FOR TRIAL

1. Whether the 1990 Quitclaim Deed from Alva Garrett to Alva Garrett and Thelma Garrett created a community property interest in the Property.
2. Whether the 2006 Quitclaim deed from Alva Garrett to Jack Garrett was a valid conveyance of Alva Garrett's interest in the Property.
    a. Whether Alva Garrett was subject to fraud, duress or undue influence at the time he executed the 2006 Quitclaim Deed from Alva Garrett to Jack Garrett.
    b. Whether the 2006 Quitclaim Deed from Alva Garrett to Jack Garrett was the product of Jack Garrett's unclean hands.
    c. Whether delivery of the 2006 Quitclaim Deed from Alva Garrett to Jack Garrett was completed prior to Alva Garrett's death in 2008.

Conclusions reached in these Findings of Fact and Conclusions of Law

1. This Court concludes, based on clear and convincing evidence, that when Alva deeded the Middleton property to himself and his wife, Thelma, in 1990, he intended to transmute the property from his separate property to community property.
2. The 1990 quitclaim deed from Alva Garrett to Alva Garrett and Thelma Garrett created a community property interest in the Middleton property.
3. Because Alva Garrett's 2006 quitclaim deed transferring his interest in the Middleton property to Jack Garrett did not include the written consent of his wife, Thelma Garrett, the transfer is void.
4. Alternatively, because the delivery of the 2006 quitclaim deed from Alva Garrett to Jack Garrett was not completed before Alva Garrett's death, it was not a valid conveyance of Alva Garrett's interest in the Middleton property.

Findings of Fact

1. Alva and Thelma Garrett were married in 1976. They remained married for 32 years until Alva's death on March 3, 2008.
2. Thelma Garrett and Alva Garrett were both married prior to their marriage to each other. Each of them had children of a prior marriage. Alva had four children from a prior marriage, John, Jack, Marilyn, and Elenore; and Thelma had three children from her prior marriage, Garrett, Thomas, and Cynthia.
3. The members of the combined family had a normal and cordial step-family relationship.
4. At the time Alva and Thelma were married, Thelma owned a home free and clear in Middleton, Idaho, referred to as the "Town" property.

5. At the time that Alva and Thelma were married, Alva held title to three significant parcels of real property free and clear: (1) the "Middleton" property, located near Middleton, Idaho, comprised at that time of approximately 80 acres (the subject real property in this action); (2) the "Willow Creek" property, comprised of an unspecified, but significant number of acres, and (3) the "Round Valley" property, located in Valley County, Idaho, consisting of approximately 60 acres.

6. Alva and Thelma lived in a home on the Middleton property during their entire 32 year marriage, and Thelma continues to reside there.

7. Prior to 1990, Alva entered into certain business transactions with his son John Garrett, who was a real estate broker, with respect to the Willow Creek and Round Valley properties:

   7.1. The Willow Creek property: The Willow Creek property was sold off in two parcels, with at least a portion of the proceeds invested in, or traded for, the purchase of a motel in Rexburg, Idaho. Alva's son, John, was involved in these transactions in some capacity. It is not clear how Alva ultimately came to part with the motel, but eventually he no longer owned either the motel or the Willow Creek property.

   7.2. The Round Valley property: Prior to Alva and Thelma's marriage, the Round Valley property consisted of approximately 80 acres. With Alva's approval, his son John subdivided Alva's Round Valley property into residential lots. Alva then conveyed separate five-acre parcels of the Round Valley property to each of his four children, John, Jack, Eleanor and Marilyn. At some time after Alva and

Thelma were married, but prior to 1990, the remaining 60 subdivided acres were sold, and the sales were managed by Alva's son, John.

8. Just as Alva owned all his real property free and clear at the time of their marriage, Thelma's "Town" property was also owned free and clear at the time of the marriage. In August of 1983, Thelma took out a $22,000 mortgage on the "Town" property in her name only, and secured it with a deed of trust to Idaho First National Bank (later known as West One Bank). This deed of trust was modified or amended in 1984 and again in 1985. The history of this "Town" property, as well as the service of any debt on the property, presents itself as a confusing history. It appears that the property became a vehicle for Thelma's children to obtain financing for their own business ventures.

8.1. In September of 1989, Thelma transferred her "Town" property to her son, Thomas Longstreet, by quitclaim deed signed by both Thelma and Alva as "husband and wife."

8.2. Defendant's Exhibit BB, which contains Alva and Thelma's annual financial records kept from 1984 through 1999 for tax purposes, reflects that Alva and Thelma continued to make payments on the interest due on the mortgage until 1990, after which it does not appear that they continued to make payments on the mortgage, or at least no further such interest payments to West One Bank are reflected in Exhibit BB after 1990. This fact tends to support that the payments towards the 1983 mortgage were being made by one of her children who was the beneficiary of loans from Thelma, or the beneficiary of the transfer of the "Town" property.

8.3. Exhibit BB reflects that Thelma and Alva continued to receive rent on her "Town" property, as well as continued to pay and deduct the taxes, water assessment, repairs and insurance through 1999. This apparently occurred with Thomas' approval.

8.4. Thomas eventually conveyed a one-third interest in the "Town" property to his brother, Garrett Longstreet, and one-third interest to his sister, Cynthia Schwartz. Eventually, Cynthia's interest was conveyed to Garrett. Throughout the remaining years of Alva and Thelma's marriage, Thomas continued to defer all rental income received from the "Town" property to Alva and Thelma, who, as previously noted, also continued to list certain deductions against that income which were incurred for the taxes, water assessments, repairs and insurance. Whatever the motive was for this arrangement, both Alva and Thelma were active and joint participants.

8.5. Garrett Longstreet also made certain payments to Alva and Thelma during the same period, which are reflected in Exhibit BB as income received from Garrett in 1994, 1996, and 1998. (Exhibit BB does not provide any records after 1999). Garrett apparently began these payments to pay back a debt to Thelma arising out of the loan proceeds from the 1983 mortgage on the "Town" property, and eventually continued to assist Alva and Thelma by sending them up to $400 per month.

8.6. The evidence reflects that on December 21, 2007, Thomas and Garrett encumbered the "Town" property with a deed of trust to Bank of the Cascades to secure a promissory note of $156,775.

8.7. On December 27, 2007, the 1983 mortgage on the "Town" property (originally taken out by Thelma) was finally paid off, but it is not clear by whom.

8.8. The Bank of Cascades debt owed by Thomas and Garrett went into default and the property was sold in a foreclosure sale on September 21, 2009. Shortly before the "Town" property was foreclosed, Thomas and Garrett deeded it back to Thelma by quitclaim deed, unbeknownst to her, however.

9. The "Middleton" property: By the year 1990, the only remaining real property that Alva still owned was the 80-acre Middleton property.

9.1. In 1977, Alva took out a $29,000 mortgage on the Middleton property in his name only, and in 1980, he took out a $24,000 mortgage in his name only.

9.2. By 1990, he was unable to make his payments and was threatened with foreclosure.

9.3. In order to pay off his debts, Alva sold approximately 53 acres of the Middleton property in April of 1990, leaving the 26 2/3 acres that are the subject of this lawsuit.

9.4. It appears from the evidence that from the proceeds of that sale, Alva retired some of his mortgage obligation on these two mortgages, as evidenced by the partial release of the 1977 mortgage that was issued on April 20, 1990, which was the same day that he closed the sale of the 53 acres.

9.5. Approximately two months later, June 18, 1990, Alva signed a quitclaim deed, transferring the remaining 26 2/3 acres of the Middleton property to "Alva Garrett and Thelma Garrett." The deed had been prepared by both Alva and Thelma, without assistance of any of their children, nor with any assistance of legal counsel. (An amended deed was issued in October of 1990, in which Alva corrected an error in the legal description, but otherwise utilizing a copy of his original quitclaim deed.)

9.6. On June 19, 1990, the day following the issuance of the original quitclaim deed from Alva to Alva and Thelma, both Alva and Thelma took out a new mortgage on the Middleton property in the sum of $20,000, in which they were identified as the mortgagors, "Alva L. Garrett and Thelma V. Garrett, husband and wife." This obligation was paid off by Alva and Thelma on October 19, 1992.

Mortgage day after Transfer

Facts relevant to determining Alva's intent regarding the 1990 quitclaim deed:

10. Thelma contends that Alva's intent was to convey the property to the marital community, partially in order to protect himself from being persuaded by his son, John, to part with any more of his remaining real property, which by that time had shrunk from several hundred acres to approximately 26 acres, and further, to protect and provide for Thelma and Alva, as this was the only remaining real property asset left to either of them.

11. It is clear that while Thelma's testimony appears to be truthful, other portions of her testimony reflect that her memory of events has faded over time, and even she acknowledged certain memory errors in her testimony when she was presented with more accurate historical records.

12. However, the 1990 transfer by Alva of his remaining 26 2/3 acres to both himself and Thelma, which included their mutual residence, must be viewed in context of the other actions taken by the parties with regard to the separate property that they each owned prior to the marriage, and in context of their dealings with each other generally.

12.1. As previously noted, Alva encumbered his separate "Middleton" property in 1977 and again in 1980.

12.2. As previously noted, by the spring of 1990, Alva was in financial difficulty and in danger of defaulting on the two mortgages that were secured by the 80-acre Middleton property, causing him to sell off 53 acres to retire a portion of the debt.

12.3. Both Alva and Thelma had parted with all other separate real property that they had brought into the marriage, and it appears that each of those transfers involved some venture with, or accommodation to, their respective children from their first marriages.

12.4. It is inescapable that one reason for Alva to transfer his remaining property to both Alva and Thelma was to effectuate obtaining another mortgage on the property.

12.5. It is also clear that Alva intended the transfer of title to both Thelma and himself, as evidenced by the language of the deed and supported by language of the mortgage that they took out the following day in their names as "husband and wife" (resulting in a community debt). While the evidence reflects that Alva did not include additional language that could have further clarified the nature of the transfer evidenced by the quitclaim deed (i.e., as "husband and wife" or as "tenants in common," etc.), the evidence reflects that the deed, as opposed to the mortgage document, was prepared by both Alva and Thelma, without the assistance of counsel or their children, and that the only testimony regarding Alva's intent at the time comes from Thelma, who is the only witness that was privy to their discussions.

12.6. During their marriage, Alva and Thelma comingled their income. Although they maintained two checking accounts, one was primarily used in the

operation of Alva's race horse training and racing business, which had been his separate business before they were married. The other account was generally where they comingled their other income. Exhibit BB generally reflects a comingling of incomes from a variety of sources, including, but not limited to, farm rental income received on the Middleton property, rental income received on the "Town" property, both Alva and Thelma's social security income, any other agricultural or livestock profits, and any other payments from Thelma's children.

12.7. It appears from the evidence in the case that a portion of the original mortgages on the Middleton property were retired by proceeds from the 1990 mortgage. It also appears that the 1990 mortgage taken out by Alva and Thelma on the Middleton property was paid off out of community funds.

12.8. On the other hand, and contradictory to the contention that Alva intended to transmute the Middleton property to the community, between 1991 and 2006, Alva had occasional discussions with his son, Jack Garrett, about transferring an interest in the Middleton property to Jack, who began farming the property in 1990. While there is no reason to doubt that Alva and Jack had these conversations, the discussions never resulted in any written effort to transfer any interest in the property by Alva until 2006, sixteen years after he transferred the property to himself and Thelma. It is clear that despite what Alva was telling Jack, his actions indicate that he was vacillating on the issue. At one point after Alva again indicated his desire to transfer his interest in the Middleton property

to Jack, Jack made an appointment at a lawyer's office to address such a transfer, but Alva failed to attend the meeting and no transfer occurred.

12.8.1. It was not until February of 2006 that Alva finally presented a quitclaim deed to Jack's brother, John Garrett, transferring his interest in the Middleton property to Jack. Thereafter, the deed was not recorded until two days after Alva's death in March of 2008, which apparently was pursuant to Alva's direction.

12.9. However, in the interim, both Alva and Thelma entered into a mutual contract for wills on January 27, 1995, and simultaneously executed wills containing mutual provisions that left their entire estate to the surviving spouse, and upon the death of the survivor, in equal shares to all seven (7) children of their combined family. Even though those documents do not expressly prohibit Alva from transferring his interest in the Middleton property, the nature and substance of the contract for wills, and the wills themselves, are consistent with Thelma's recollection that Alva intended to transfer the property to their marital community.

13. This Court finds that when Alva deeded the Middleton property to himself and his wife, Thelma, in 1990, he intended to transmute the property from his separate property to community property.

Facts surrounding the issuance of a quitclaim deed from Alva to Jack:

14. At some time prior to or in 1990, but before Alva sold off 53 acres of the Middleton property, Alva's son, Jack Garrett, proposed to purchase the Middleton property by assuming the debt against it and granting a life estate to Alva and Thelma. In support of that offer, he sought a determination whether he could assume the debt on the 80-acre

Middleton parcel. Jack, Alva, and Thelma met with a loan officer at the mortgage holder, Federal Land Bank's offices, but Jack was unable to effectuate such an assumption, as he did not qualify for refinancing. No agreement was reached.

15. Also In 1990, Jack Garrett began farming the Middleton property and leased the farm land from Alva and Thelma.

16. When Jack began farming the Middleton property, he gave his father approximately $10,000.00.

17. Of that $10,000.00, the sum of $8,000.00 constituted an advance on rent that Jack was to pay for farming the Middleton property, which was the rate of approximately $100.00 per acre.

18. The remaining $2,000.00 was a loan, and Alva and Thelma executed a promissory note to Jack, dated March 21, 1990, to evidence such loan.

19. On December 16, 1991, Alva and Thelma paid Jack $1,758.00 toward the principle of the debt, leaving $242.00 still owing as of that date.

20. Jack entered a written farm lease with Alva and Thelma in March of 1992, which was signed by all three of them.

21. Jack continued farming the remaining 26 2/3 acres, and continues to do so today.

22. Jack paid rent on the farm ground up until 2008, and ceased payment after Alva died.

23. In approximately 2000, Alva spoke to Jack about giving him the farm ground, and discussed the idea of splitting the Middleton property.

24. In 2005, Jack made an appointment at an attorney's office for his father Alva to sign a quitclaim deed, conveying Alva's interest in the Middleton property to Jack, but the appointment was not kept by Alva.

25. Jack first became aware that Thelma was part owner of the Middleton property in 2000. Other than when Thelma met with Alva and Jack at the Federal Land Bank offices in 1990, Thelma was never a present when any of the conversations occurred between Alva and Jack regarding Alva assigning his interest in the property to Jack. Jack was aware that Thelma would not agree to such a transfer.

26. Other than the $2,000 loan that Jack made to Alva and Thelma, the evidence does not reflect any other record of financial assistance by Jack to Alva or Thelma to make the payments on the Middleton property. Jack testified that despite the lack of any record currently, prior to 1990, he loaned Alva $2,000 and $2,500 on separate occasions to help make payments on the Middleton property. This would be consistent with the fact that Alva was having trouble making the payments on the two mortgages on the Middleton property, but no such loans were reflected in Exhibit BB (Alva and Thelma's financial records for tax purposes from 1984 through 1999).

27. On February 14, 2006, Alva executed a quitclaim deed "for value received," which conveyed his interest in the Middleton property to his son, Jack Garrett. As previously noted, Alva presented the quitclaim deed to Jack's brother, John. Pursuant to Alva's instructions not to record the deed until after his death, the deed was not recorded by John until two days after Alva's death.

28. Despite the earlier communications between Jack and Alva regarding the proposed conveyance of Alva's interest in the Middleton property, Jack was not active in the eventual preparation or the recording of the 2006 Quitclaim Deed.

29. There was no direct evidence presented at the trial to indicate whether Alva had completely divested himself of the deed by giving it to John, or if Alva still

maintained sufficient dominion and control over John's handling of the deed to request it be returned to him if he so decided.

30. In the present case, therefore, the intent of the grantor and grantee are best reflected in the facts surrounding the delivery, and those facts reflect that Alva did not intend for the deed to take effect according to its terms until after his death. The facts reflect that Alva did not intend to divest himself of his interest in the Middleton property until his death.

30.1. As noted, Alva did not want the deed recorded until after he died.

30.2. Jack did not take possession of the Middleton property after Alva executed the quitclaim deed.

30.3. After Alva executed the quitclaim deed, Jack continued to pay Alva and Thelma annual rent in October of 2006 for farming the Middleton property. He made this annual rent payment again in October of 2007.

30.4. Alva continued to accept the rent on the Middleton property farmland for both 2006 and 2007, all of which was paid after he executed the 2006 quitclaim deed.

30.5. Jack was not aware of the deed initially, but sometime after the 2006 quitclaim deed was executed, Jack became aware that quitclaim deed had been executed. Jack actually saw the deed sometime in 2007, which was before Alva died.

30.6. Other than having seen the deed in 2007, Jack Garrett never took physical possession of the quitclaim deed while Alva Garrett was living.

30.7. Neither Alva, Jack Garrett, nor John Garrett discussed Alva's execution of the quitclaim deed with Thelma, and she did not consent to Alva's execution of the quitclaim deed.

30.8. Jack never collected rent from either Thelma or Alva for their continued possession of the Middleton property.

31. Alva Garrett passed away on March 3, 2008, and as previously noted, the quitclaim deed from Alva to Jack was recorded by Alva's son, John Garrett, on March 5, 2008, two days after Alva's death.

32. Even though the previously mentioned mutual contract for wills, entered between Alva and Thelma in January of 1995, did not expressly prohibit Alva from transferring his interest in the Middleton property during his lifetime, the contract specifically provided that upon either spouse's death, that spouse agreed to "give, devise and bequeath his or her property in accordance with the provisions of his or her will attached hereto."

32.1. Alva's Last Will and Testament that was attached to the contract for wills provides that "[a]fter the payment of . . . all my just debts and obligations . . . I hereby give, devise and bequeath all the rest, residue and remainder of my property of every kind and nature, real, personal and mixed, . . . owned by me at the time of my death, to my wife, Thelma V. Garrett." (Defendant's Exhibit B, page 2 of the will, "FIFTH" paragraph).

32.2. It is clear from the evidence before the Court that the deed from Alva to Jack was not executed based upon any contractual obligation between Alva and Jack, but rather as a gratuitous expression of Alva's appreciation for Jack's effort in farming the land, loaning Alva and Thelma money, and having been the child of Alva's who

was the most connected to the farm and would benefit the most from the farm. Notwithstanding that sentiment, it is clear that Alva did not intend for the deed to take effect, nor to divest himself of the property, until after his death.

33. Thelma Garrett did not have any knowledge of the quitclaim deed until after it was recorded after Alva died. She first became aware of the deed during the probate of Alva's estate, when her attorney advised her that it had been recorded.

34. Two independent witnesses, and long time acquaintances of Alva, testified that Alva's mental condition had deteriorated by 2006 (and earlier) to the extent that his memory was noticeably affected.

35. However, Alva's memory never deteriorated to the point where he did not remember his wife and family.

36. At the time Alva executed the 2006 Quitclaim Deed, he and Thelma were still living together at the Middleton property.

37. Thelma and Alva never executed a formal marriage settlement agreement.

Conclusions of Law

Regarding Thelma V. Garrett's claim that the 1990 quitclaim deed from Alva Garrett to Alva Garrett and Thelma Garrett created a community property interest in the Middleton property:

1. The character or nature of property acquired during marriage as community or separate property vests at time of acquisition. *Estate of Freeburn*, 97 Idaho 845 (1976); *Winn v. Winn*, 105 Idaho 811 (1983).

2. Income from all property, separate or community, is community property, unless the conveyance by which it is acquired or spouses, by written agreement, provide otherwise. I.C. §32-906(1).

3. Net rents and profits from separate property are community property. *Malone v. Malone,* 64 Idaho 252 (S.C. 1942); *Gapsch v. Gapsch*, 76 Idaho 44 (S.C. 1954); *Martsch v. Martsch*, 103 Idaho 142 (1982).

4. Social Security benefits are separate property and the issue is pre-empted by federal law. *Bowlden v. Bowlden*, 118 Idaho 89 (Ct. App. 1990).

5. Where parties commingle, blend and confuse separate funds with community property, and treat and handle their separate and community funds in one bank account as one fund, all such funds become community property. *Gapsch v. Gapsch*, 76 Idaho 44 (1954).

6. Transmutation is an arrangement between spouses which changes the character of property from separate to community or vice versa. *Ustick v. Ustick*, 104 Idaho 215 (Ct. App. 1983).

7. The determination whether property has been transmuted, from separate to community property or vice versa, is, as we have long stated, a question of intent. *Hoskinson v. Hoskinson,* 139 Idaho 448, 459, 80 P.3d 1049, 1060 (2003); *Suchan v. Suchan,* 106 Idaho 654, 664, 682 P.2d 607, 617 (1984); *In re Bogert's Estate,* 96 Idaho 522, 526, 531 P.2d 1167, 1171 (1975); . . . The party asserting transmutation must prove the claim by clear and convincing evidence.

   Barrett v. Barrett, 149 Idaho 21, 232 P.3d 799, 801-802 (2010).

8. Although the *Barrett* case arose in a divorce action, the holding of the Court is applicable to the issues of this case:

> [W]e conclude that the language of a deed executed in the course of refinancing does not conclusively determine the character of property for purposes of a divorce action. Rather, the intention of the party or parties executing the deed is dispositive. Thus, neither I.C. § 55-606 nor the statute of frauds governs because the pertinent question is not the effectiveness of the deed. Although the trial judge, as the finder of fact, may consider a deed as evidence in determining intent, it is not the only evidence available to a judge considering the question of transmutation.

Barrett v. Barrett, 149 Idaho 21, 24, 232 P.3d. 799, 802 (2010).

9. [T]he determination whether property has been transmuted is a question of fact turning on intent. In making this factual determination, trial courts are free to consider all relevant evidence regarding that intent. *Barrett v. Barrett,* 149 Idaho 21, 25, 232 P.3d. 799, 803 (2010).

10. [I]n *Winn v. Winn,* 105 Idaho 811, 673 P.2d 411 (1983), involving a property purchase concluded some months after the marriage using separate property of the husband, the Court considered a variety of factors to be considered in the absence of the parties' "actual, articulated intent": (1) whether the community was liable for payment on the loan; (2) the source of the payments toward the loan; (3) the basis of credit upon which the lender relied in making the loan; (4) the nature of the down payment; (5) the names on the deed; and (6) who signed the documents of indebtedness. *Id.* at 814–15, 673 P.2d at 414–15. This Court explained:

> [t]he presence or absence of any or all of the above listed factors is relevant in determining the character of the credit by which a loan is obtained. None is conclusive. We deliberately refrain from selecting one item as dispositive. Such an approach is too rigid in light of our ultimate purpose of determining the likely intent of the spouses and in consideration of the highly individualistic and often complex fact situations presented.

Id. at 815, 673 P.2d at 415.

Barrett v. Barrett, 149 Idaho 21, 24, 232 P.3d 799, 802 (2010).

11. The characterization of property as either community or separate involves mixed questions of law and fact. *Krebs v. Krebs,* 114 Idaho 571, 573, 759 P.2d 77, 79 (Ct.App.1988). The manner and method of acquisition of property are questions of fact for the trial court. *Batra v. Batra,* 135 Idaho 388, 391, 17 P.3d 889, 892 (Ct.App.2001). The characterization of an asset in light of the facts found, however, is a question of law over which this Court exercises free review. *Id.*

Kraly v. Kraly, 147 Idaho 299, 208 P.3d 281 (2009).

12. All property that is acquired after marriage by either husband or wife is community property, including property that is owned separately by one spouse who then deeds

such property to the marital community. See I.C. § 32-906. *Dunagan v. Dunagan*, 147 Idaho 599, 602, 213 P.3d 384, 387 (2009).

13. Thelma V. Garrett has established by clear and convincing evidence that when Alva deeded the Middleton property to himself and his wife, Thelma, in 1990, he intended to transmute the property from his separate property to community property.

Regarding Jack L. Garret's claim that the 2006 quitclaim deed from Alva Garrett to Jack Garrett was a valid conveyance of Alva Garrett's interest in the Middleton property:

14. I.C. §32-912 provides the general rule that an attempted conveyance of community real estate by one spouse, without the written consent of the other, is void. *See* I.C. § 32-912; *Fuchs v. Lloyd,* 80 Idaho 114, 120, 326 P.2d 381, 384 (1958) (citations omitted). *Lovelass v. Sword,* 140 Idaho 105, 108-109, 90 P.3d 330, 333 - 334 (2004).

15. Because Alva's 2006 quitclaim deed, transferring his interest in the Middleton property to Jack Garrett did not include the written consent of his wife, Thelma Garrett, the transfer is void.

16. Mutual and reciprocal wills are revocable, even after the acceptance of benefits by one of the testators, absent an agreement or contract between the parties to make the wills irrevocable. Even then, strictly speaking, it is the contract, and not the wills, which is irrevocable. *In re Isaacson's Estate*, 77 Idaho 12, 285 P.2d 1061 (1955); (citations omitted). *Collord v. Cooley*, 92 Idaho 789, 794, 451 P.2d 535, 540 (Idaho 1969).

    a. The contract for mutual execution of wills did not prohibit Alva from transferring his separate property before his death, but did prohibit him

from transferring or devising his separate property outside the terms of his will upon his death.

17. Regarding delivery of a deed, the Idaho Supreme Court has held:

> "Delivery is merely a symbol indicating, as interpreted by the courts, complete and fixed relinquishment of title by the grantor to the grantee." *Johnson v. Brown,* 65 Idaho 359, 369, 144 P.2d 198, 203 (1943). "Such delivery may be actual or constructive." *Id.* at 365, 144 P.2d at 201; *Hartley v. Stibor,* 96 Idaho 157, 525 P.2d 352 (1974).
>
> *Hogg v. Wolske*, 142 Idaho 549, 556, 130 P.3d 1087, 1094 (2006)

18. 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).

    Barmore v. Perrone, 145 Idaho 340, 344-345, 179 P.3d 303, 307 - 308 (2008).

19. "Delivery in some form is absolutely essential" to the validity of a deed. *Bowers v. Cottrell,* 15 Idaho 221, 228, 96 P. 936, 938 (1908). "[D]elivery includes surrender and acceptance, and both are necessary to its completion." *Estate of Skvorak v. Sec. Union Title Ins. Co.,* 140 Idaho 16, 20-21, 89 P.3d 856, 860-61 (2004) (quoting *Bowers,* 15 Idaho at 228, 96 P. at 938). . . . The mere placing of a deed in the hands of the grantee does not necessarily constitute a delivery. The question is one of intention: whether the deed was then intended by the parties to take effect according to its terms." *Estate of Skvorak,* 140 Idaho at 21, 89 P.3d at 861 (quoting *Crenshaw v. Crenshaw,* 68 Idaho 470, 475, 199 P.2d 264, 267 (1948)).

    Riley v. W.R. Holdings, LLC, 143 Idaho 116, 123, 138 P.3d 316, 323 (2006).

20. This Court has consistently held that in order for a deed to be adequately delivered it must be voluntarily "surrendered" by the grantor, with an intent to pass immediate and present title. This intent is indispensable to valid delivery.... [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.

Matter of Estate of Ashe, 114 Idaho 70, 77, 753 P.2d 281, 288 (Ct. App. 1988), (Citing *In re Estate of Courtright,* 99 Idaho 575, 579–580, 586 P.2d 265, 269–270 (1978)).

21. The doctrine regarding delivery of a deed to a third party is addressed in CJC Deeds §89:

> A grantor legally may transfer a deed to a third person with instructions to deliver it to the grantee after the grantor's death.
> A grantor legally may transfer a deed to a third person with instructions to deliver it to the grantee after the grantor's death. Under such circumstances the deed takes effect from the first delivery. On the other hand, the grantor must surrender dominion and control over the title, and, if a power to recall the deed is reserved by him or her, there is no effectual delivery and the deed cannot take effect, even though it comes into the manual custody of the grantee and is recorded without authorization.
> The intention of the grantor to part with the title, as evidenced by the circumstances surrounding the transaction, affords the true test. Such intention must be established as of the time of delivery to the depositary. It follows that, if the grantor intends to pass title, the deed is not invalidated by the fact that the depositary is uncertain as to the effect of the delivery and does not consider it irrevocable. Even though the grantor retains control over the deed and the depositary is his or her agent, the grantor may by express declarations or acts, such as giving the grantee the memorandum receipt from the depositary, make an effectual delivery. Also, if delivery to a depositary is properly made, the grantor's mental reservation contrary to that expressed by his or her words or deeds, or his or her subsequent change of intention, or his or her regaining possession of the deed, or destruction of the deed, does not affect the validity of the transfer. However, the grantor and grantee may by common consent avoid the effect of a completed delivery to a third person by withdrawing the deed from his or her control, and in such case the grantee cannot claim title.
>
> CJS DEEDS § 89

22. With regard to inter vivos gifts, the Idaho Supreme Court has held:

> In *Zimmerman v. Fawkes*, 70 Idaho 389, 219 P.2d 951 (1950), this Court enunciated the essential elements which must be present before a valid inter vivos gift will be found to exist:
>
> '* * * 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 immediate and absolute effect.'

Id. at 391, 219 P.2d at 952.

Respondents do not dispute the existence of the first three of these elements. Rather they contend there was no present delivery because the property did not pass beyond the dominion and control of the donor. 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).
>
> Such transfer or delivery need not necessarily be to the donee in person. It may be to a third party agent acting in the donee's behalf. Boston Insurance Co. v. Beckett, 91 Idaho 220, 419 P.2d 475 (1966); Bunnell v. Iverson, 147 Colo. 552, 364 P.2d 385 (1961).

The question before this Court is whether McCoy was acting as the decedent's agent; i. e., whether Ova Lewis still exercised dominion over McCoy to request return of the deed to her. If she could have, then she did not relinquish all dominion, and no effective transfer was made. On the other hand, if the decedent had divested herself of control over the deed, then McCoy was acting, in effect, as appellant's agent. This is a question of intent as of the time the deed was given to McCoy.

Matter of Lewis' Estate, 97 Idaho 299, 302, 543 P.2d 852, 855 (1975).

23. As previously addressed in the Findings of Fact, Alva did not intend to divest himself of title to the Middleton property until after his death. He still leased the land to Jack per the written lease agreement, accepted the rents, and otherwise continued to exercise dominion and control over the property until his death on March 3, 2008.

24. Therefore, delivery of the 2006 quitclaim deed from Alva Garrett to Jack Garrett was not completed prior to Alva's death.

Conclusion

1. This Court concludes, based on clear and convincing evidence, that when Alva deeded the Middleton property to himself and his wife, Thelma, in 1990, he intended to transmute the property from his separate property to the marital community.
2. The 1990 quitclaim deed from Alva Garrett to Alva Garrett and Thelma Garrett created a community property interest in the Middleton property.
3. Because Alva Garrett's 2006 quitclaim deed, transferring his interest in the Middleton property to Jack Garrett did not include the written consent of his wife, Thelma Garrett, the transfer is void.
4. Alternatively, because the delivery of the 2006 quitclaim deed from Alva Garrett to Jack Garrett was not completed before Alva Garrett's death, it was not a valid conveyance of Alva Garrett's interest in the Middleton property.

Order

1. Jack L. Garrett's claim for partition of the Middleton property is denied.
2. Thelma V. Garrett's claim to quiet title in the Middleton property is granted. Thelma V. Garrett is the adjudged the sole owner of the Middleton property.
3. Ms. Garrett's counsel is directed to submit a proposed judgment that is consistent with this decision.

Be it so ordered this 19 day of May, 2011,

Gregory M. Culet
District Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order were forwarded to the following persons on the 19 day of May, 2011:

Rebecca A. Rainey
Attorney at Law
2627 W. Idaho St.
Boise, ID 83702

Chris Troupis
Attorney at Law
PO Box 2408
Eagle, Idaho 83616

District Clerk

Christ T. Troupis, ISB # 4549
TROUPIS LAW OFFICE
1299 E. Iron Eagle, Ste 130
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Attorney for Defendant/Counterclaimant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR CANYON COUNTY

JACK L. GARRETT,

Plaintiff,

vs.

THELMA V. GARRETT,
An individual,

Defendant.

THELMA V. GARRETT,

Counterclaimant,

vs.

JACK L. GARRETT,

Counterdefendant.

Case No: CV 09-8763-C

JUDGMENT QUIETING TITLE

THIS MATTER having come on for trial before the above-entitled Court on the Plaintiff's Complaint for Partition and the Defendant's Counterclaim to quiet title. Based upon the Findings of Fact and Conclusions of Law entered in May 19, 2011, the Court enters the following Judgment:

1. This action concerns the title and ownership of the following real property, hereinafter referred to as the "subject real property":

"The West Twenty-Six and two-thirds (26 2/3) acres of land located in the Southwest Quarter of the South East Quarter, (SW ¼ of SE ¼) Township Five North, Range Two West, Section 32, Boise Meridian, Canyon County, Idaho.

Described more fully as follows: Commencing at the Southwest corner of the Southeast Quarter, Section 32, Township Five North, Range Two West, Canyon County, Idaho: 53 1/3 Rods East, 80 Rods North, 53 1/3 Rods West, 80 Rods South, in the above described land, together with their appurtenances."

2. Plaintiff Jack L. Garrett's claim for partition of the subject real property is denied.

Judgment is entered in favor of the Defendant, Thelma V. Garrett on the Plaintiff Jack L. Garrett's claim for partition of the subject real property.

3. Judgment is entered in favor of the Defendant, Thelma V. Garrett quieting title to the subject real property in her name. Thelma V. Garrett is hereby adjudged to be the sole owner of the subject real property.

Dated: May 31, 2011

The Honorable Gregory M. Culet
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 24th day of May, 2011, I caused to be served a true and correct copy of the foregoing Judgment Quieting Title, by U.S. Mail, postage prepaid, addressed to the following:

Rebecca A. Rainey
Attorney at Law
2627 W. Idaho St.
Boise, Idaho 83702

Christ T. Troupis

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Attorneys for Plaintiff/Counterdefendant/Appellant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JACK L. GARRETT, an individual,

Plaintiff/Appellant,

vs.

THELMA V. GARRETT, an individual,

Defendant/Respondent.

THELMA V. GARRETT,

Counterclaimant,

vs.

JACK L. GARRETT,

Counterdefendant.

Case No. CV-09-8763-C

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT, Thelma V. Garrett, AND THE RESPONDENT'S ATTORNEY, Christ T. Troupis, Troupis Law Office, P.A., 1299 E. Iron Eagle, Suite 130, P.O. Box 2408, Eagle, ID 83616, AND TO THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Jack L. Garrett, by and through undersigned counsel of record, Rebecca A. Rainey of Rebecca A. Rainey, P.A., hereby appeals against the above-named respondent, Thelma V. Garrett, to the Idaho Supreme Court from the final Judgment entered in the above-entitled action on the 1st day of June, 2011, Honorable Judge Gregory M. Culet presiding.

2. Appellant has a right to appeal the final judgment entered in this matter to the Idaho Supreme Court as the Judgment described in paragraph 1 above is a final and appealable judgment under and pursuant to Rule 11(a)(1) I.A.R.

3. A preliminary statement of issues on appeal which the appellant intends to assert in the appeal is as follows:

a) Whether the District Court erred in taking evidence on the question of Alva Garrett's intent when executing the 1990 quitclaim deed for purposes of determining whether such deed was intended to transmute his separate property interest into community property;

b) Whether the District Court erred in finding that Thelma Garrett proved, by clear and convincing evidence, that Alva Garrett intended to transmute his separate property interest in the subject property to Thelma Garrett.

c) Whether the District Court erred in not limiting Thelma's community property interest in the subject property to the amount of the $20,000.00 mortgage taken at the time title was placed in the names of Alva Garrett and Thelma Garrett.

d) Whether the District Court erred in finding that the 2006 quitclaim deed to Jack Garrett was a gift.

e) Whether the District Court erred in finding that Thelma Garrett proved, by clear and convincing evidence, that Alva Garrett delivered the 2006 quitclaim deed prior to his death.

Pursuant to I.A.R. 17(f) this preliminary statement of issues shall not prevent appellant from asserting other issues on appeal.

4. No order has been entered sealing all or any portion of the record.

5. Transcripts:

a) The following transcripts are requested:

i. The reporter's standard transcript of the trial held on April 11-12, 2011, supplemented by closing arguments of counsel;

ii. The reporter's standard transcript of the hearing on motions for summary judgment held on June 18, 2010.

b) The appellant request the preparation of the following portions of the reporter's transcript in [ ] hard copy [ ] electronic format [X] both

6. In addition to those automatically included under Rule 28, I.A.R., the appellant requests the following additional documents be included in the clerk's record:

a) Plaintiff/Counterdefendant's Motion for Summary Judgment filed May 14, 2010.

b) Memorandum in Support of Plaintiff/Counterdefendant's Motion for Summary Judgment filed May 14, 2010.

c) Affidavit of Rebecca Rainey in Support of Plaintiff/Counterdefendant's Motion for Summary Judgment filed May 14, 2010, and all exhibits thereto.

d) Defendant/Counterclaimant's Motion for Summary Judgment filed May 19, 2010.

e) Affidavit of Christ Troupis in Support of Defendant/Counterclaimant's Motion for Summary Judgment filed May 19, 2010, and all exhibits thereto.

f) Memorandum in Support of Defendant/Counterclaimant's Motion for Summary Judgment and in Opposition to Plaintiff/Counterdefendant's Motion for Summary Judgment filed May 19, 2010.

g) Reply Memorandum in Support of Jack L. Garret's Motion for Summary Judgment and Memorandum in Opposition to Thelma V. Garrett's Motion for Summary Judgment filed June 4, 2010.

h) Affidavit of John Garrett in Support of Plaintiff/Counterdefendant's Response to Defendant/Counterclaimant's Motion for Summary Judgment filed June 4, 2010.

i) Defendant's Reply Memorandum in Support of Defendant/Counterclaimant's Motion for Summary Judgment and in Opposition to Plaintiff/Counterdefendant's Motion for Summary Judgment filed June 9, 2010.

7. The Appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court:

a) Plaintiff's Exhibits 3, 5, and 16 – 26.

b) Defendant's Exhibits A, D, E, K, L, BB, KK.

8. I certify:

a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below

i. Laura Whiting
1115 Albany Street
Caldwell, ID 83605

b) That the clerk of the district court has been paid an estimated fee of $400.00 for preparation of the reporter's transcripts.

c) That the estimated fee of $100 for preparation of the clerk's record has been paid.

d) That all appellate filing fees have been paid.

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

DATED this 13th day of July, 2011.

REBECCA A. RAINEY, P.A.

By _____
Rebecca A. Rainey
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of July, 2011, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served by the method indicated below, and addressed to the following:

Christ T. Troupis
Troupis Law Office, P.A.
1299 E. Iron Eagle, Suite 130
P.O. Box 2408
Eagle, ID 83616
Facsimile (208) 938-5482
Attorneys for Defendant/Counterclaimant

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

Rebecca A. Rainey

Christ T. Troupis, ISB # 4549
TROUPIS LAW OFFICE
1299 E. Iron Eagle, Ste 130
PO Box 2408
Eagle, Idaho 83616
Telephone: 208/ 938-5584
Facsimile: 208/ 938-5482
Email: ctroupis@troupislaw.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR CANYON COUNTY

JACK L. GARRETT, **Plaintiff,** **vs.** **THELMA V. GARRETT,** **An individual,** **Defendant.**	**Case No: CV OC 09-8763-C** **RESPONDENT'S DESIGNATION OF ADDITIONAL DOCUMENTS TO BE INCLUDED IN CLERK'S RECORD ON APPEAL**

COMES NOW RESPONDENT THELMA V. GARRETT, by and through Christ T. Troupis, her attorney, and hereby designates the following additional documents for inclusion in the Clerk's Record on Appeal:

All of the Defendant's exhibits offered and admitted at trial, to the extent not previously designated in Appellant's Notice of Appeal.

Dated: July 19, 2011.

Christ T. Troupis
Attorney for Respondent
Thelma V. Garrett

CERTIFICATE OF MAILING

I hereby certify that on this 19th day of July, 2011, I caused to be served a true and correct copy of the foregoing Respondent's Designation of Additional Documents to be included in Clerk's Record on Appeal, by U.S. Mail, first class, postage prepaid, addressed to the following:

Rebecca A. Rainey
Attorney At Law
2627 W. Idaho St.
Boise, Idaho 83702

Christ T. Troupis

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JACK L. GARRETT, an individual, Plaintiff-Counterdefendant-Appellant, -vs- THELMA V. GARRETT, an individual, Defendant-Counterclaimant-Respondent.	)	Case No. CV-09-08763*C CERTIFICATE OF EXHIBITS

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify the following exhibits were used at the Court Trial and requested in the Notice of Appeal:

Plaintiff's Exhibits:

3	**Irrigation Land Lease**	**Marked**	**Sent**
5	**Quitclaim Deed**	**Marked**	**Sent**
16	**Deed of Trust**	**Admitted**	**Sent**
17	**Quitclaim Deed**	**Admitted**	**Sent**
18 - 20	**Amend. of Deed of Trust**	**Admitted**	**Sent**
21	**Substitution of Trustee**	**Admitted**	**Sent**
22 – 25	**Quitclaim Deed**	**Admitted**	**Sent**
26	**IDADIV Credit Union Statement**	**Admitted**	**Sent**

Defendant's Exhibits:

A	**Quitclaim Deed**	**Admitted**	**Sent**
B	**Contract for Wills**	**Admitted**	**Sent**
C	**Last Will and Testament**	**Admitted**	**Sent**
H	**Home Federal Bank CD**	**Admitted**	**Sent**
J	**VISA account Statement**	**Admitted**	**Sent**
L	**Warranty Deed**	**Admitted**	**Sent**
N	**Property Tax Bills**	**Admitted**	**Sent**
O	**Appl. For Property Tax Red.**	**Admitted**	**Sent**
P	**Farm Bureau Insurance Policy**	**Admitted**	**Sent**
U	**Promissory Note**	**Admitted**	**Sent**
V	**Checks**	**Admitted**	**Sent**
W	**T.V. Livestock Statement**	**Admitted**	**Sent**
X	**Racing Commission License**	**Admitted**	**Sent**
Z	**Les Bois Park Statement**	**Admitted**	**Sent**
BB	**Joint Income & Expense Reg.**	**Admitted**	**Sent**
CC	**Quitclaim Deed**	**Admitted**	**Sent**
DD	**Petition for Informal Probate**	**Admitted**	**Sent**
EE	**Statement of Informal Probate**	**Admitted**	**Sent**
FF	**Letters Testamentary**	**Admitted**	**Sent**

CERTIFICATE OF EXHIBITS

GG	**Personal Rep. Deed**	**Admitted**	**Sent**
HH	**Land Lease**	**Admitted**	**Sent**
II	**Notes**	**Admitted**	**Sent**
KK	**Mortgage**	**Admitted**	**Sent**
LL	**Deed of Trust**	**Admitted**	**Sent**
MM	**Notice of Default**	**Admitted**	**Sent**
NN	**Trustee's Deed**	**Admitted**	**Sent**

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 21 day of October, 2011.

CHRIS YAMAMOTO, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.
By: J Randall Deputy

CERTIFICATE OF EXHIBITS

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JACK L. GARRETT, an individual,	)	
	)	
Plaintiff-Counterdefendant-Appellant,	)	
	)	Case No. CV-09-08763*C
-vs-	)	
	)	CERTIFICATE OF CLERK
THELMA V. GARRETT, an individual,	)	
	)	
Defendant-Counterclaimant-Respondent.	)	

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules, including documents requested.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 21 day of October, 2011.

CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon.

By: J Randall Deputy

CERTIFICATE OF CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JACK L. GARRETT, an individual,	)	
	)	
Plaintiff-Counterdefendant-Appellant,	)	Supreme Court No. 38971-2011
	)	
-vs-	)	CERTIFICATE OF SERVICE
	)	
THELMA V. GARRETT, an individual,	)	
	)	
Defendant-Counterclaimant-Respondent.	)	

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that I have personally served or had delivered by United State's Mail, postage prepaid, one copy of the Clerk's Record and one copy of the Reporter's Transcript to the attorney of record to each party as follows:

Rebecca A. Rainey, RAINEY LAW OFFICE

Christ t. Troupis, TROUPIS LAW OFFICE

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 21 day of October, 2011.

CHRIS YAMAMOTO, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.
By: J Randall Deputy

CERTIFICATE OF SERVICE