1-30-2012

Garrett v. Garrett Appellant's Reply Brief Dckt. 38971

IN THE SUPREME COURT OF THE STATE OF IDAHO

JACK L. GARRETT, an individual,

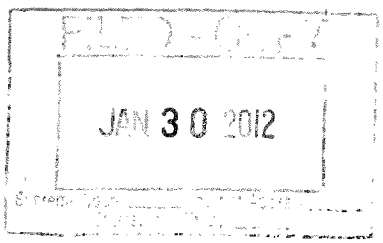
Plaintiff – Counterdefendant-Appellant.

vs.

THELMA V. GARRETT, an individual,

Defendant-Counterclaimant-Respondent.

Supreme Court No. 38971-2011



APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT.

HONORABLE GREGORY M. CULET, DISTRICT JUDGE PRESIDING.

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I. INTRODUCTION

This appeal involves two separate and distinct legal issues: transmutation of real property and valid delivery of a deed. In his opening brief, Jack argued that the District Court committed error on both issues by applying the incorrect legal standards and relying on evidence that was legally and logically irrelevant if the correct legal standards had been applied. Jack also argued that there was not substantial and competent evidence to support several of the facts found by the District Court.

Thelma's responsive brief argued, almost exclusively, that none of the evidence presented at trial was controverted and, accordingly, this Court should simply defer to the District Court's decision. While much of the evidence presented at trial was uncontroverted, this appeal is not about evidentiary issues; it is about legal issues. Specifically, whether the correct standards of law were applied and whether the findings would actually support the District Court's judgment if the correct standards of law had been applied.

Because the District Court erred on each of these points, it is immaterial whether the evidence presented was controverted. In the final analysis, the evidence presented and the facts found simply did not support the judgment entered. For the reasons that follow, Jack respectfully requests that this Court reverse the decision of the District Court with instructions to enter an order to partition the Middleton Place.

II. STANDARD OF REVIEW

The crux of this appeal concerns the intersection of the law and the facts and, specifically, whether the District Court committed error when applying the facts to the law. In his opening brief, Jack argued that the District Court committed multiple errors because it

applied the incorrect standard of law. Because the standards of law applied by the District Court were incorrect, the findings could not and did not support the judgment.

Thelma's responsive brief argues that this Court should defer to the District Court's determination that clear and convincing evidence supported its conclusions of law. *See, generally*, Resp. Br. 10-11. This argument misses a critical step. While the District Court's findings are entitled to significant deference, this Court has greater leeway when considering whether the findings actually support correct legal standards.

Unlike review of whether substantial and competent evidence supports findings of fact, this Court may exercise free review over the District Court's application of those findings to the correct legal standard: "[T]his court may substitute its view for that of the district court on a legal issue." *Marshall v. Blair*, 130 Idaho 675, 679, 946 P.2d 975, 979 (1997) (*citing* Standards of Appellate Review in State and Federal Courts, IDAHO APPELLATE HANDBOOK, Section 4.2 (1996)); *see also Kraly v. Kraly*, 147 Idaho 299, 303, 208 P.3d 281, 285 (2009) ("The characterization of [real property] in light of the facts found, however, is a question of law over which this Court exercises free review."). Accordingly, when determining whether the District Court properly applied its findings to the law, this Court may exercise free review. *Marshall,* 130 Idaho at 679-80, 946 P.2d at 979-80; *see also Ustick v. Ustick,* 104 Idaho 215, 221, 657 P.2d 1083, 1089 (Ct. App. 1983) (noting that the reviewing court can determine the legal nature of transactions, so long as doing so does not require it to weigh evidence, resolve conflicts in the evidence, draw inferences from the evidence, form an opinion as to the credibility of witnesses or make factual determinations different from the trial court).

While a handful of findings were not supported by substantial and competent evidence, these findings address facts that were otherwise irrelevant as a matter of law. Because the

present appeal asks this Court to (i) review the legal standards applied by the District Court and (ii) apply the District Court's findings to the correct legal standards, all matters presented for review are questions of law over which this Court exercises free review.

III. ARGUMENT

First, the District Court applied the incorrect legal standards in reaching the conclusion that the 1990 Quitclaim Deed transmuted Alva's separate property interest in the Middleton Place into community property. And, because the court applied the incorrect legal standard it relied on factual findings that were legally and logically irrelevant and do not support the judgment. Applying the correct legal standard, the District Court's findings do not support a conclusion that Alva transmuted his separate property interest in the Middleton Place into community property when he executed the 1990 Quitclaim Deed. Accordingly, this Court should reverse the decision of the District Court and remand with instructions to enter an order that Alva and Thelma held title to the Middleton Place as tenants in common, with their respective interests characterized as separate property.

Second, the District Court's errors on the issue of delivery are almost a mirror image of the errors committed on the transmutation issue: The District Court applied the incorrect legal standard and, in so doing, relied on findings of fact that were legally and logically irrelevant to support the judgment. Applying the correct legal standard, the findings do not support a conclusion that Alva retained dominion or control over the 2006 Quitclaim Deed at the time he deposited it into escrow. Accordingly, this Court should reverse the decision of the District Court and remand with instructions to enter an order holding that Alva conveyed his interest in the Middleton Place to Jack. Because these two legal conclusions support the request for

partition prayed for in Jack's complaint, the District Court should be further instructed to enter an order for partition.

A. The District Court erred when deciding the transmutation issue by applying the incorrect legal standard and by relying on legally and logically irrelevant facts.

The District Court erred in two ways when examining the transmutation issue. First, it failed to anchor its analysis of transmutation of real property to any statutory formalities. And, second, because its analysis was not based on statutory formalities, it relied on legally and logically irrelevant evidence.

1. Because "intent to transmute" is not anchored to any statutory authority it is the incorrect legal standard to apply to transmutation of real property.

Jack and Thelma present two very different interpretations of the legal standard to be applied when analyzing transmutation of real property. Jack contends that this appeal presents the opportunity for this Court to clarify the interplay between Titles 32, 55, Idaho Code, and the parol evidence rule when dealing with transmutation of real property. Thelma contends that the recent case of *Barrett v. Barrett,* 149 Idaho 21, 232 P.3d 799 (2010), stands for the proposition that no statutory formalities are required for the transmutation of real property and this appeal is nothing more than an attempt to overrule *Barrett.*

It is well settled under Idaho law that parties may transmute real property only by complying with statutory formalities. *Stockdale v. Stockdale*, 102 Idaho 870, 873, 643 P.2d 82, 85 (Ct. App. 1982). Consistent with this well-settled law, Jack has identified three potential statutory anchors that can be used to reconcile *Barrett* with Idaho's statutory formalities: Idaho Code § 32-917, Idaho Code § 55-508, and Idaho Code § 55-104.

On this appeal, Thelma has effectively asked this Court to hold that no statutory formalities limit relevant parol evidence that may be considered and the only test for

transmutation of real property under Idaho law is whether the grantor had an "intent to transmute." Resp. Br. at 12-14. Thelma's characterization of this appeal is correct only if this Court intended that *Barrett* overrule thirty years of Idaho precedent prohibiting the informal transmutation of real property.

Because there is no indication that *Barrett* was intended to create such sweeping changes to Idaho's real property and community property laws, because the statutory anchors Jack cited are consistent with *Barrett*, and because Thelma offered no legal authority, analysis, or argument in support of her request to over-turn well settled law, this Court should reject Thelma's over-broad interpretation of *Barrett* and hold that parol evidence of transmutation of real property must be anchored in some statutory authority.

a. *Barrett* neither expressly nor impliedly held that courts may ignore the statutory authority of Idaho Code § 55-508 when characterizing the interests created by a deed executed by and between spouses.

Idaho Code § 55-508 unambiguously states:

> 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.**

I.C. § 55-508 (emphasis added).

In *Barrett*, the deed read: "Ann Barrett and Gregory Barrett, Wife and Husband as Tenants by the Entireties." 149 Idaho at 22, 232 P.3d at 800. Unlike that deed, the 1990 Quitclaim Deed contains no indication or reference to the fact that Alva and Thelma were married. Because the 1990 Quitclaim Deed does not contain an express declaration that Alva and Thelma hold the Middleton Place as anything other than tenants in common, in order to even consider whether title was held as community property, the District Court had to reject the plain

language of Section 55-508 and rely on extrinsic evidence of the parties' marriage. *See* App. Br. at 8.

A rule of law that permits a trial court to rely on extrinsic evidence of marriage solely to avoid application of Idaho Code § 55-508 would judicially nullify the statute with respect to every conveyance by and between spouses. Because the deed in *Barrett* contained an express declaration that the parties held title as something other than tenants in common, *Barrett* does not require that courts ignore Idaho Code § 55-508 when characterizing property interests created by deeds executed by and between spouses. Accordingly, Jack's request that this Court rely on the statutory authority of Section 55-508 is not a request for this Court to overrule *Barrett*. Rather, his request is consistent with Idaho law requiring that the transmutation of real property follow statutory formalities.

b. *Barrett* neither expressly or impliedly held that courts may ignore the statutory authority of Idaho Code § 55-104 when characterizing the interests created by a deed executed by and between spouses.

Thelma argues that the "intent to transmute" standard articulated in *Barrett* should not be restrained by the "acquired as community property" standard of Idaho Code § 55-104, calling such limitation "overly simplistic, formulaic, and not in line with Idaho case law." Resp. Br. at 13–15. In effect, Thelma argues that *Barrett* held parties may transmute real property without complying with any statutory formalities. Because *Barrett* did not expressly overturn longstanding authority and because Thelma has not offered any authority, argument, or analysis in support of this bold extension of Idaho law, Thelma's interpretation of *Barrett* should be rejected. Instead, *Barrett* should be given an interpretation and application that is consistent with Idaho statutory authority and Idaho case law.

Thelma's interpretation of *Barrett* is based on a concluding sentence which reads "the 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,* 149 Idaho at 25, 232 P.3d at 803 (emphasis added). After stripping that statement of the historical context of *Winn v. Winn,* 105 Idaho 811, 673 P.2d 411 (1983), Thelma argues that a court can consider any and all extrinsic evidence and ignore the requirement that transmutation of real property comply with statutory formalities.

Conversely, in an effort to read *Barrett* within the context of the longstanding principal that transmutation of real property must comply with statutory formalities, Jack cited to Idaho Code § 55-104 as one of three potential statutory anchors. Jack argued that "relevant evidence" referenced in *Barrett* was evidence speaking to the "acquired as community property" standard of Idaho Code § 55-104. Jack then discussed how each of the six *Winn/Barrett* factors worked within the timing and funding analysis mandated by Idaho Code §§ 32-903 and 32-906, thereby satisfying the statutory formality of Section 55-104.[1] App. Br. at 9-14.

Thelma offered no argument, analysis, or authority in support of her proposition that all evidence is **relevant** evidence regarding "intent to transmute," nor has she offered any argument, analysis, or authority to support her proposition that this Court should shed the requirement that transmutation of real property must comply with statutory formalities. Avoiding any statutory restraint on the evidentiary inquiry authorized by the *Winn/Barrett* line of cases would effectively overturn the long standing rule that transmutation of real property must comply with statutory formalities. Thus, Thelma's proposed application of *Barrett* is overbroad and should be

[1] Jack recognizes that the six *Winn/Barrett* factors present an illustrative, not exhaustive, list of potentially relevant evidence. The critical proposition advanced by Jack is that the evidence considered must be relevant to the timing and funding analysis discussed in *Kraly*, 147 Idaho at 303, 208 P.3d at 285, and anchored in the statutory authority of Idaho Code §§ 32-903 and 32-906.

rejected. Accordingly, Jack respectfully requests that this Court hold that extrinsic evidence regarding intent to transmute (i.e., evidence speaking to the six *Winn/Barrett* factors) is limited to the "acquired as community property" standard of Idaho Code § 55-104 and that the District Court erred by applying the incorrect legal standard.

2. The District Court's decision must be reversed because its findings of fact are legally irrelevant when the correct legal standard is applied.

In reaching its conclusion that the 1990 Quitclaim Deed transmuted Alva's separate property interest in the Middleton Place into community property, the District Court relied on several facts that are irrelevant as a matter of law. The District Court looked to any and all evidence of Alva's intent to transmute, instead of the "acquired as community property" standard of Idaho Code § 55-104.

As noted in Jack's opening brief, the District Court relied on at least five findings of fact that speak only of Alva's undisclosed, subjective intent regarding transmutation: (i) Alva had previously encumbered the Middleton Property (¶ 12.1);[2] (ii) Alva had encountered financial difficulty (¶ 12.2); (iii) Alva and Thelma had previously alienated all other real property owned by either of them (¶ 12.3); (iv) Alva and Thelma had a contract for wills and mutually reciprocal wills (¶ 12.9); and (v) some alleged fear that John would talk Alva into alienating the property (¶ 10).[3] App. Br. at 17-18. However, because the correct inquiry is restrained by the "acquired as community property" standard of Section 55-104, evidence of Alva's undisclosed, subjective intent to transmute is irrelevant as a matter of law.

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[2] The Findings of Fact and Conclusions of Law appear in the Record at Volume II, page 239-262. Each paragraph is separately numbered. Rather than identifying each paragraph by its full citation to the record, as he did in his opening brief, Jack will identify each paragraph as (¶), when referring to specific findings and conclusions.

[3] Jack detailed these facts in his opening brief, showing why each did not apply to the correct legal standard. App. Br. at 16-21. In response, Thelma argued only that these facts were uncontroverted. Resp. Br. at 17-18.

The District Court also supported its conclusion with the finding that Alva and Thelma retired prior encumbrances with the proceeds of a loan secured by the 1990 mortgage (¶ 12.7).[4] Thelma has not cited and Jack cannot locate any Idaho authority that stands for the proposition that using loan proceeds to retire separate property debt has any impact on the characterization of the asset securing the loan proceeds. Like the other five findings, this particular fact is simply legally irrelevant to the question of transmutation.

3. The District Court's decision must be reversed because the findings that are relevant to the "acquired as community property" standard of Idaho Code § 55-104 do not logically support the conclusion that Alva transmuted his interest in the Middleton Place.

In reaching its conclusion that the 1990 Quitclaim Deed transmuted Alva's separate property interest in the Middleton Place into community property, the District Court did rely on several facts that are legally relevant under the "acquired as community property" standard of Idaho Code § 55-104, which guides the *Winn/Barrett* factors. However, because the District Court did not anchor its characterization of the Middleton Place to the correct legal standard, these particular findings were misapplied. When properly applied, these findings do not logically support the District Court's characterization of the Middleton Place as community property. Because this Court may exercise free review when applying the facts to the law, it is

[4] This portion of the finding in ¶ 12.7 is not only legally irrelevant, it is also not supported by substantial and competent evidence. Jack detailed the evidence in the record, demonstrating that the two original mortgages created a total encumbrance of $44,000.00 and showing that the proceeds from the sale of 53 acres of the Middleton Place generated a $75,000.00 purchase price. App. Br. at 18. Jack then noted the absence of any portion of Thelma's accounting ledger indicating a remaining loan balance on these prior mortgages. App. Br. at 17-18. Thelma countered this evidence with citation to her testimony that the new mortgage was taken out to retire the earlier mortgages. Resp. Br. at 14-15 (citing Tr. p. 217, L. 19 – p. 222, L. 2). A review of Thelma's testimony, however, demonstrates that she testified that the $20,000.00 loan was retired with payments from the sale of the 53 acres (which were Alva's separate property). Tr. p. 220, L. 23 – p. 221, L. 7. While Thelma's testimony the point that the prior mortgages were retired using proceeds from the sale of the 53 acres was clear, her testimony as to what the proceeds from the $20,000 loan were used for is unclear and confused. Tr. p. 221, L. 8 – p. 222, L. 20. Accordingly, no reasonable mind could conclude that any portion of the loan proceeds secured by the $20,000.00 1990 mortgage was used to retire the pre-existing debts on the 53 acres.

within this Court's authority to freely determine the characterization of the Middleton Place based on the lower court's factual findings.

First, the finding that Alva executed the 1990 Quitclaim Deed to effectuate obtaining a mortgage on the Middleton Place (¶ 12.4) is relevant only in that it opens the door to the "acquired as community property" standard of Idaho Code § 55-104 and consideration of the six *Winn/Barrett* factors. That is to say, because the 1990 Quitclaim Deed may have been associated with a credit acquisition, a court may consider extrinsic evidence of whether Thelma acquired her interest as community property.[5] The credit acquisition does not help to establish the character of the property. Because this finding only opens the door to consideration of the *Winn/Barrett* factors, it does not support the District Court's characterization of the Middleton Property as community property.

The District Court also looked to the names on the deed to support its conclusion that Alva's interest in the Middleton Place was transmuted into community property. (¶12.5). The District Court did not, however, correctly apply this factor to the "acquired as community property" standard of Section 55-104. The 1990 Quitclaim Deed does not expressly state that the grantees hold their interests as anything other than tenants in common: Accordingly, the statutory presumption of Idaho Code § 55-508 applies. Because the deed creates a presumption

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[5] During the course of this matter, Thelma has taken manifestly inconsistent positions with respect to whether the 1990 Quitclaim Deed was prepared in connection with a credit acquisition. Currently, for purposes of this appeal, Thelma argues that the deed was executed during the course of credit acquisition, thereby opening the door for this Court to consider parol evidence and, more specifically, the six *Winn/Barrett* factors. Resp. Br. at 14-15. Conversely, at the summary judgment stage and at trial, Thelma rejected any claim that the preparation of the deed was done in conjunction with a credit acquisition, arguing that the lack of such connection is proof that the couple intended to transmute Alva's separate property interest into real property. Tr. p. 43, L. 22-p. 45, L. 17; p. 418, L. 3-L. 7.

Thelma's attempt to ascribe two mutually exclusive meanings to this finding demonstrates how little meaning this Court should give to this particular factor. Thelma cannot argue that the 1990 Quitclaim Deed was executed during the course of a refinancing, so parol evidence should be considered, and then argue that the 1990 Quitclaim Deed had nothing to do with refinancing efforts, so the Court should assume greater intent to transmute than that which is expressly reflected in the deed. Her argument is internally inconsistent and logically flawed.

that Alva and Thelma held their interest as tenants in common, this factor suggests only that additional evidence must be considered to characterize Thelma's tenant in common interest.

The District Court also looked to the names on the mortgage to support its characterization of the Middleton Place as community property. (¶ 12.5). However, under the facts of this particular case, the names on the mortgage shed no light on whether Thelma acquired her interest in the Middleton Place as community property. The 1990 mortgage includes the names "Alva L. Garrett and Thelma V. Garrett, husband & wife." Def.'s Ex. KK. While the mortgage provides more information regarding the relationship of Alva and Thelma than does the 1990 Quitclaim Deed, the "husband & wife" reference does not indicate whether Thelma acquired her interest as community property or separate property, nor does it indicate how the bank may have characterized the Middleton Place. Without more, the "husband & wife" reference lends equal support to either characterization. Accordingly, this particular fact does not necessarily support the District Court's characterization of the Middleton Place as community property.

The District Court also relied on its finding that Alva and Thelma co-mingled other personal property and separate income (¶ 12.6) to support its characterization of the Middleton Place. This particular finding is both legally and logically irrelevant. It is well settled under Idaho law that parties cannot informally transmute an interest in real property through co-mingling of funds. *See, e.g., Stockdale*, 102 Idaho at 873, 643 P.2d at 85. It is, therefore, logically impossible that co-mingling of personal property assets constitutes relevant evidence of an informal intent to transmute real property. Accordingly, using the fact of co-mingling of personal property and separate income as circumstantial evidence that the parties intended to informally transmute their interest in real property would be improper. App. Br. at 18. Thelma

did not offer any argument or authority that countered this position, instead noting only that the evidence was not contradicted. Resp. Br. at 18.

Finally, the District Court relied on the finding that Alva and Thelma used community funds to pay the indebtedness secured by the 1990 mortgage to support its characterization of the Middleton Place as community property. (¶ 12.7).[6] However, under Idaho law, using community funds to pay the indebtedness secured by separate property collateral does not change the character of the underlying security. Rather, the reverse is true: Under well-settled Idaho law, the character of the debt follows the character of the security. *Gapsch v. Gapsch,* 76 Idaho 44, 55, 227 P.2d 278, 285 (1954). Further, "the character of an item of property as community or separate vests at the time of its acquisition." *Winn*, 105 Idaho at 814, 673 P.2d at 414 (citing *In re Estate of Freeburn*, 97 Idaho 845, 555 P.2d 385 (1976)).

> [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 fundamental of the transmutation doctrine: that the character of property may be changed *by agreement* between the spouses.

Id. at 814, n. 2, 673 P.2d at 414, n. 2 (emphasis in original): Under this authority, the possible use of approximately $2,000 from an unidentified source[7] to make payments on a note secured

[6] Not only does this fact not support the conclusion reached by the District Court, it is also not supported by substantial and competent evidence. Thelma was unable to testify as to any payments made out of community funds towards the indebtedness secured by the 1990 mortgage. App. Br. at 19–20. The entries on the accounting ledger that could, possibly, be linked to payments by Alva and/or Thelma towards the indebtedness secured by the 1990 mortgage totaled only $2,028.25 in payments towards a $20,000.00 indebtedness. App. Br. at 20. Moreover, there was no evidence whether these payments were made from Alva's separate property income, Thelma's separate property income, or any income earned by the community. Because this finding is not supported by substantial and competent evidence, it must be disregarded.

[7] Thelma makes much of the fact that her social security payments were nearly double Alva's, as she argues that the District Court could have inferred that the bank looked to her income when making its lending decision. Resp. Br. at 16-17. A review of the findings indicates that the court did not make such an inference. Moreover, even if the bank had looked to Thelma's social security payments, those are her separate income: Social security payments are separate property. *Winn v. Winn*, 101 Idaho 270, 277, n.1, 611 P.2d 1055, 1062, n. 1 (1980). Thelma's accounting

by the Middleton Place does not support the District Court's characterization of the Middleton Place as community property.

B. The District Court erred when deciding the delivery issue by applying the incorrect legal standard and by relying on legally and logically irrelevant facts.

The District Court's errors on the delivery issue mirror the errors committed on the transmutation issues. To begin, instead of placing the burdens of proof and production on Thelma to establish by clear and convincing evidence that Alva retained dominion or control over the 2006 Quitclaim Deed when he delivered it into escrow, the District Court improperly placed these burdens on Jack to establish that Alva intended to divest himself of title. Because the District Court looked to the wrong party to prove the incorrect standard of law, its findings are legally and logically irrelevant and do not support a conclusion that delivery was invalid when the correct standard of law is applied.

1. The District Court applied the wrong legal standard on the delivery issue because it required Jack to prove Alva's intent to divest himself of title rather than requiring Thelma to prove Alva retained dominion and control over the deed when he deposited it into escrow.

As discussed in Jack's opening brief, based on the undisputed facts of this case, Jack's claim of title to the Middleton Place is supported by two legal presumptions: (i) he has title to the property based on the duly recorded 2006 Quitclaim Deed and (ii) the duly recorded deed was

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ledger clearly delineated which portion of the funds on deposit in the couple's joint accounts were her social security payments and which portion of such funds were Alva's social security payment. Def.'s Ex. BB. And, these two sources of separate income were not so inextricably intertwined that they were co-mingled. Under Idaho law, the commingling of separate personal property of one spouse with the separate property of the other spouse and/or with community property does not convert the separate personal property into community personal property unless "it is *impossible* to trace the source of the funds." *Stahl v. Stahl*, 91 Idaho 794, 797, 430 P.2d 686, 689 (1967), quoting *Thomasset v. Thomasset*, 122 Cal. App. 2d 116, 264 P.2d 626, 631 (1953) (emphasis in original). "So long as the separate property of either spouse is identifiable and traceable, commingling of such separate property with community property does not convert the separate property into community property." *Id.* Indeed, to the extent that the lender might have relied on Thelma's social security income as a potential source of repayment, the lender would have been relying on a separate property asset, not a community property asset. The lender looking to Thelma's separate property income as a potential source of repayment does not support the characterization of the Middleton Place as community property.

delivered as of the date of the deed. In order to overcome these presumptions, Thelma was required to prove by clear and convincing evidence that Alva retained dominion or control over the deed when he delivered it to a third-party, thereby making delivery invalid. That is to say, Thelma was required to prove that at the time Alva gave the 2006 Quitclaim Deed to John, Alva reserved the right to have the deed returned to him, if he requested it. App. Br. at 23-24.

In his opening brief, Jack detailed Idaho case law regarding the correct legal standard for proving that delivery was invalid:

> 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).

App. Br. at 25 (emphasis added). Thelma did not attempt to refute, rebut, or distinguish this well settled authority. Rather, Thelma misinterpreted this argument and authority, attempting to recharacterize the issue on appeal as one of circumstantial vs. direct evidence. *See, generally,* Resp. Br. at 19. That re-characterization misses the issues presented on this appeal.

Jack's appeal cites error by the District Court in (i) placing the burden of proof on him and (ii) then applying the incorrect legal standard. Although the District Court found that Alva instructed John to record the deed after Alva's death, (¶ 27), the court placed the burden on Jack to prove that Alva "completely divested himself of title" (¶ 29). That is the incorrect legal standard.

The correct legal standard is to place the burden on Thelma to prove by clear and convincing evidence that Alva retained dominion or control over the deed at the time he deposited it into escrow with John.[8] *See In re 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). Accordingly, Jack respectfully requests that this Court apply the uncontroverted findings to the correct legal standard: whether Alva retained dominion or control over the deed.

2. The District Court's decision must be reversed because all of the findings support a conclusion that the 2006 Quitclaim Deed was validly delivered.

In his opening brief, Jack argued that the findings were not inconsistent with the legal conclusion of valid delivery. App. Br. at 24 – 27. In response, Thelma argued that all of these facts were uncontroverted and, further, that circumstantial evidence was competent evidence. Resp. Br. at 19-20. Jack agrees that circumstantial evidence is competent evidence and the facts were uncontroverted. However, even if evidence is circumstantial and uncontroverted, the findings must still be applied to the correct legal standard. Because the findings are consistent with the legal conclusion that the 2006 Quitclaim Deed was validly delivered, they cannot—as a matter of law—also support the conclusion that the 2006 Quitclaim Deed was not validly delivered.

As noted in Jack's opening brief, at both summary judgment and trial, Thelma failed to present any evidence that Alva retained dominion or control over the deed at the time he placed

[8] Thelma argues that it was not possible for her to obtain direct evidence of the escrow instructions given to John because she was unaware of the existence of the deed until after Alva's death. Resp. Br. at 19. Thelma's alleged lack of knowledge at the time Alva delivered the deed into escrow does not excuse Thelma from her evidentiary burdens. John submitted an affidavit at the summary judgment stage testifying that the only instruction he received from Alva was not to have the deed recorded until after Alva's death. R. Vol. II, p. 223, ¶ 11. Thelma did not take John's deposition during discovery, nor did she call John as a witness at trial. Accordingly, the **only** evidence is that Alva did not give John any limiting instructions that would support the legal conclusion that Alva retained dominion or control over the 2006 Quitclaim Deed when he delivered it into escrow.

it into escrow. Because this is the correct legal standard for determining whether delivery to a third party is valid, *Cell v. Drake*, 61 Idaho 299, 100 P.2d 949 (1940), the absence of evidence on the point is fatal to Thelma's claim. Tellingly, during closing argument, Thelma's counsel admitted that there was little to no evidence presented on the issue of delivery: "I don't know how much evidence [Thelma] actually presented to the court on the issue of delivery." Tr. p. 436, L. 10-12. Because Thelma had the burden to prove ineffective delivery by clear and convincing evidence, her counsel's concession that she had not presented evidence on the issue of delivery is a very strong indication that she failed to meet her burden.

Here, all of the findings support the legal conclusion that there was valid delivery of the 2006 Quitclaim Deed during Alva's lifetime. It is undisputed and uncontroverted that Alva delivered the deed to John with instructions to have it recorded after Alva's death. (¶ 27). Based on nearly identical facts, this Court concluded delivery was valid:

> [T]he positive instruction given to [the third party], to keep the deed in his safe until after [grantor's] *death*, and to deliver it to [grantee] *after* [grantor's] *death*, precludes any intention, either express or implied, that [grantor] reserved the right or privilege of recalling the deed at any time prior to her death; and of course she could not do so afterward. The instruction is plain and unambiguous.
>
> Under a well recognized line of authorities in this country, a deed to real property may be executed and placed in the hands of a depositary or escrow holder for delivery to the grantee after the death of the grantor, and **constitutes a present passage of title with a reservation of a life estate in the grantor.**

Cell, 61 Idaho at 303, 100 P.2d at 950 (italics in original) (bold and underlining added).

Applying the uncontroverted facts to this well settled authority: Alva's delivery of the 2006 Quitclaim Deed to John constitutes valid delivery as a matter of law, unless there is sufficient evidence that Alva retained dominion or control over the deed. *See id.* The findings

that Jack was not aware of the deed initially, (¶ 30.5), and never took physical possession of the deed, (¶ 30.6), are not proof that Alva retained dominion or control over the deed. Therefore, these findings are irrelevant.

Under *Cell*, Alva's instruction that John not record the deed until after Alva's death "precludes any intention, either express or implied, that [Alva] reserved the right or privilege of recalling the deed at any time prior to [Alva's] death." *See Cell*, 61 Idaho at 303, 100 P.2d at 950. Accordingly, as a matter of law, Alva did not retain dominion or control over the deed. The findings that Alva did not want the deed recorded until after his death, (¶ 30.1), and that John—consistent with these wishes and instructions—did not record the deed until after Alva's death, (¶ 31), are not proof that Alva retained dominion or control over the deed. Rather, these findings show that John, as an escrow agent, followed the escrow instructions. Accordingly, these findings are entirely consistent with a conclusion of valid delivery.

Under *Cell,* Alva's instruction that John not record the deed until after Alva's death also "constitutes a present passage of title [to Jack] with a reservation of a life estate in [Alva]." *See Cell*, 61 Idaho at 303, 100 P.2d at 950. This authority is found throughout Idaho law: "[I]t 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." *Hartley v. Stibor*, 96 Idaho 157, 160, 525 P.2d 352, 355 (1974) (citation omitted); *see also In re Estate of Courtright*, 99 Idaho 575, 577-80, 586 P.2d 265, 267-70 (1978). Accordingly, the findings that Jack did not take possession of the property after Alva executed the quitclaim deed, (¶ 30.2), Jack continued to pay rent, (¶ 30.3), Alva continued to accept rent, (¶ 30.4), and Jack did not accept rent, (¶ 30.8), do not prove that Alva retained dominion or control over the deed. Rather, these findings are entirely

consistent with the passage of present title to Jack with a reservation of a life estate by Alva. Thus, these findings are entirely consistent with a conclusion of valid delivery.

In short, not a single finding proves that Alva retained dominion and control over the deed—the proposition that Thelma was required to prove by clear and convincing evidence in order to establish that delivery was invalid. Because the findings are consistent with present passage of title to Jack with a reservation of a life estate in Alva, this Court may rely on the findings to conclude as a matter of law that there was valid delivery during Alva's lifetime.

IV. CONCLUSION

For the foregoing reasons, Jack respectfully requests that this Court reverse the decision of the District Court with instructions to enter an order holding that Alva and Thelma held their respective tenants in common interests in the Middleton Place as separate property and that Alva conveyed his separate property interest to his son, Jack. Jack further requests that this Court instruct the District Court to enter an order granting Jack's prayer for partition of the Middleton Place.

DATED this 30th day of January, 2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of January, 2012, I caused to be served two true and correct copies of **APPELLANT'S REPLY BRIEF** by the method indicated below, addressed to the following:

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