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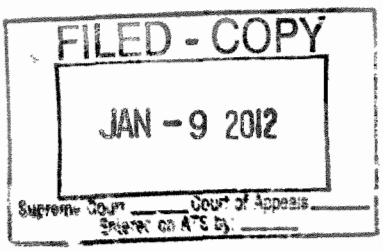
Garrett v. Garrett Respondent's Brief Dckt. 38971

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



RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

HONORABLE GREGORY M. CULET, DISTRICT JUDGE PRESIDING

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STATEMENT OF THE CASE

A. Nature of the Case

Contrary to the Appellant's characterization of this case as an opportunity to clarify Idaho Code on the proof required to establish transmutation, what Jack Garrett seeks in reality is the reversal of this Court's holding in *Barrett v. Barrett,* 149 Idaho 21, 24, 232 P.3d 799, 802 (2010), that language in the deed is not dispositive on the character of property conveyed, and that the court may consider all relevant evidence on the issue of transmutation to determine the parties' intent. The Appellant did not present any evidence to the trial court on the issue of transmutation, instead relying solely on the language of the deed from Alva to Alva and Thelma. Nor did Jack controvert any of the evidence presented by Thelma to prove that her husband intended to transmute their residence from his separate property to their community property.

The Appellant asks this Court to set aside a multitude of precedents in order to create new law limiting the court's consideration of any relevant evidence outside of the language of the deed itself, thereby making those words dispositive on the question of the parties' intent. Jack Garrett also asks this Court to find that the evidence of transmutation was not clear and convincing even though it was uncontroverted, and to find that the quitclaim deed to Jack was delivered notwithstanding his nondisclosure of the existence of the deed, continued payment of rent to Alva and Thelma for the land, failure to take possession of it until after Alva died, and recording of the deed only after Alva died, coupled with Jack's admission that notwithstanding execution of the quitclaim deed, he believed his father was entitled to treat the Middleton property as his own for the rest of his life.

B. Procedural History

This case was instituted by Jack's filing suit against his step-mother, Thelma, to partition the Middleton property on August 21, 2009. Both parties moved for summary judgment. Thelma contended that Alva transmuted his separate property interest in the Middleton farm to community property when he executed the June 18, 1990 deed from "Alva", to "Alva and Thelma." Jack argued that the deed unambiguously established a tenancy in common between Alva and Thelma. The Court denied both motions for summary judgment.

A court trial ensued. Following the trial, the Court issued its Findings of Fact and Conclusions of Law on May 31, 2011, finding in favor of Thelma Garrett and ruling that Alva transmuted the Middleton farm property from separate to community property through the 1990 deed, and therefore the 2006 quitclaim deed to Jack was void because Thelma did not participate in it or consent to it. Additionally, the Court found that there was no delivery of the quitclaim deed to Jack because Alva did not have any intention to divest himself of a present interest in the Middleton farm property when he executed the deed. Jack appealed that decision.

C. Statement of Facts

Alva and Thelma Garrett were married for 32 years, from 1976 until Alva's death on March 3, 2008. Tr. p. 122, line 23 – p. 124, line 6. Thelma Garrett and Alva Garrett were both married prior to their marriage to each other. Each of them had children of a prior marriage. Alva had four children from a prior marriage, and Thelma had three children from her prior marriage. Tr. p. 124, line 7 – 20; p. 128, line 5 – 13. When they were first married, Alva owned three significant parcels of real property free and clear. Tr. p. 125, line 16 – p. 126, line 23. During the first fourteen (14) years of their marriage, as a result of failed business ventures with his son John, Alva lost all of his properties except for a portion of the Middleton farm on which he lived with Thelma during the

entire 32 years of their marriage. Tr. p. 390, line 15 – 22. Due to his financial problems and the threat of foreclosure, he had to sell off 53 acres of the farm, leaving the home and 26 acres. Tr. p. 138, line 25 – p. 140, line 8. To preserve that property for himself and Thelma, and to effectuate obtaining another mortgage on the property, Alva deeded the remaining portion of the Middleton farm property to himself and Thelma. The property was refinanced at the same time in both of their names. Tr. p. 142, line 3 – p. 143, line 25; p. 161, line 9 – p. 167, line 12. Thelma and Alva pooled all of their income, consisting primarily of Social Security payments, and jointly paid off the mortgage and all of their other expenses. Tr. p. 144, line 10 – p. 145, line 7; p. 155, line 3 – p. 157, line 18; p. 274, line 4 – p. 277, line 1.

Jack Garrett admitted that he had no knowledge of his father's intent with respect to the 1990 deed to Alva and Thelma. Tr. p. 386, line 8 – 18.

In 1995, Alva and Thelma entered into a contract for wills and executed wills containing mutual provisions leaving their entire estate to the surviving spouse, and upon the death of the survivor, in equal shares to all seven (7) children of their combined family. At the time that these instruments were executed, the only real property owned by Alva and Thelma was the remaining 26-2/3 acres of the Middleton property. Tr. p. 185, line 14 – p. 191, line 21. Exhibits B and C.

On February 14, 2006, Alva executed a quitclaim deed purportedly conveying his interest in the Middleton property to his son, Jack Garrett. The deed was prepared by John Garrett, who kept it until March 5, 2008, two days after Alva died, when John recorded the deed. Tr. p. 281, line 15 – 21; p. 201, lines 10 – 22. Jack was not present when the quitclaim deed was signed and did not know the circumstances of Alva's signing of the deed. Tr. p. 393, line 6 – 18. Thelma was unaware of the preparation and execution of the deed and did not consent to it. Tr. p. 183, line 9 – p. 184, line 4; p. 191, line 22 – p. 193, line 10.

In the interim period from the time the deed was executed up to the time it was recorded, no one disclosed the existence of the deed to Thelma. To Thelma's knowledge, Alva did not receive any money from Jack for the quitclaim deed. Tr. p. 193, line 11 – 15. After the deed was executed and up to the time that Alva died, Jack did not take possession of the property or assert any present ownership interest in it. Moreover, he continued to rent the Middleton farm property from Alva and Thelma and pay rent to them under his lease. He did not collect rent from Alva or Thelma for their use of the farm property. Tr. p. 198, line 2 – p. 201, line 9; p. 396, line 4 – 19. Since she was unaware of the existence of the unrecorded quitclaim deed until after Alva's death, Thelma never had the opportunity to discuss it with Alva. Tr. p. 201, line 10 – p. 203, line 8. Jack admitted that he understood that in executing the quitclaim deed, Alva did not intend to part with ownership of the property during his lifetime, but only after he died. R. p. 190, p. 183.

Thelma still lives on the Middleton farm property.

ISSUES PRESENTED ON APPEAL

I. **WAS THE COURT'S FINDING THAT THE 1990 DEED TRANSMUTED ALVA'S SEPARATE PROPERTY INTO THE COMMUNITY PROPERTY OF ALVA AND THELMA SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE?**

II. **WAS THE 2006 QUITCLAIM DEED TO JACK VOID BECAUSE THE 1990 DEED TRANSMUTED THE MIDDLETON FARM PROPERTY INTO COMMUNITY PROPERTY RENDERING IT UNNECESSARY FOR THE COURT TO ADDRESS THE ISSUE OF DELIVERY OF THE 2006 QUITCLAIM DEED?**

III. **WAS THE COURT'S FINDING THAT THE 2006 DEED TO JACK WAS NOT DELIVERED SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE?**

ARGUMENT

I. THE COURT'S FINDING THAT THE 1990 DEED TRANSMUTED ALVA'S SEPARATE PROPERTY INTO THE COMMUNITY PROPERTY OF ALVA AND THELMA WAS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE

A. The District Court's findings are entitled to great weight on appeal.

This is an appeal from a bench trial. The trial court found that the Defendant, Thelma Garrett, proved by clear and convincing evidence that in executing a June, 1990 deed, Thelma's husband, Alva Garrett, transmuted his separate property into their community property. The Court also found that Alva's February, 2006 quitclaim deed to his son, Plaintiff Jack Garrett, was void because Thelma did not participate in or consent to the community property conveyance, and void also because it was not delivered, since Alva did not intend to divest himself of present ownership interest when he executed the quitclaim deed.

In *Sirius LC v. Erickson,* 150 Idaho 80, 84, 244 P.3d 224, 228 (2010), the Court noted:

> When reviewing a judgment of the district court following a bench trial, this Court is "limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law." *Borah v. McCandless,* 147 Idaho 73, 77, 205 P.3d 1209, 1213 (2009). Findings of fact will not be overturned unless clearly erroneous, *see* Idaho R. Civ. P. 52(a); "however, we exercise free review over issues of law." *American Pension Services, Inc. v. Cornerstone Home Builders, L.L.C.,* 147 Idaho 638, 641, 213 P.3d 1038, 1041 (2009).

This Court does not reweigh the evidence and defers to the trial court with respect to its judgment of the credibility of the witnesses. As set out in *Opportunity, LLC v. Ossewarde,* 136 Idaho 602, 605, 38 P.3d 1258, 1261 (Idaho 2002):

> The standard of review of a non-jury trial court's findings of fact is set forth in Idaho Rule of Civil Procedure 52(a). *Williamson v. City of McCall,* 135 Idaho 452, 19 P.3d 766, , 769 (citing I.R.C.P. 52(a)). I.R.C.P. 52(a) provides in pertinent part:
>
> > In all actions tried upon the facts without a jury ... the court shall find the facts specifically and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. Findings of fact shall not be set aside unless clearly erroneous. In application of this principle regard shall be given to the special opportunity of the trial

> court to judge the credibility of those witnesses that appear before it.*Id.* (quoting I.R.C.P. 52(a)). "In determining whether a finding is clearly erroneous this Court does not weigh the evidence as the district court did. The Court inquires whether the findings of fact are supported by substantial and competent evidence." *Id.* (citation omitted). "This Court will not substitute its view of the facts for the view of the district judge." *Id.* (citation omitted). "Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact had been proven." *Id.*

The trial court concluded that Thelma proved that transmutation of the real property occurred, and that the quitclaim deed to Jack was not delivered by clear and convincing evidence. The court's finding is entitled to great weight on appeal. In *Barrett v. Barrett,* 149 Idaho 21, 24, 232 P.3d 799, 802 (2010), this Court declared:

> Concomitantly, because the question of whether a "clear and convincing" burden of proof has been met is a question for the trier of facts to decide in the first instance, the determination of the trial judge-that a claim was not shown by clear and convincing evidence-is entitled to great weight on appeal. *Hoskinson,* 139 Idaho at 459, 80 P.3d at 1060 (quoting *Ustick*, 104 Idaho at 222, 657 P.2d at 1090).

Moreover, as this court recently noted in *Harris, Inc. v. Foxhollow Const. & Trucking, Inc.,* 264 P.3d 400, 407 (August, 2011):

> We will not disturb findings supported by substantial and competent evidence, "even if the evidence is conflicting." [*Independence Lead Mines v. Hecla Mining Co.,* 143 Idaho 22, 26, 137 P.3d 409, 413 (2006)] "It is the province of the district court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses." *Thorn Springs Ranch, Inc. v. Smith,* 137 Idaho 480, 484, 50 P.3d 975, 979 (2002). We, therefore, liberally construe a trial court's findings "in favor of the judgment entered." *Id.*

Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Uhl v. Ballard Med. Prods., Inc.,* 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). "This Court will not substitute its view of the facts for the view of the district judge." *In re Williamson,* 135 Idaho 452, 454, 19 P.3d 766, 768 (2001) (citing *Carney v. Heinson,* 133 Idaho 275, 281, 985 P.2d 1137, 1143 (1999). "Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact had been proven." *Id.*

B. The Court looks to the intent of the parties to determine whether a deed results in transmutation.

In interpreting and construing deeds of conveyance, the primary goal is to seek and give effect to the real intention of the parties. *Neider v. Shaw,* 138 Idaho 503, 65 P.3d 525 (2003); *C & G, Inc. v. Rule,* 135 Idaho 763, 25 P.3d 76 (2001); *Benninger v. Derifield,* 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) As this Court declared in *Barrett v. Barrett,* 149 Idaho 21, 23, 232 P.3d 799, 801 (2010):

> The determination whether property has been transmuted, from separate to community property or vice versa, is, as we have long stated, a question of intent. *Hoskinson v. Hoskinson,* 139 Idaho 448, 459, 80 P.3d 1049, 1060 (2003); *Suchan v. Suchan,* 106 Idaho 654, 664, 682 P.2d 607, 617 (1984); *In re Bogert's Estate,* 96 Idaho 522, 526, 531 P.2d 1167, 1171 (1975); *see also Ustick v. Ustick,* 104 Idaho 215, 222, 657 P.2d 1083, 1090 (Ct. App. 1983); *Griffin v. Griffin,* 102 Idaho 858, 861, 642 P.2d 949, 952 (Ct. App. 1982).

C. The District Court properly considered all relevant evidence in order to determine Alva's intent to transmute his separate property into community property.

Jack Garrett's claim that the only evidence the trial court was allowed to consider was the language of the deed itself is not supported by Idaho law. This Court's decision in *Barrett, supra,* states that even where the deed in question is unambiguous, its language is still not dispositive on the issue of the character of the property, and the court may consider all other relevant evidence to ascertain the true intent of the parties. In *Barrett,* the magistrate judge determined that the deed in question was unambiguous. Notwithstanding that finding, the Supreme Court held that the language in the deed was not dispositive on the issue of transmutation, and the court could consider other evidence to determine the grantor's intent to transmute the property. *Barrett, supra,* at 24, 232 P.3d at 802. The Court noted:

> "...the language of a deed executed in the course of refinancing does not conclusively determine the character of property for purposes of a divorce action. Rather, the intention of the party or parties executing the deed is dispositive. Thus, neither I.C. §55-606 nor

the statute of frauds governs because the pertinent question is not the effectiveness of the deed. Although the trial judge, as the finder of fact, may consider a deed as evidence in determining intent, it is not the only evidence available to a judge considering the question of transmutation.

This Court has previously allowed courts to look to a variety of factors in determining the character of property. In *Hoskinson* while recognizing that marriage settlement contracts require formalities, the Court felt free to look to additional testimony to ascertain the intent of the parties. 139 Idaho at 459-60, 80 P.2d at 1060-61. Similarly, in *Winn v. Winn,* 105 Idaho 811, 673 P.2d 411 (1983), involving a property purchase concluded some months after the marriage using separate property of the husband, the Court considered a variety of factors to be considered in the absence of the parties' "actual, articulated intent": (1) whether the community was liable for payment on the loan; (2) the source of the payments toward the loan; (3) the basis of credit upon which the lender relied in making the loan; (4) the nature of the down payment; (5) the names on the deed; and (6) who signed the documents of indebtedness. *Id.* at 814-15, 673 P.2d at 414-15. This Court explained:

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

Id. at 815, 673 P.2d at 415. The fact that *Winn* involved the purchase of new property rather than the question of whether existing property was transmuted does not change the analysis here. *Winn* was clear in its holding that evidence beyond the deed itself could be introduced to determine the character of property even where that determination might differ from the language of the deed.

The Court concluded by declaring that:

...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, supra,* at *25,* 232 P.3d at 803.

1. The Deed from "Alva" to "Alva and Thelma" was ambiguous and therefore parol evidence was admissible to establish the parties' intent.

The District Court found that the June 18, 1990 deed from Alva L. Garrett to Alva L. Garrett and Thelma V. Garrett was ambiguous because it did not specify how Alva and Thelma held title, and because they refinanced the property at the same time that this deed was executed. In light of that ambiguity, the Court considered additional relevant evidence on the issue of the parties' intent to determine the character of the property.

In *Benninger, supra,* at 489, 129 P.3d at 1238, the Court noted that:

> If, however, the instrument of conveyance is ambiguous, interpretation of the instrument is a matter of fact for the trier of fact." *Latham v. Garner,* 105 Idaho 854, 673 P.2d 1048 (1983)....Uncertainties should be treated as ambiguities; such ambiguities are subject to be cleared up by resort to the intention of the parties as gathered from the deed, from the circumstances attending and leading up to its execution, from the subject matter, and from the situation of the parties at the time. *City of Kellogg v. Mission Mountain Interests,* 135 Idaho 239, 16 P.3d 915 (2000).

As this Court held in *Sells v. Robinson,* 141 Idaho 767, 773, 118 P.3d 99, 105 (2005):

> If a deed is ambiguous, parol evidence is admissible to prove the parties' intent. In construing an ambiguous deed, the Court should give effect to the parties' intentions. *Daugharty v. Post Falls Highway Dist.* 134 Idaho 731, 735, 9 P.3d 534, 538 (2000). To give effect to the intent of the parties, "the contract or other writing must be viewed as a whole and in its entirety." *Id.* The Court must consider all of the surrounding facts and circumstances. *Bumgarner v. Bumgarner,* 124 Idaho 629, 637, 862 P.2d 321, 329 (Ct. App. 1993)
>
> *Accord, McCoy v. McCoy,* 125 Idaho 199, 204, 868 P.2d 527, 532 (1994) ("... where the deed's language is ambiguous, parol or extrinsic evidence describing the surrounding facts and circumstances is admissible to prove the parties' intent. *Id.* In such a case, the interpretation of intent is a question of fact to be determined by the trier of fact, not only from the instrument itself but also from extrinsic evidence. *Phillips,* 121 Idaho at 697, 827 P.2d at 710.")

2. Since the deed from Alva to Alva and Thelma was executed in connection with refinancing of their farm property, the trial court was entitled to consider parol or extrinsic evidence to determine their intent.

This Court in *Barrett, supra, at 24,* 232 P.3d at 802, stated expressly that the language of a deed executed in the course of refinancing is not dispositive on the character of the property even if it is unambiguous, and additional evidence of intent may be considered by the court. Although Jack Garrett asserts that financing was not related to this deed because it occurred after the deed was executed (Appellant's Brief, p. 15), the transactions actually took place within a day of each other. The deed was dated June 18, 1990 and the mortgage dated June 19, 1990. Tr. p. 164, line 7 – p. 167, line 12. Thelma testified that the new mortgage was taken out jointly by

Alva and Thelma to pay off an earlier mortgage following sale of the other 53 acres attached to this farm property. Tr. p. 217, line 19 – p. 222, line 2. There was substantial competent evidence on which the trial court could conclude that the deed was executed in connection with refinancing of the property. R. Vol. II, p. 245 – 247, Findings #9.5, 9.6, 12.4, 12.5.

Contrary to Jack Garrett's argument, the trial court was not limited to consideration of the six factors listed in *Winn v. Winn,* 105 Idaho 811, 673 P.2d 411 (1983) to ascertain the parties' intent. In *Barrett,* that list was cited as merely instructive on the types of evidence that have been considered by courts in the past, but the Court eschewed a narrow delineation of those factors as exclusive in every case, quoting with approval the language in the *Winn* decision that the determination of the parties' intent is "highly individualistic" and often involves "complex fact situations." The Appellant's view of this inquiry is overly simplistic, formulaic, and not in line with Idaho case law or with the ultimate goal – to determine the parties' actual intent.

3. The court considered the applicable *Winn* factors in finding that Alva intended to transmute his property.

The Appellant contends that Alva's deed was executed as a gift to Thelma. But the evidence showed, and the court properly found that the property was refinanced and a mortgage executed one day after and in connection with the execution of that deed. The mortgagors were identified as "Alva L. Garrett and Thelma V. Garrett, husband and wife." Tr. p. 165, line 14 – p. 166, line 4. Exhibit KK. The Court found that a community debt was created through the making of this mortgage by Alva and Thelma. R. Vol. II, p. 247, FF #12.5. That finding was supported by Thelma's testimony regarding the making of the mortgage and payments made on it from their joint checking account into which Thelma's Social Security checks were deposited. Tr. p. 161, line 13 – p. 167, line 12; p. 273, line 24 – p. 277, line 1.

Although the *Winn* Court listed six factors that it considered in determining whether transmutation occurred, it noted that no single factor was conclusive on the issue. The trial court here considered evidence consistent with the *Winn* factors that supported the Court's finding that transmutation had occurred. These included the following:

"(1) whether the community was liable for payment on the loan;"

Alva and Thelma were both signatories on the IDAVIV mortgage, Exhibit KK

"(2) the source of the payments toward the loan;"

Thelma testified that she received approximately twice the amount as Alva in Social Security payments, which constituted most of their joint income. She deposited her Social Security check into their joint checking account, and all payments on the IDAVIV mortgage were made out of that account. The account records show principal and interest payments made on the mortgage from that account. Tr. p. 273, line 24 – p. 277, line 1. Earlier, Thelma testified that she and Alva paid off this mortgage without any financial help from Alva's children. Tr. p. 166, line 25 – p. 167, line 12.

"(3) the basis of credit upon which the lender relied in making the loan;"

Thelma and Jack both testified that Alva was in financial difficulties in 1990 and facing potential foreclosure. Jack testified that his father was having difficulty making his loan payments. Tr. p. 139, line 1 – p. 140, line 8; Tr. p. 369, line 22 – p. 370, line 6. Thelma's Social Security income was almost double Alva's, and their joint income was used to make the payments on the new mortgage, which was executed within one day of Thelma being added to the title. The Court could reasonably infer from these facts that Thelma's income was a consideration of the lender in making the loan.

"(4) the nature of the down payment;"

There was no down payment since this was a refinance and not new acquisition.

"(5) the names on the deed;"

Both Alva and Thelma were named on the deed. Tr. p. 164, line 18-23, Exhibit A.

"(6) who signed the documents of indebtedness."

Both Alva and Thelma signed the mortgage. Tr. p. 165, line 14 – p. 166, line 24, Exhibit KK.

D. The court's finding that Alva transmuted his interest in the Middleton property was supported by substantial competent evidence that was not controverted by the Appellant.

Thelma Garrett presented evidence to establish the following facts relevant to the issue of transmutation. None of this evidence was controverted by Jack Garrett.

1. Although Alva Garrett was debt free and owned three substantial parcels of real property when he married Thelma Garrett in 1976, by 1990, following various business transactions with his son John Garrett, Alva owned only the Middleton farm property, which now was mortgaged. Moreover, Alva was in financial trouble, unable to make his loan payments, and threatened with foreclosure on that property. Tr. p. 390, lines 15-22; p. 138, line 25 – p. 140, line 8.

2. Alva sold off 53 acres of the Middleton farm property to retire some of his debt. On June 18, 1990, he deeded the remaining 26 2/3 acres on which Alva and Thelma's residence is situated to himself and his wife, Thelma. Tr. p. 138, line 25 – p. 140, line 8. Exhibit A.

3. Alva deeded the remaining Middleton property to himself and Thelma because he was afraid that John might talk him into doing something with it and they would lose the property they had left. Tr. p. 139, line 1 – 140, line 8; p. 142, line 3 – 21.

4. On June 19, 1990, the day after the deed was executed, Alva and Thelma executed a mortgage for $20,000 secured by their interest in the Middleton property. They were jointly

obligated on the mortgage and made all payments on the mortgage out of their joint checking account. Thelma contributed about twice as much as Alva to that account based on larger Social Security payment. Alva and Thelma paid the mortgage off without the assistance of Alva's children. Tr. p. 161, line 9 – p. 167, line 12; Exhibit KK.

5. From about 1984 and for the rest of their married life until Alva's death in 2008, Alva and Thelma pooled all of their income, business interests, and assets, and paid all of their expenses out of their joint bank accounts, including the mortgage on the Middleton property. Tr. p. 144, line 10 – p. 145, line 7; p. 155, line 3 – p. 157, line 18; p. 274, line 4 – p. 277, line 1.

6. On January 27, 1995, Alva and Thelma entered into a contract for wills and executed wills containing mutual provisions leaving their entire estate to the surviving spouse, and upon the death of the survivor, in equal shares to all seven (7) children of their combined family. At the time that these instruments were executed, the only real property owned by Alva and Thelma was the 26 2/3 acres of the Middleton property. Tr. p. 185, line 14 – p. 191, line 21. Exhibits B, C.

7. Alva did not include any provision in his will that identified or treated his interest in the Middleton property as being his separate property or being held as a tenant in common. Tr. p. 185, line 14 – p. 191, line 21. Exhibit C.

II. THE 2006 QUITCLAIM DEED TO JACK IS VOID BECAUSE THE 1990 DEED TRANSMUTED THE MIDDLETON FARM PROPERTY INTO COMMUNITY PROPERTY. IT IS THEREFORE UNNECESSARY FOR THIS COURT TO ADDRESS THE ISSUE OF DELIVERY OF THE 2006 QUITCLAIM DEED.

The trial court accurately set out the applicable Idaho law and properly applied it in Paragraphs 14 and 15 of its Conclusions of Law when it stated:

"14. I.C. §32-912 provides the general rule that an attempted conveyance of community real estate by one spouse, without the written consent of the other, is void. *See* I.C. §32-912;

Fuchs v. Lloyd, 80 Idaho 114, 120, 326 P.2d 381, 384 (1958) (citations omitted). *Lovelass v. Sword,* 140 Idaho 105, 108-109, 90 P.3d 330, 333-334 (2004).

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

Since the Middleton farm property was Alva and Thelma Garrett's community property, the quitclaim deed to Jack was void under Idaho law and it is therefore unnecessary for the Court to make additional findings on the issue of delivery of the deed. R. Vol. II, p. 257.

III. THE COURT'S FINDING THAT THE 2006 DEED TO JACK WAS NOT DELIVERED WAS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE

A. The Court did not commit error with respect to Jack's burden of proof.

In her answer to Jack's Complaint, Thelma denied that the quitclaim deed to Jack had any "legal effect." R. p. 26, Par. 4. Thelma presented evidence to the trial court that Alva did not have the intent to convey a present interest in the Middleton property to Jack. His complaint is apparently that the evidence was not direct, but circumstantial. Since Jack kept the existence of the quitclaim deed secret from Thelma during Alva's life, direct evidence from Alva would have been difficult to acquire. However, circumstantial evidence is sufficient to establish Alva's intent. *Hobbs v. Ada County,* 93 Idaho 443, 446, 462 P.2d 742, 745 (1969)

B. Thelma presented sufficient circumstantial evidence to prove that the Alva did not have an intent to convey a present interest in the real property during his life.

Thelma presented circumstantial evidence of facts from which the Court could reasonably infer that Alva did not have the intent to divest himself of a present interest in the Middleton property when he executed the quitclaim deed to Jack.

That evidence included the following facts:

1. The existence of the deed was not disclosed to Thelma during Alva's life. R. Vol. II, p. 189, Par. 23, 24; Tr. p. 183, line 9 – p. 184, line 4; p. 191, line 22 – p. 193, line 10.

2. The quitclaim deed from Alva to Jack was not recorded until March 5, 2008, two days after Alva's death. R. Vol. II, p. 190, Par. 29; Tr. p. 281, line 15-21; p. 201, lines 10-22. Exhibit CC.

3. Jack did not have possession of the deed while Alva was living. R. Vol. II, p. 189, Par. 25.

4. Jack did not take possession of any part of the Middleton property until after Alva died. Tr. p. 198, line 2 – p. 201, line 9; p. 396, line 4-19.

5. Jack did not assert any ownership interest in the Middleton property or exercise any incidents of ownership until after Alva died. R. Vol. II, p. 189, Par. 23-31; Tr. p. 198, line 2 – p. 201, line 9; p. 396, line 4-19.

6. After Alva executed the quitclaim deed in 2006, Jack continued to pay Alva and Thelma annual rent in October for farming the Middleton property. He made these payments in October, 2006 and October, 2007. Alva died in March, 2008. R. Vol. II, p. 189, Par. 27; Tr. p. 198, line 2 – p. 201, line 9; p. 396, line 4-19.

7. Jack did not collect rent from either Thelma or Alva for their continued possession of the Middleton property for the period after Alva signed the quitclaim deed in 2006 up to his death in 2008. R. Vol. II, p. 189, Par. 28; Tr. p. 198, line 2 – p. 201, line 9; p. 396, line 4-19.

8. Jack admitted that the purpose of Alva's quitclaim deed was to transfer his interest in the Middleton property only after he died. Jack felt that as long as Alva was living he was entitled to continue to treat the Middleton property as his own notwithstanding the quitclaim deed. R. Vol. II, p. 190, Par. 31

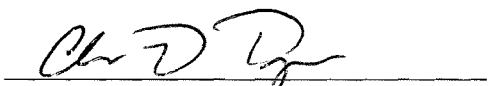
Jack did not dispute any of this evidence. Instead, he relied solely upon the content and recording of his quitclaim deed from Alva in support of his claim.

CONCLUSION

Thelma Garrett presented substantial competent evidence to the trial court upon which it properly concluded that the Middleton farm property in which she and her husband, Alva Garrett, resided for 32 years was their community property. She also presented substantial competent evidence to the court upon which it properly concluded that the quitclaim deed to Jack Garrett was not delivered. The findings of fact and conclusions of law are supported in the record and the decision of the trial court should be affirmed.

Respectfully submitted,

TROUPIS LAW OFFICE, P.A.



Christ T. Troupis, Attorney for Respondent
Thelma V. Garrett

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2012, two (2) copies of the foregoing document was served by U.S. Mail, first class postage prepaid, upon:

Rebecca A. Rainey
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