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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

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT.

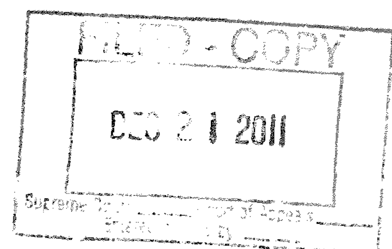
HONORABLE GREGORY M. CULET, DISTRICT JUDGE PRESIDING.

Rebecca A. Rainey ISB No. 7525
Residing at RAINEY LAW OFFICE
910 W. Main Street, Ste. 258
Boise, Idaho 83702
Tel: (208) 258-2061
Fax: (208) 473-2952

Attorneys for Appellant/Plaintiff

Christ T. Troupis ISB No. 4549
Residing at TROUPIS LAW OFFICE
1299 E. Iron Eagle, Ste. 130
P.O. Box 2408
Eagle, Idaho 83616
Tel: (208) 559-6434
Fax: (208) 473-2952

Attorneys for Respondent/Defendant



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I. STATEMENT OF THE CASE

This case presents the Court with an opportunity to clarify the interplay between Titles 32 and 55, Idaho Code, and the parol evidence rule. The first question presented to the Court today is whether the District Court erred by relying on any and all circumstantial and contextual evidence to reach a finding that a grantor had an undisclosed, subjective intent to transmute his separate interest in real property into community property when he executed a quitclaim deed from himself, Alva L Garrett, to grantees "Alva L Garrett and Thelma V Garrett" and, if so, whether clear and convincing evidence exists to support the District Court's findings.

This case also presents the Court with an opportunity to affirm the long-standing presumption that a duly recorded deed is valid and to confirm that delivery of a deed to a third-party during the lifetime of the grantor with instructions to record the deed after the grantor's death is validly delivered. The second issue before the Court today is whether the District Court erred when it placed the burden of proof regarding valid delivery on the record title-holder.

II. ISSUES PRESENTED ON APPEAL

A. Whether the District Court applied an incorrect legal standard when it concluded that any and all extrinsic evidence of a grantor's intent is admissible to establish transmutation of a husband's separate interest in real property into community property.

B. Whether substantial and competent evidence supports the District Court's finding that a wife proved by clear and convincing evidence that a grantor transmuted his separate interest in real property into community property.

C. Whether the District Court erred by improperly placing the burdens of proof and production of evidence of valid delivery upon the holder of record title pursuant to a duly recorded deed.

D. Whether substantial and competent evidence supports the District Court's conclusion that delivery was not effective when a grantor placed a deed in the hands of a third party with instructions to record the deed after the grantor's death.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Alva Garrett (Alva) and Thelma Garrett (Thelma) were married in 1976. R. Vol. II, p. 241. Each brought separate real property to the marriage; Alva's separate property included his eighty-acres located outside of Middleton, Idaho (the Middleton Place). R. Vol. II, p. 243. Until Alva passed away in 2008, Alva and Thelma lived together on the Middleton Place. R. Vol. II, p. 243.

During their marriage both Alva and Thelma engaged in various transactions regarding their separate real property. R. Vol. II, pp. 242-45. Alva took out two mortgages on the Middleton Place, one in 1977 and one in 1980; however, by 1990 he was unable to make the payments on these mortgages and was threatened with foreclosure. R. Vol. II, p. 245. In order to pay off his debts, Alva sold fifty-three acres of the Middleton Place, leaving him with 26 2/3 acres. R. Vol. II, p. 245. Shortly after the sale, Alva executed a Quitclaim deed from "Alva L Garrett" to "Alva L Garrett and Thelma V Garrett" (the 1990 Quitclaim Deed). R. Vol. II, p. 247; Def.'s Ex. A. The following day, Alva and Thelma executed a mortgage for $20,000.00, pledging the Middleton Place as collateral. Def.'s Ex. KK.

That same year, Alva's son Jack Garrett (Jack) began leasing the farmland on the Middleton Place. R. Vol. II, p. 250. Jack continued to farm the land throughout his father's life.

R. Vol. II, p. 250. On February 14, 2006, Alva executed a Quitclaim Deed from "Alva L Garrett, a married man, his interest on this date" to "Jack L. Garrett" (the 2006 Quitclaim Deed). Def.'s Ex. CC. Alva gave this deed to his other son, John Garrett (John), and instructed him not to record the deed until after Alva's death. R. Vol. II, p. 251. Jack knew of the 2006 Quitclaim Deed prior to Alva's death. R. Vol. II, p. 252. Shortly after Alva's death, and in accordance with Alva's instructions, John recorded the 2006 quitclaim deed. R. Vol. II, p. 253.

On August 21, 2009, Jack filed a claim for partition of the Middleton Place. R. Vol. I, pp. 6-10. Thelma answered, and the following spring—shortly after this Court announced its decision in *Barrett v. Barrett,* 149 Idaho 21, 232 P.3d 799 (2010)—both Jack and Thelma moved for summary judgment. R. Vol. I, pp. 11-50, pp. 56-58, pp. 148-50. Jack argued that the 1990 Quitclaim Deed created a tenancy in common in Alva and Thelma and that parol evidence could not be considered for purposes of altering the clear and unambiguous language of the 1990 Quitclaim Deed. R. Vol. I, pp. 69-72. Thelma argued that the 1990 Quitclaim Deed created a community property interest and that the court could consider "all relevant evidence" for purposes of discovering Alva's undisclosed, subjective intent to transmute the property when he executed the 1990 Quitclaim Deed. R. Vol. II, pp. 191-94

The District Court determined that the 1990 Quitclaim Deed was

> [N]ot ambiguous at all regarding the property conveyed, the fact that it was conveyed, who it went to, the description, et cetera. But regarding the issue of intent of Alva as to classification, whether it's to the community or to the parties themselves, that is ambiguous. And because it's an alleged change in the status of the property from separate, which it was before, to community, that ambiguity requires we take evidence regarding intent. . . .

Tr. p. 103, L. 3-13. The Court then determined that **all** parol evidence regarding Alva's intent would be admissible at trial to determine whether the 1990 Quitclaim Deed changed the character of the Middleton Place from separate to community property. Tr. p. 104, L. 6-9.

The case then proceeded to trial on the issues of whether Alva intended to transmute his separate property interest in the Middleton Place into community property when he executed the 1990 Quitclaim Deed and, if not, whether the 2006 Quitclaim deed was a valid conveyance of Alva's interest in the Middleton Place to Jack. R. Vol. II, p. 240. After trial, the District Court determined that the 1990 Quitclaim Deed created a community property interest in the Middleton Place and, alternatively, that the 2006 Quitclaim Deed was not validly delivered during Alva's lifetime. R. Vol. II, p. 261. It then entered an order quieting title in the Middleton Place to Thelma. R. Vol. II, p. 261. Jack now appeals both parts of this decision. R. Vol. II, pp. 266-71.

IV. ARGUMENT

This Court is presented with two issues today. First, the Court must determine whether the 1990 Quitclaim Deed, which identified "Alva Garrett" as the grantor and "Alva Garrett and Thelma Garrett" as the grantee(s), satisfied the strict statutory formalities required for transmuting a separate interest in real property into community property when it is undisputed that the Middleton Place was Alva's separate property at the time the 1990 Quitclaim Deed was executed. Because the deed does not satisfy the strict statutory formalities and because the District Court based its findings and conclusions on legally irrelevant evidence, this Court should reverse the decision below and hold that, in accordance with Title 55, Idaho Code, the 1990 Quitclaim Deed created a tenancy in common between Alva and Thelma.

Next, the Court must determine whether the 2006 Quitclaim Deed from Alva to Jack was validly delivered when Alva gave the 2006 Quitclaim Deed to John to hold in escrow until Alva's death. Idaho law places the burden on the party challenging the validity of a duly recorded deed to produce clear, satisfactory, and convincing evidence that the deed is invalid. In finding that there was no evidence of a valid delivery, the District Court improperly placed the

burden of proof on Jack to produce direct evidence of present intent to convey. However, under the correct standard, Thelma was required to produce clear and convincing evidence of no present intent to convey. Because Thelma failed to meet her burden of proving no present intent to convey, this Court should reverse the decision below and hold that Alva validly conveyed his separate property interest in the Middleton Place to Jack.

A. The 1990 Quitclaim Deed created a tenancy in common between Alva and Thelma.

Title 55, Idaho Code, establishes that the 1990 Quitclaim Deed created a tenancy in common between Alva and Thelma. In order to avoid this statutorily mandated conclusion, the District Court improperly considered legally irrelevant evidence regarding Alva's undisclosed subjective intent and ultimately concluded that Alva intended to transmute his separate interest in real property to community property when he executed the 1990 Quitclaim Deed. R. Vol. II, p. 257, ¶ 13. Because transmutation of real property may be accomplished only by complying with strict statutory formalities, the District Court's consideration of **<u>any and all</u>** extrinsic evidence and the legal conclusions resulting from such evidence are in error. Therefore, this Court should reverse the lower court and hold, as a matter of law, that the 1990 Quitclaim Deed gave Thelma a separate property interest in the Middleton Place.

1. Transmutation of real property must comply with strict statutory formalities.

The District Court improperly relied on the concept of transmutation to avoid the legal conclusions mandated by Title 55, Idaho Code. Transmutation is "a broad term used to describe arrangements between spouses which change the character of property from separate to community and vice versa." *Stockdale v. Stockdale*, 102 Idaho 870, 872, 643 P.2d 82, 84 (1982) (quoting W. Reppy & W. DeFuniak, *Community Property in the United States* 421 (1975)). Idaho law recognizes both formal and informal transmutation. While spouses may informally,

orally, or even accidentally transmute personal property, Idaho law provides that "the separate or community character of **real property** may be altered only in the manner provided or permitted by statute." *Id.* at 873, 643 P.2d at 85 (emphasis added). *See also* Idaho Code §§ 32-916 & 32-917; *Reed v. Reed*, 137 Idaho 53, 59, 44 P.3d 1108, 1114 (2002) (citing *Wolford v. Wolford*, 117 Idaho 61, 66, 785 P.2d 625, 630 (1990)); *Jemmett v. McDonald*, 136 Idaho 277, 278 n.1 32 P.3d 669, 670 n.1 (2001) (noting that real property transmutations must adhere to the strict statutory requirements); *In re Estate of Keevan*, 110 Idaho 452, 461, 716 P.2d 1224, 1233 (1986) ("Idaho law does not recognize the transmutation of real property by oral agreement."); *Griffin v. Griffin*, 102 Idaho 858, 862, 642 P.2d 949, 953 (Ct. App. 1982) ("Idaho law does not recognize transmutation of real property by oral agreement.").

Idaho Code § 32-917 sets forth the requirements for transmuting real property. It provides that character of real property can be changed only by (i) a contract; (ii) in writing; (iii) being executed and acknowledged with proper formalities. Additionally, the party alleging that the character of real property has changed bears the burden of proving transmutation by clear and convincing evidence. *Reed*, 137 Idaho at 59, 44 P.3d at 1114 (citing *Wolford*, 117 Idaho at 66, 785 P.2d at 630); *Barrett v. Barrett*, 149 Idaho 21, 24, 232 P.3d 799, 802 (2010) (quoting *Hoskinson*, 139 Idaho at 459, 80 P.3d at 1060 (quoting *Ustick*, 104 Idaho at 222, 657 P.2d at 1090))).

"When a trial court finds facts that must be established by clear and convincing evidence, the question on appeal remains whether the findings are supported by substantial and competent evidence." *In re Ashe*, 114 Idaho 70, 77, 753 P.2d 281, 287 (1988). "Clear and convincing evidence is generally understood to be '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *In re Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006)

(citing *Black's Law Dictionary* 577 (7th ed. 1999)). "Substantial and competent evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Folks v. Moscow Sch. Dist. No. 281*, 129 Idaho 833, 836, 933 P.2d 642, 645 (1997)). "'Obviously, the substantial evidence test requires a greater quantum of evidence in cases where the trial court finding must be supported by clear and convincing evidence, than in cases where a mere preponderance is required.'" *Id.* (quoting *Folks v. Moscow Sch. Dist. No. 281*, 129 Idaho 833, 836, 933 P.2d 642, 645 (1997)).

2. The party alleging that the character of real property has changed may prove compliance with these strict statutory formalities by presenting a written document expressly evidencing the intent to create a community property interest or by demonstrating that an interest in real property was acquired as community property.

Thelma and the District Court relied on the 1990 Quitclaim Deed to support the conclusion that Alva transmuted his separate property interest in the Middleton Place into community property.[1] This written deed was silent regarding Alva's intent to transmute his separate property interest in the Middleton Place into community property. Because the 1990 Quitclaim Deed was silent on this point, the District Court found that it was ambiguous and relied on extrinsic evidence to resolve the perceived ambiguity. In so doing, the District Court erred by considering legally irrelevant extrinsic evidence and, further, by relying on an insufficient quantum of evidence, to determine that the written deed changed the character of separate real property to community property.

a. Thelma failed to produce a writing expressly stating Alva's intent to convert his separate property interest in the Middleton Place into community property.

[1] Several decisions of this Court impliedly hold that a written deed may satisfy these statutory formalities. *See, e.g., Reed*, 137 Idaho at 59, 44 P.3d at 1114.

Title 55, Idaho Code, governs the interpretation of deeds. Nothing contained within Title 32, Idaho Code, suggests a separate set of rules for interpreting deeds executed by and between spouses. Accordingly, interpretation of the 1990 Quitclaim Deed must begin with Title 55, Idaho Code. Idaho Code § 55-508 provides as follows:

> 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). Consistent with this statutory mandate, this Court has long and consistently held that a deed that is clear and unambiguous on its face cannot be challenged with extrinsic evidence to show the intent of the parties. *Howard v. Perry*, 141 Idaho 139, 141-42, 106 P.3d 465, 467-68 (2005) (citing *Kimbrough v. Reed*, 130 Idaho 512, 515, 943 P.2d 1232, 1235 (1997)); *Rowan v. Riley*, 139 Idaho 49, 54, 72 P.3d 889, 894 (2003) (citing *Simons v. Simons*, 134 Idaho 824, 827, 11 P.3d 20, 23 (2000)); *Hall v. Hall*, 116 Idaho 483, 484, 777 P.2d 255, 256 (1989). As per these statutory requirements, the intent of the parties must be determined from the deed itself. *Rowan*, 139 Idaho at 54, 72 P.3d at 894 (citing *Simons v. Simons*, 134 Idaho 824, 827, 11 P.3d 20, 23 (2000)).

The 1990 Quitclaim Deed conveys the Middleton Place from "Alva L Garrett" to "Alva L Garrett and Thelma V Garrett[.]" Def.'s Ex. A. The deed does not expressly declare that the conveyance constitutes anything other than a tenancy in common. Indeed, because the deed does not expressly state that Alva and Thelma were married, the District Court erroneously relied on extrinsic evidence—evidence that Alva and Thelma were married at the time the deed was executed—to reach the conclusion that the deed was ambiguous. A stranger to the deed would not know if Alva and Thelma were parent and child, brother and sister, cousins, or even two unrelated persons. Accordingly, under Idaho Code § 55-508, the face of the unambiguous 1990

Quitclaim Deed leads to the statutorily mandated conclusion that Thelma and Alva held their interest in the Middleton Place as tenants in common.

b. The District Court erred by considering legally irrelevant evidence in reaching the conclusion that Thelma's interest in the Middleton Place was acquired as community property.

Even though Title 55 mandates that Thelma and Alva held their respective interest as tenants in common, the District Court relied on this Court's decision in *Barrett v. Barrett,* to allow any and all extrinsic evidence, regardless of its legal relevance, to reach its determination that Alva intended to create a community interest in the Middleton Place. While *Barrett* stands for the proposition that a narrow category of relevant extrinsic evidence may be considered to alter an otherwise unambiguous conveyance between spouses, the District Court erred by holding that any and all evidence was relevant to alter an unambiguous conveyance between spouses.

i. Idaho Code § 55-104 permits a narrow inquiry into relevant extrinsic evidence regarding the source of funds used to acquire an interest in property for purposes of determining if it was acquired as community property.

Idaho Code § 55-104 provides that the tenancy in common mandate of Section 55-508 can be overcome if the property was acquired as community property:

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

I.C. § 55-104 (emphasis added). Title 32, Idaho Code, governs whether an interest in property was acquired as community property or separate property. Idaho Code § 32-903 provides:

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

Idaho Code § 32-906(2) gives rise to the presumption that a conveyance between spouses creates a separate property interest in the grantee.

> 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.

Property acquired during marriage that does not fall within these statutory definitions is presumptively community property. When he executed the 1990 Quitclaim Deed, Alva retained a portion of his separate property interest and conveyed a portion of his separate property interest in the Middleton Place to Thelma; therefore, the property interest conveyed to Thelma is presumed to be her sole and separate property.

ii. This Court has developed a list of six relevant factors for purposes of determining the character of an interest in real property acquired during marriage with credit.

This Court has long held that extrinsic evidence may be considered for purposes of determining whether an interest in property was acquired as community or separate property. Pursuant to Idaho Code § 32-903, the only two elements properly considered in characterizing property as community or separate are (1) when the property was acquired (timing) and (2) what funds were used to acquire such property (funding). *Accord Kraley v. Kraley*, 147 Idaho 299, 303, 208 P.3d 281, 285 (2009).

In *Winn v. Winn*, this Court recognized that a lending institution might prepare a deed during a financing transaction that does not accurately reflect the character of an interest in property. 105 Idaho 811, 673 P.2d 411 (1983). Accordingly, this Court held that the character of an interest in real property acquired through a credit acquisition was amenable to the timing

and funding analysis of Idaho Code § 32-903 and, further, that relevant extrinsic evidence could be used to conduct this inquiry. *Id.* at 814-15, 673 P.2d at 414-15.

In identifying the extrinsic evidence relevant to the Section 32-903 inquiry, the Court noted the long-standing and well-established principle that "the character of an item of property as community or separate vests at the time of acquisition." *Id.* at 814, 673 P.2d at 414 (citing *In re Freeburn,* 97 Idaho 845, 555 P.2d 385 (1976)). The Court then determined that property acquired with credit takes on the character of the loan proceeds used to acquire the property. *Id.* The loan proceeds have the same character as the property that was the source of security for the loan or, if unsecured, the character of the estate that was the basis for extending the credit. *Id.* at 814-15, 673 at 414-15. Relying on a long line of Idaho authority, this Court identified several factors relevant to this inquiry. *Id.* A studied review of the authority relied on by the *Winn* Court demonstrates that each factor plays a specific role in the timing and funding analysis of Idaho Code § 32-903. The application of each factor differs within the individual circumstances of each case, but the application is always anchored to the timing and funding elements of Idaho Code § 32-903.

To summarize the analysis presented by the *Winn* Court: It is well-settled under Idaho law that property owned prior to the marriage is considered separate property, while property acquired after the marriage is presumed to be community property. This presumption can be overcome by showing that the funding source for property acquired after the marriage was separate property—either through the proceeds of separate property assets, or property received by gift, bequest, or devise. Consistent with these well-settled principles, an interest in property acquired during the marriage with credit takes on the character of the loan proceeds used to acquire such interest. 105 Idaho at 814-15, 673 P.2d at 414-15.

Idaho law recognizes a presumption that property purchased with loan proceeds obtained during the marriage is community property. *In re Freeburn*, 97 Idaho at 848-49, 555 P.2d at 388-89 (citing *Simplot v. Simplot*, 96 Idaho 239, 246, 526 P.2d 844, 851 (1974)). This presumption of community property applies even if only one spouse signs the documents of indebtedness. *Id.* (citing *Simplot v. Simplot*, 96 Idaho 239, 246, 526 P.2d 844, 851 (1974)). However, as with any other asset, this presumption can be overcome by showing that the collateral pledged to secure a loan was a separate property asset. *Id.*; *see also Gapsch v. Gapsch*, 76 Idaho 44, 55, 277 P.2d 278, 285 (1954) (holding that money "borrowed upon the credit of the husband's separate property interest . . . was his separate property . . . ."). This separate property characterization applies even if both spouses sign the documents of indebtedness. *Speer v. Quinlan*, 96 Idaho 119, 130-31, 525 P.2d 314, 326-27 (1974); *Shovlain v. Shovlain*, 78 Idaho 399, 401, 403, 305 P.2d 737, 737, 739 (1956) (holding that the husband's co-signature on the mortgage document did not change the fact that the underlying security was wife's separate property, thereby leading to the legal conclusion that the loan proceeds were wife's separate property).

In *Barrett v. Barrett*, this Court recognized that during the course of refinancing separate property, a married couple and their lender might rely on the credit of the community estate to such an extent that the community effectively acquires the separate property interest. 149 Idaho at 802-03, 232 P.3d at 24-25; *c.f. Winn*, 105 Idaho at 814 n. 2, 673 P.2d at 414 n. 2 (noting that real property cannot be gradually transmuted as it is "violative of the fundament of the transmutation doctrine: that the character of property may be changed *by agreement* between the spouses.") (emphasis in original). Relying on *Winn,* the *Barrett* Court identified six factors relevant to the inquiry of whether the parties' reliance on the community estate is so significant

that the character of the property refinanced changes from separate to community. These six relevant factors include (1) whether the community was liable for payment on the loan, (2) the names on the deed, (3) who signed the documents of indebtedness, (4) the basis of credit the lender relied on when making the loan, (5) the source of the down payment, and (6) the source of payments. *Id.* at 802, 232 P.3d at 24 (citing *Winn*, 105 Idaho at 814-15, 673 P.2d at 414-15). While the *Barrett* Court referred to this situation under the generic transmutation label, because it relied on the factors identified in *Winn*—which guide the Section 32-903 analysis—it is more precisely analyzed as a situation where the community estate effectively acquires an entirely new interest in the property through the use of community credit.

The *Barrett* dissent took issue with the inquiry into extrinsic evidence allowed by the *Barrett* majority. *Id.* at 804, 232 P.3d at 26 (W. Jones, J. dissenting). While these concerns were well-founded, especially in light of the application of *Barrett* given by the District Court in this matter, the majority and dissenting opinions of *Barrett* can be reconciled with each other, and with Idaho law, through a reasoned application of the interplay between Titles 55 and 32, Idaho Code, if the extrinsic evidence considered is limited to the six relevant factors identified by *Winn/Barrett.*

To briefly summarize, it is well-settled that transmutation of real property must comply with statutory formalities. Idaho Code § 32-917 provides one mechanism for complying with these statutory formalities; Idaho Code § 55-104 provides the other. Because Idaho Code § 55-104 allows extrinsic evidence to be considered for purposes of determining whether an interest in property was **acquired as community property**, the extrinsic evidence allowed by *Winn* and *Barrett* is consistent with Idaho Statutes when limited to the statutory timing and funding analysis of Idaho Code § 32-903. To allow extrinsic evidence beyond that narrow

inquiry would create a judicial end-run around the well-settled requirement that real property may only be transmuted by complying with statutory formalities and would give rise to separate parol evidence rules for interpreting deeds executed by and between spouses and for interpreting deeds executed by and between non-spouses. The present case gives this Court an opportunity to anchor the extrinsic evidence permitted by *Winn/Barrett* to the requirements of Idaho Code §§ 55-104 and 32-903.

iii. The District Court improperly read *Barrett* to stand for the proposition that *any and all* extrinsic evidence regarding Alva's undisclosed, subjective intent was relevant for purposes of determining whether he intended to transmute his separate property interest in the Middleton Place into community property.

In the decision denying Jack Garrett's motion for summary judgment, the District Court erred by holding that the *Winn/Barrett* analysis was not limited to an inquiry regarding whether property was **acquired as community property**. Tr. p. 102, L. 25- p. 103, L. 13. Following from this determination, the District Court held trial of this matter on the incorrect premises that any and all evidence regarding Alva's undisclosed, subjective intent, was relevant for purposes of establishing whether Alva intended to transmute his separate property interest in the Middleton Place into community property. Tr. p. 103 L. 6-p. 104, L. 9. Accordingly, the conclusions of law ultimately reached by the District Court were based on legally irrelevant evidence. R. Vol. II, p. 246-249, ¶ 10-13.

c. Substantial and competent evidence does not support the District Court's conclusion that the 1990 Quitclaim Deed created a community property interest.

It is undisputed that Thelma acquired her interest in the Middleton Place during the marriage. Curiously, Thelma never took an affirmative position regarding the source of funds used to acquire her interest in the Middleton Place. During the hearings on the motions for summary judgment, both parties presumed that Thelma acquired her interest in the Middleton

Place gratuitously, thereby making it a gift from her husband. *See, e.g.,* Tr. p. 43, L. 22 – p. 45, L. 17. After the hearings on the motions for summary judgment, it came to light that Alva and Thelma executed a mortgage securing indebtedness in the amount of $20,000.00 the day after Alva executed the 1990 Quitclaim Deed.

The District Court relied heavily on this mortgage and the assumption that it created community property debt to support its conclusion that Alva intended to transmute his separate property interest into community property.[2] However, because the character of an interest in property is determined at the time of acquisition, the characterization of the property interest acquired by Thelma when the 1990 Quitclaim Deed was executed must be considered separate and apart from any change in that characterization arising from the subsequent mortgage. The District Court improperly combined this analysis.

To begin, as discussed above, Thelma acquired her interest in the Middleton Place pursuant to the 1990 Quitclaim Deed wherein Alva conveyed a partial interest to Thelma and retained a partial interest for himself. This deed did not expressly declare that the grantees held their respective interests as anything other than tenants in common. Thus, under the language of Idaho Code §§ 55-508 and 32-906, the 1990 Quitclaim Deed presumptively created a tenancy in common, with both spouses holding their respective interests as separate property.

After Thelma acquired her separate property interest, Alva and Thelma executed a mortgage. The District Court relied on this mortgage as evidence that Alva intended to transmute these separate property interests into community property. However, because Alva and Thelma held separate property interests, only evidence speaking to the six *Winn/Barrett*

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[2] Ironically, during closing argument, Thelma's counsel vehemently disavowed any connection between the 1990 mortgage and the 1990 Quitclaim Deed. Tr. p. 437, L. 6 – p. 458, L. 14 ("But whether or not at the time of this deed there was some specific reason that was the reason Alvie did this, I think that's pure speculation. I don't think that the Idadiv mortgage is proof that that was his intent. And that's my argument.").

factors was relevant and properly considered to determine if the property was transmuted under the section 32-903 analysis.

The District Court identified several facts supporting its conclusion that Alva intended to transmute his separate interest in the Middleton Place into community property.[3] These facts fail to present clear, satisfactory and convincing evidence to support the District Court's conclusion that the subsequent mortgage effectively transmuted separate property interests into community property under the six *Winn/Barrett* factors.

In support of its conclusion that the Middleton Place was transmuted from separate property into community property, the District Court found that Alva had previously encumbered the Middleton Place, once in 1977 and again in 1980. R. Vol. II, pp. 246-247. ¶ 12.1. The District Court also found that financial difficulty led Alva to sell off fifty-three acres of the Middleton Place to retire these mortgages. R. Vol. II, p. 247, ¶ 12.2. These two facts speak only to what Alva elected to do with his separate property assets in order to satisfy his separate property debts; neither speaks to whether any interest in the Middleton Place was **acquired as community property**. Accordingly, these facts are irrelevant to the Section 32-903 analysis and should be disregarded.

The District Court also found that both Alva and Thelma had alienated all of the real property owned by the separate estate of either spouse prior to the marriage. R. Vol. II, p. 247, ¶ 12.3. Neither the District Court's discussion of this matter nor the record contain any indication

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[3] The District Court's findings of facts and conclusions of law related to the question of whether Alva intended to transmute his separate property interest into community property are found in paragraphs 10 – 13 of the findings of fact and conclusions of law. R. Vol. II, pp. 246-249. Paragraphs 10, 11, and 13 do not appear to be relevant to the Court's conclusion. Paragraph 10 states that one reason Alva may have conveyed his separate interest in the property to the marital community was to "protect himself from being persuaded by his son, John, to part with any more of his remaining real property ... and to protect and provide for Thelma and Alva, as this was the only remaining real property asset left to either of them." This fact is irrelevant to the characterization of property as community and/or separate. Paragraph 11 speaks only to Thelma's credibility and memory. Paragraph 13 presents the Court's conclusion that Alva intended to transmute the property with the 1990 Quitclaim Deed.

that the proceeds from either party's separate property were used, in any way, to **acquire a community property interest** in the Middleton Place. Accordingly, these facts are irrelevant to the Section 32-903 analysis and should be disregarded.

Next, the District Court found, "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." R. Vol. II, p. 247, ¶ 12.4. This does not, however, lead to the conclusion that the Middleton Place was community property. Pursuant to well-settled authority, "[t]he proceeds of loans made upon the security of a spouse's separate estate are separate." *Winn,* 105 Idaho at 814, 673 P.2d at 414. Accordingly, because prior to executing the mortgage the Middleton Place is properly characterized as separate property, the use of the Middleton Place as security for a mortgage cannot change that characterization. Rather, the proceeds of the loan secured by the mortgage take on the character of the underlying collateral: separate property. Accordingly, the District Court erred by misapplying this particular fact to the applicable legal standard.

The District Court also found that because both spouses signed the mortgage, the mortgage resulted in a community debt. R. Vol. II, p. 247, ¶ 12.5. Again, this legal conclusion does not follow from the facts. As discussed above, the character of the debt follows the character of the security. *Gapsch,* 76 Idaho at 55, 227 P.2d at 285. The character of separate property securing a mortgage loan does not change, even if both the husband and wife sign the mortgage document. *Speer,* 96 Idaho at 130-31, 525 P.2d at 326-27. Accordingly, because the Middleton Place is properly characterized as separate property, there is no evidence to support the District Court's finding that the existence of the mortgage created a community debt. Indeed, the presence of both Alva and Thelma's signature on the mortgage is entirely consistent with the

statutorily mandated conclusion that Alva and Thelma held their respective separate property interests in the Middleton Place as tenants in common

Next, the District Court relied on co-mingling of income as yet another basis to find that Alva intended to transmute the Middleton Place into community property. R. Vol. II, p. 247-48, ¶ 12.6. Idaho law expressly prohibits the transmutation of an interest in real property through an informal process such as co-mingling of funds. *Stockdale,* 102 Idaho at 873, 643 P.2d at 85. The character of real property is determined at the time of acquisition and can be changed only by an agreement of the parties that complies with the statutory formalities. *Kraley,* 147 Idaho at 303, 208 P.3d at 285; I.C. § 32-917. Co-mingling does not satisfy the statutory formalities. Accordingly, the District Court erred in relying on this fact.

The District Court then found that the 1977 and 1980 mortgages on the Middleton Place were retired using funds from the 1990 mortgage and that community funds were used to pay off the 1990 mortgage. R. Vol. II, p. 248, ¶ 12.7. Neither of these facts is supported by the evidence; both are legally irrelevant. First, there is no evidence in the record to support the District Court's finding that the existing mortgages were paid off using the funds from the 1990 mortgage. The two original mortgages were taken out in 1977 for $20,000.00 and in 1980 for $24,000.00, resulting in a total encumbrance of $44,000.00. R. Vol. II, p. 245, ¶ 9.1; Tr. p. 372, L. 21-p. 374, L. 2. There was no evidence presented at trial regarding the previous payments made on the debt secured by these mortgages or the interest rates associated with such mortgages. There was no evidence presented at trial regarding the outstanding balance of the mortgages at the time the 1990 mortgage was taken out. There was evidence presented that Alva sold off fifty-three acres of the Middleton Place to pay off such mortgage, and Thelma's accounting ledger indicates that he received $75,000.00 as the purchase price. Def.'s Ex. BB.

Thelma's accounting ledger does not, however, provide an accounting of a remaining loan balance (if any) on the mortgage.[4] Accordingly, there is no evidence supporting the District Court's finding that Alva retired any portion of the original mortgages with the proceeds of the 1990 mortgage.

Second, the record does not support the District Court's finding that "it appears that the 1990 mortgage taken out by Alva and Thelma on the Middleton property was paid off out of community funds." R. Vol. II, p. 248, ¶ 12.7. There was no evidence presented at trial that any payments were made with community funds. Instead, Thelma testified during direct examination that she "helped" make payments towards the 1990 mortgage, Tr. p. 162, L. 20, but she could not identify anything within her accounting ledger supporting this testimony:

> Q: [by Rainey] Do you recall if you and Alva ever made regular monthly or yearly payments on this [the 1990] mortgage?
>
> A: [Thelma] Yeah. Seems like there – I was making payments. That's right. I was making payments for – maybe that's what it was for. But I can't – I can't remember.
>
> Q: But you don't remember specifically?
>
> A: No. But I – it comes to me that we were making payments, yeah.
>
> Q: If you were making either monthly or annual payments, would they show up on your income tax record?
>
> A: Should, shouldn't they?
>
> Q: Let's turn to your income tax records, starting in – we'll go to 1991. And if you would, just take a moment to look at the entries in 1991, and see if you can identify any of those that are related to paying down that mortgage, that $20,000 mortgage.
>
> A: No, I don't.

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[4] Given that the principal balance of the combined mortgages totaled $44,000.00 and that Thelma's accounting ledger indicated that the sale proceeds were $75,000.00, there is a strong indication that both mortgages were likely retired with the proceeds from the sale.

Q: You don't see anything in 1991?

A: Huh-uh.

Q: Do you see anything in 1992 that shows you paying down that $20,000 mortgage?

A: No.

Tr. at p. 221, L. 18 – p. 222, L. 18; Def.'s Ex. BB.

Though Thelma was unable to link any entries in the expense register to mortgage payments, there are two entries that could, arguably, be relevant: "Idadiv Mtg. 1147.16 Mtg Interest Farm" during 1990 and "Idadiv Fed CU Loan 880.89" during 1992. Def.'s Ex. BB. Even if these entries are presumed to relate to the 1990 mortgage, evidence of a total of $2,028.25 in payments towards a $20,000.00 mortgage from an unspecified source is a legally insufficient basis for the District Court to find by clear and convincing evidence that the whole of the mortgage was paid from community funds. Moreover,

> [P]roperty cannot be converted gradually from community to separate [or vice versa] by one spouse making payments on a community debt from his or her separate funds. That would in effect allow one spouse to "buy" the community property and thereby unilaterally transmute its character. Such reasoning is violative of the fundament of the transmutation doctrine: that the character of property may be changed *by agreement* between the spouses

Winn, 105 Idaho at 814 n. 2, 673 P.2d at 414 n. 2 (emphasis in original). And, critically, any payment made by Thelma is entirely consistent with the statutorily mandated conclusion that Alva and Thelma held their respective separate property interests in the Middleton Place as tenants in common.

Finally, the District Court relies on Alva and Thelma's contract for wills as further evidence of Alva's intent to transmute the Middleton Place into community property. R. Vol. II,

p. 249, ¶ 12.9.[5] The District Court correctly noted that neither the contract for wills nor the actual wills include a prohibition against Alva transferring his separate property estate prior to his death. However, it then found that the contract and the wills themselves are consistent with the conclusion that Alva intended to create a community property interest in the Middleton Place. Like the other facts the District Court relied on, this specific fact is legally irrelevant. Under Idaho law, the character of real property cannot be transmuted by the undisclosed, subjective intent of a party—it must be done by a formal agreement complying with certain statutory formalities. I.C. § 32-917. Neither the contract for wills nor the wills themselves satisfied this requirement. Accordingly, it was error for the District Court to rely on the existence of the contract for wills to conclude that Alva intended to informally transmute the Middleton Place into community property.

d. Under the correct legal and evidentiary standards, neither the 1990 Quitclaim Deed nor the subsequent mortgage transmuted the Middleton Place into Community Property.

As the foregoing demonstrates, the District Court committed multiple legal and factual errors in finding that Thelma met her burden of proving transmutation by clear and convincing evidence. First, the District Court ignored the requirement that real property may be transmuted only by agreement of the parties that complies with strict statutory formalities. This error caused the District Court to then consider legally irrelevant extrinsic evidence; that is to say, extrinsic evidence outside the statutorily permitted timing and funding analysis of Idaho Code § 32-903 and the six *Winn/Barrett* factors. The District Court committed further error by finding a number of facts that were not supported by substantial and competent evidence. All of these errors led the District Court to reach the improper conclusion that Alva transmuted his separate property

[5] In paragraphs 12.8 and 12.8.1, the District Court discusses the evidence "contradictory to the contention that Alva intended to transmute the Middleton property to the community[.]" R. Vol. II pp. 248-49.

interest in the Middleton Place into community property. This conclusion was based upon an erroneous application of the facts to the incorrect legal standard and was not otherwise supported by substantial and competent evidence.

Contrary to the District Court's unsupported factual findings and erroneous legal conclusions, what the facts do show is that on June 19, 1990, Alva gratuitously transferred a portion of his fee simple interest in the Middleton Place to his wife while retaining an interest for himself. Applying Idaho's property laws and community property laws, this gratuitous transfer resulted in each spouse holding an interest in the Middleton Place as tenants in common, with their respective interests therein properly characterized as sole and separate property.

Based on the foregoing, Jack Garrett respectfully requests that this Court reverse the District Court's decision and hold that the 1990 Quitclaim Deed created a tenancy in common, with each spouse holding their respective interest as their sole and separate property.

B. The 2006 Quitclaim Deed from Alva to Jack was validly delivered.

In this matter, the District Court's conclusion that Alva transmuted his separate property interest into community property was sufficient to dispose of the entire matter: If the Middleton Place was held as community property, Alva did not have the right to transfer any interest in the Middleton Place unless Thelma joined in the conveyance, and the attempted 2006 transfer would have been invalid as a matter of law.

However, recognizing the unsettled state of the law on the transmutation issue, the District Court alternatively addressed whether the 2006 Quitclaim Deed from Alva to Jack was validly delivered. In this portion of its findings of fact and conclusions of law, the District Court committed error by improperly placing the burdens of proof and production on Jack and by relying on an insufficient quantum of evidence to support the finding that Alva's delivery of the

2006 Quitclaim Deed to a third-party was invalid. Because the District Court erred by improperly placing the evidentiary burden of delivery on Jack, and because Thelma failed to meet her evidentiary burden, this Court should reverse the District Court and hold that the 2006 Quitclaim Deed was validly delivered and conveyed Alva's separate property interest in the Middleton Place to Jack.

1. The District Court erred by placing the burdens of proof and production on Jack.

When this case commenced, title to the property was held in the name of Jack Garrett. Accordingly, the presumptions arose that (i) Jack was the owner of the property described in such deed and (ii) the deed was delivered as of February 14, 2006, the date of the instrument. It is well established that when a grantor uses a written deed to convey property and the deed is recorded, Idaho law presumes that the grantee, the record title holder, is the owner of the property described in the deed. *Bliss v. Bliss*, 127 Idaho 170, 174, 898 P.2d 1081, 1085 (1995) (written deed signed by grantor constitutes a valid conveyance); *Fenn v. Noah*, 142 Idaho 775, 780, 133 P.3d 1240, 1245 (2006) ("Idaho law presumes the holder of title to property is the legal owner of the property."). Where a presumption exists, the court may base its decision exclusively on the presumption, even in the face of uncontroverted evidence, if that uncontroverted evidence does not rise to the level of clear, satisfactory, and convincing. *See In re Ashe*, 114 Idaho 70, 76, 753 P.2d 281, 287 (1988).

One who challenges a record title-holder's ownership must establish by clear, satisfactory, and convincing evidence that the transfer of title was invalid, regardless of whether the deed is challenged for alleged fraud or mistake, *Hawe v. Hawe*, 89 Idaho 367, 376, 406 P.2d 106, 111 (1965), for alleged oral transfer, *Russ Ballard & Family Achievement Inst. v. Lava Hot Springs Resort*, 97 Idaho 572, 579, 548 P.2d 72, 79 (1976), or alleged failure to deliver, *Erb v.*

Kohnke, 121 Idaho 328, 331, 824 P.2d 903, 906 (Ct. App. 1992). As the party challenging the validity of the deed, Thelma had the burden of rebutting both of these presumptions by evidence that is clear, satisfactory, and convincing.

The District Court found with respect to the 2006 Quitclaim Deed, "[o]n February 14, 2006, Alva executed a quitclaim deed 'for value received,' which conveyed his interest in the Middleton property to his son, Jack Garrett. . . . 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." R. Vol. II, p. 251, ¶ 27. Applying Idaho rules of evidence regarding presumptions, these findings should have resulted in Jack—the record title-holder—enjoying the benefit of the presumption that his duly recorded deed was valid.

In reaching the conclusion that Alva did not intend to deliver the deed, however, the District Court relied on the absence of any direct, affirmative evidence regarding whether Alva completely divested himself of title. R. Vol. II, pp. 252-53, ¶ 29. This improperly placed the burdens of proof and production on Jack. Because Jack enjoyed the presumption of validity, it was not Jack's burden to produce direct, affirmative evidence regarding whether Alva completely divested himself of title.

2. Thelma failed to present clear, satisfactory, and convincing evidence that Alva did not intend to divest himself of title at the time he delivered the deed into escrow with John.

Before a deed can operate as a valid transfer of title, the deed must be delivered during the life of the grantor. *Crenshaw v. Crenshaw*, 68 Idaho 470, 475, 199 P.2d 264, 266 (1948). "[A] deed is presumed to have been delivered on the date of the instrument." *Hill v. Sligar*, 128 Idaho 858, 860, 920 P.2d 74, 76 (1996) (*citing Worthington v. Koss*, 72 Idaho 132, 135, 237 P.2d

1050, 1052 (1951) (citing *Hiddleson v. Cahoon*, 37 Idaho 142, 146, 214 P. 1042 (1923)). No particular form of delivery is required. *Bowers v. Cottrell*, 15 Idaho 221, 228, 96 P. 936, 938 (1908).

Delivery is effective if a deed is given to a third party with instructions to deliver to the grantee after the death of the grantor. *Cell v. Drake,* 61 Idaho 299, 303, 100 P.2d 949, 950 (1940) (citing *Showalter v. Spangle,* 93 Wash. 326, 160 P. 1042 (1916); *Martin v. Flaharty*, 13 Mont. 96, 32 P. 287 (1893)). It is well recognized that delivery to a third party with such instructions "constitutes a present passage of title with a reservation of a life estate in the grantor." *Id.* To prove delivery to a third party was invalid, the party challenging delivery must show that at the time the deed was delivered into escrow, the grantor retained some dominion over the third party to request the return of the deed. *Estate of Lewis*, 97 Idaho 299, 302, 543 P.2d 852, 855 (1975) (noting that the "question of intent as of the time the deed was given [into escrow] is the controlling question).

In this case, the District Court found that the only instructions Alva gave to John were to record the deed after Alva's death. R. Vol. II, p. 251, ¶ 27. Thelma did not present any evidence and the District Court did not find that Alva gave John any other limiting instructions or retained any dominion or control over the deed. Indeed, during closing arguments her attorney stated: "I don't know how much evidence [Thelma] actually presented to the court on the issue of delivery." Tr. p. 436, L. 10-12. Accordingly, under the well-settled line of authorities, delivery of the deed to John with instructions to record after Alva's death constituted present passage of title from Alva to Jack.

Additionally, in factually similar situations, Idaho courts have noted that the fact that the grantor did not recall the deed from the escrow holder prior to the grantor's death is evidence that the grantor intended the deed to be delivered.

> Where one had the mental power to alter his intention and the physical power to destroy a deed in his possession, and dies without doing either, there is but little reason for saying that this deed shall be inoperative simply because during his life he might have done that which he did not do. It is much more consonant with reason to determine the effect of the deed by the intention existing up to the time of death than to refuse to give it that effect, because the intention might have been changed.

Johnson v. Brown, 65 Idaho 359, 367, 144 P.2d 198 (1943) (citing *McKemy v. Ketchum*, 188 Iowa 1081, 1082, 175 N.W. 325, 326 (1920)).

The affirmative evidence relied on by the District Court is not inconsistent with valid delivery and, therefore, does not constitute substantial and competent evidence supporting the District Court's conclusion. For example, the District Court noted that Alva and Thelma maintained possession of the Middleton Place, that Jack continued to farm it pursuant to the pre-existing lease agreement, and that Jack did not collect rents from Alva and Thelma. R. Vol. II, p. 252-253, ¶ 30. However, "it is not ... inconsistent with the passage of a present title, particularly in a father-son relationship, that the incidents of management be retained by a grantor." *See, e.g., Hartley v. Stibor,* 96 Idaho 157, 160, 525 P.2d 352, 355 (1974) (quoting *Corkins v. Corkins*, 101 N.W.2d 362, 364 (Mich. 1960)); *see also In re Estate of Courtright*, 99 Idaho 575, 577-80, 586 P.2d 265, 267-70 (1978).

The District Court also looked to Alva and Thelma's contract for wills as evidence that Alva did not intend to divest himself of title when he delivered the 2006 Quitclaim Deed to a third party. R. Vol. II, p. 253, ¶ 32. Again, this evidence is not inconsistent with the passage of present title. *See Ohms v. Church of the Nazarene*, 64 Idaho 262, 270, 130 P.2d 679, 683 (1942)

(refusing to set aside a deed that had the same effect of a testamentary disposition that was violative of a contract for wills: "The deed was not testamentary in character because title immediately vested in the grantee reserving only a life estate.") (citing *Cell v. Drake*, 61 Idaho 299, 100 P.2d 949 (1940)). Indeed, the fact that Alva was aware that the contract for wills prevented him from transferring his property to Jack after his death supports the conclusion that he intended for the conveyance made prior to his death to be effective.

Because the evidence relied on by the District Court is not inconsistent with Alva's intent to deliver, the District Court's findings and conclusions are not supported by substantial and competent evidence. *See In re Estate of Ashe*, 114 Idaho 70, 76 n. 2, 753 P.2d 281, 288 n. 2 (1988) (citing *Griffin v. Griffin*, 102 Idaho 858, 652 P.2d 949 (Ct. App. 1982) (relying exclusively on presumption where evidence rebutting the presumption was supportive but not conclusive); *Hooker v. Hooker* 95 Idaho 518, 511 P.2d 800 (1972) (relying on presumption and "isolated testimony" to reach conclusion that there was a substantial conflict in the evidence insufficient to overcome the clear and convincing burden of proof.)).

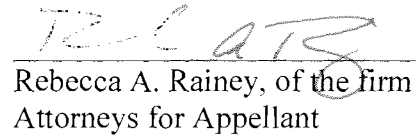
Because Jack enjoyed the presumption of validity, it was Thelma's burden to overcome that presumption by clear and convincing evidence. The evidence relied on by the District Court was simply not inconsistent with Alva's present intent to convey title to Jack and, therefore, not inconsistent with the presumption that the duly recorded deed was validly delivered. Because Thelma failed to present any evidence tending to show that Alva retained dominion and control over the deed at the time he delivered it to John, the District Court erred in finding that delivery did not occur prior to Alva's death.

V. CONCLUSION

For the foregoing reasons, Jack respectfully requests that this Court reverse the District Court's Judgment quieting title to Thelma and hold that the 1990 Quitclaim Deed created a tenancy in common in Alva and Thelma and that the 2006 Quitclaim Deed was valid. Jack also requests that this Court vacate the order of costs to Thelma below.

DATED this 21st day of December, 2011

RAINEY LAW OFFICE



Rebecca A. Rainey, of the firm
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of December, 2011, I caused to be served a true and correct copy of **APPELLANT'S BRIEF** by the method indicated below, 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 Respondent

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

Rebecca A. Rainey