IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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ELIZABETH C. HOWARD,

Appellant,

vs.

SHAUGHNAN L. HUGHES,

Respondent.
_____/

Supreme Court Case No. 72685

District Court Case No. 15DC-10-0876

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

None.

DATED this 8th day of February, 2018.

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I.

JURISDICTIONAL STATEMENT

Respondent agrees that jurisdiction for this appeal exists pursuant to NRAP 3A(b)(1).

II.

ROUTING STATEMENT

To the extent this appeal seeks clarification of perceived conflicts between *Sack v. Tomlin*, 110 Nev. 204, 871 P.2d 298 (1994) and *Langevin v. York*, 111 Nev. 1481, 907 P.2d 981 (1995), which are controlling authorities in this matter, the appeal is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(14). However, Respondent does not object to transfer of this appeal to the Court of Appeals pursuant to NRAP 17(c)-(d).

III.

STATEMENT OF ISSUES

1. The District Court did not err in finding that Appellant, ELIZABETH C. HOWARD (hereafter "HOWARD") created a valid joint tenancy in real property in which she and Respondent, SHAUGHNAN L. HUGHES (hereafter "HUGHES") held equal shares where (a) HUGHES presented overwhelming and uncontroverted evidence of her donative intent at the time of the transfer of the property to joint tenancy, (b) both parties provided evidence of an informal

agreement to share in certain expenses associated with ownership of the property, and (c) both parties contributed to the installation of several improvements on the property.

2. The District Court did not err in concluding that HOWARD and HUGHES intended to share equal ownership of the property and the benefits created by the added improvements thereto where (a) neither party kept detailed records of their contributions to the property and (b) both parties testified of their intent to own the property together.

IV.

STATEMENT OF THE CASE

HOWARD appeals from a February 27, 2017 Order After February 6, 2017 Hearing in which the District Court, following a bench trial on HUGHES' Complaint for Partition, concluded that HOWARD and HUGHES were joint tenants with equal ownership interests in real property located at 11633 Fulkerson Road in Fallon, Nevada (the "Property") and ordered HOWARD to either (a) buy HUGHES out of his interest or (b) list the property together with HUGHES and share equally in the sales proceeds.

V.

STATEMENT OF FACTS

HUGHES met HOWARD in the Fall of 2009 and shortly thereafter a romantic relationship developed between the two. AA Vol. 2 at 0113-0115. Approximately one year later, the parties moved from Suisun City, California, together to Fallon, Nevada. AA Vol. 2 at 0116. The parties leased together two homes (one on Melanie Dr. and the other on Stillwater Ave.) consecutively for approximately one year each in Fallon between in 2010 and 2012. AA Vol. 2 at 0117.

During the period in which the parties were living together in leased homes in Fallon, the parties at various times discussed marriage and explored the

possibility of purchasing a home for them and HUGHES' two daughters, who were also residing with the parties at the time. AA Vol. 2 at 0118-0122. The parties jointly applied for credit from the USDA in anticipation of purchasing real property together in Fallon. AA Vol. 2 at 0121-0122. At times, HUGHES and HOWARD worked with a realtor to assist them in looking for a home to purchase. AA Vol. 2 at 0120-0121.

At some point in or around late 2011 to 2012, HOWARD obtained an award and/or entered into a settlement for damages arising from a workplace injury she had allegedly suffered. AA Vol. 2 at 0123. With the proceeds from the aforementioned injury award, HOWARD purchased the Property situated at 11633 Fulkerson Road Fallon, Nevada, which was deeded to her on July 6, 2012. AA Vol. 2 at 0128-0131.

On July 11, 2012, the Defendant executed a Quitclaim Deed in favor of herself and HUGHES as joint tenants. RA Vol. 3 at 0651-0653.[1] It was always the intention of the parties that the Property be jointly owned. AA Vol. 2 at 0129-0131. HUGHES chose the Property as the home to be purchased for the

[1] HOWARD's counsel should be sanctioned for failure to strictly comply with NRAP 30, which provides in pertinent part that "counsel have a duty to confer and attempt to reach an agreement concerning a possible joint appendix." HOWARD's counsel never contacted HUGHES' counsel to confer about a possible joint appendix and HOWARD failed to include in her appendix several documents material to this Court's consideration of her appeal, including without limitation the exhibits admitted at trial and upon which much of the District Court's dispositive order in this matter was based.

parties to live in. AA Vol. 2 at 0125-0128. HUGHES paid the property taxes assessed against the Property. RA Vol. 4 at 0654-0671. Indeed, he continues to pay the property taxes pending this appeal despite not having resided at the Property since March 2015. AA Vol. 2 at 0135-0139; RA Vol. 4 at 0654-0655; RA Vol. 4 at 0671.

While the Property was acquired in July 2012, the parties did not move in to the Property until approximately September October 2012. AA Vol. 2 at 0146-0147. The Property consists of approximately 11.09 acres and at the time of its acquisition consisted of a single family residence and an airplane hangar. AA Vol. 2 at 0147-0150. Prior to the parties moving in to the Property, HUGHES worked on cleaning up the Property by removing substantial amounts of debris and material therefrom. AA Vol. 2 at 0145-0147. The Property had previously been used as a storage lot for disabled vehicles and as a ranch. AA Vol. 2 at 0126-0128. Materials removed by HUGHES include without limitation barbed wire, concrete slabs, discarded and burned railroad ties, poles, concrete material, rocks, glass, metal pieces, engine parts, buried vegetation, drainage culverts, loose wires, fence posts, dilapidated fence lines, and small animal pens. AA Vol. 2 at 0127; RA Vol. 3 at 0630-0631.

After cleaning up the debris on the Property, HUGHES erected a new fence around a 4.5 acre portion of the Property, moved the existing driveway

from one side of the Property to the other, installed a new entrance to the Property, and installed new hang gates to the Property. AA Vol. 2 at 0147-0155. HUGHES spent time addressing the dilapidation of the existing airplane hangar, which consisted in part of reinforcing footings and smoothing the ground inside and out of the hangar. AA Vol. 2 at 0146.

Much of the work described above included excavation, much of which was done by hand, and preventative installations and maintenance to reinforce the new fence line and to prevent the further dilapidation of the hangar. HUGHES graded the property with a tractor purchased by his father for this specific purpose. AA Vol. 2 at 0146-0155; AA Vol. 2 at 0239. However, once the aforementioned tractor became overburdened by the amount of work necessary to accomplish the levelling of the ground, HUGHES contracted with a third party to complete the work with the third party's own equipment under HUGHES' direction. AA Vol. 2 at 0157-0160.

HUGHES constructed several retaining walls and terraces on the Property using railroad ties and base rock. AA Vol. 2 at 0160-0172. This substantial work was accomplished over more than a year's time with breaks during winter months. RA Vol. 3 at 0631. HUGHES installed and groomed road base rock within the 4.5 acre fenced area. HUGHES installed gardens, chicken coops, an aviary, and a poultry house on the Property. AA Vol. 2 at 0172-0176.

HUGHES' teenage daughter, Savannah, assisted HUGHES with much of the aforementioned work. AA Vol. 2 at 0154-0156, 0162, 0171. HOWARD also assisted HUGHES from time to time with the foregoing work. AA Vol. 2 at 0154.

In addition to paying the property taxes, HUGHES from time to time paid the property insurance on the Property as well. AA Vol. 2 at 0139-0144; RA Vol. 4 at 0672-0676.

In the Spring of 2013, HOWARD coaxed her mother to move from Suisun City, California to Fallon, Nevada. AA Vol. 2 at 0178-0179. HUGHES first understood that HOWARD's mother would purchase her own property from proceeds earned from the sale of her home in Suisun City and that her stay on the Property, in HUGHES' daughter's bedroom, would be temporary. AA Vol. 2 at 0179-0180.

It soon became apparent that HOWARD's mother's stay on the Property was not going to be temporary when HOWARD and her mother pressured HUGHES to allow her to stay. HUGHES demanded that HOWARD's mother move out of his daughter's bedroom and she then moved into a trailer, which she had located on the Property. AA Vol. 2 at 0180.

Shortly thereafter, HOWARD convinced HUGHES to allow the erection of an accessory dwelling (mother-in-law quarters) on the Property in which her

mother could live. AA Vol. 2 at 0180-0182. In August 2013, HUGHES and HOWARD applied for and obtained a special use permit from Churchill County to erect the accessory dwelling behind the main residence on the Property. AA Vol. 2 at 0182-0186; RA Vol. 4 at 0872-0875.

The accessory dwelling was a prefabricated home, approximately 1,000 square feet, whose installation on the Property was completed pursuant to the special use permit and a building permit in or about July 2014. AA Vol. 2 at 0187-0189; RA Vol. 4 at 0877. HUGHES and HOWARD painted the accessory dwelling, put down a subfloor, and installed some shelving in the accessory dwelling. AA Vol. 2 at 0211-0212. HUGHES installed an egress window attachment on the accessory dwelling and modified the rear steps of the dwelling. AA Vol. 2 at 0211-0212.

A detached garage was also erected on the Property and HUGHES paid to have electrical wiring added to the garage, which was going to be used for his business dealings regarding sales of guns, ammo, and other items pursuant to permits he held to do the same. AA Vol. 2 at 0168-0170, 0196, 0223-0224.

HOWARD paid for much of the material used by HUGHES in performing the substantial labor described above. However, HUGHES paid for some of the work either by directly paying for materials or by giving cash to HOWARD as reimbursement for portions of the materials. AA Vol. 2 at 0192.

HUGHES' father also made contributions to the Property and to household expenses, but neither HOWARD's mother nor HUGHES' father claimed any legal interest in the Property during the proceedings in the District Court. AA Vol. 2 at 0237-0241.

In March 2015, HOWARD locked HUGHES out of the Property and filed an application for protective order with the New River Township Justice Court, which was denied. RA Vol. 2 at 0289-0305; AA Vol. 2 at 0275.

On July 27, 2015, HUGHES filed a Complaint for Partition pursuant to Chapter 39 of Nevada Revised Statutes and served the same on HOWARD by publication after traditional service means were unsuccessful. AA Vol. 1 at 0001-0008. On November 24, 2015, several days after a responsive pleading was due, HOWARD filed an Answer and Counterclaim. AA Vol. 1 at 0009-0022. HOWARD's Counterclaims were dismissed on January 7, 2016 after HOWARD failed to oppose HUGHES' Motion to Dismiss. AA Vol. 1 at 0023-0024.

In addition to failing to oppose HUGHES' Motion to Dismiss, HOWARD failed to timely provide disclosures pursuant to NRCP 16.1 as well as filing and serving an early case conference report as required by NRCP 16.1. As a result of HOWARD's several failures to comply with the rules, HUGHES requested and the Court held a pretrial conference on May 17, 2016. RA Vol. 1 at 0044-0048; AA

Vol. 1 at 0025-0073. Immediately prior to the pretrial conference, HOWARD served HUGHES with a Motion to Set Aside Dismissal of her Counterclaims in which HOWARD's counsel asserted that his office had in fact filed an Opposition to HUGHES' Motion to Dismiss and served a copy of the same upon counsel for HUGHES. RA Vol. 1 at 0049-0065. Of course, neither HUGHES' counsel nor the District Court had received any such Opposition in the intervening five months and HOWARD's counsel was subsequently admonished for his lack of candor to the tribunal and HOWARD's Motion to Set Aside Dismissal of her Counterclaims was denied. RA Vol. 1 at 0025-0073; AA Vol. 1 at 0078-0085.

On or about June 28, 2016, HOWARD filed a Motion for Summary Judgment in which she sought an order confirming that title to the Property should be vested or restored 100% to her on the basis that she alone had purchased the Property and that HUGHES had made no financial contribution to the Property. RA Vol. 1 at 0082-0207. HUGHES opposed the Motion for Summary Judgment on the basis that he had contributed financially and had also contributed substantially more in terms of labor. RA Vol. 2 at 0228-0305. On September 7, 2016, the District Court denied HOWARD's Motion for Summary Judgment and specifically noted HUGHES had shown evidence of his contributions to the Property, both financial and in kind. AA Vol. 1 at 0078-0085.

On August 25, 2016, HUGHES filed a Motion for Sanctions in which he asked that HOWARD and/or her counsel be sanctioned for multiple and repeated failures to comply with the applicable rules of civil procedure. RA Vol. 2 at 0370-0442. The District Court sanctioned HOWARD's counsel in the amount of $16,500 on April 24, 2016. The April 24, 2016 Sanctions Order is the subject of a Petition for Writ of Mandamus in Docket No. 74857, which is currently pending in the Court of Appeals.

Trial of this matter was originally scheduled to occur on October 3, 2017. It was continued to February 6, 2017 in order to allow HUGHES to obtain an appraisal of the Property, which HOWARD was ordered to allow. AA Vol. 1 at 0090-0092. The Property was appraised at $225,000 on January 13, 2017. RA Vol. 5 at 0878-0901.

After repeated requests and reminders from counsel for HUGHES and the District Court, HOWARD finally submitted her case conference report on or about January 4, 2017, nearly ten months late and just one month before trial. RA Vol. 3 at 0468-0527. In her case conference report, HOWARD demanded a jury trial and asserted several affirmative defenses for the first time. RA Vol. 3 at 0469, 0472. As a result, on January 6, 2017 HUGHES filed a Motion in Limine to preclude introduction of evidence at trial of affirmative defenses not affirmatively or timely pled. RA Vol. 3 at 0494-0527. The District Court opined in a January 27, 2017

Order that evidence supporting an affirmative defense would not be admitted, but that evidence of a defense that is not affirmative might be relevant to HUGHES' partition claim. AA Vol. 1 at 0093-0099. In her January 27, 2017 trial statement, HOWARD asserted yet another affirmative defense (statute of frauds) for the first time. RA Vol. 3 at 0567. HUGHES verbally objected to introduction of any evidence on that defense in opening remarks at the February 6, 2017 bench trial. AA Vol. 2 at 0107-0111.

The February 6, 2017 bench trial commenced at 9 am and concluded in mid-afternoon on the same day. AA Vol. 2 at 0105-0297. Both HUGHES and HOWARD testified. HUGHES' father, John Hughes, and his daughter, Fallon Hughes, also testified. At trial, HUGHES testified extensively concerning his relationship with HOWARD, their decision to move to Fallon from California, their joint decision to buy a property together, the circumstances surrounding HOWARD's quitclaim deed to herself and HUGHES as joint tenants, and his substantial and significant contributions to the Property. AA Vol. 2 at 0112-0228. HUGHES showed photographs of the property, before, during, and after his work thereon over more than a year's time. RA Vol. 4 at 0677-0726. These photographs depicted significant changes to the fences, grading, landscaping, and the installation of various accessory buildings, the bulk of the work for which was performed by HUGHES himself. HUGHES was aided in some of the projects by

his daughter, Savannah, by HOWARD, and by others. In all, HUGHES testified for more than two hours and the transcript of his testimony takes up 120 pages of the approximately 200 page transcript from the trial. AA Vol. 2 at 0112-0228.

Next, John Hughes, HUGHES' father, was called to the stand. John Hughes discussed his observations of the parties' relationship and his financial and other contributions to them as they moved into and improved the Property. AA Vol. 2 at 0228-0249. He noted that he had provided cash, several household items, and a tractor that was used by HUGHES and HUGHES' daughter in the extensive grading work on the Property.

Most importantly, John Hughes testified concerning discussions he had with HOWARD about her intentions in transferring the Property to herself and HUGHES as joint tenants. He testified that shortly after her execution and recording of the quitclaim deed, they had a telephone conversation in which she told John that she wanted HUGHES to be on title to the Property so that her family could not exclude him therefrom in the event something happened to her as she was frequently traveling from Fallon to California to seek medical treatment. AA Vol. 2 at 0233-0235. John also noted that HOWARD wanted to ensure HUGHES' contributions to the Property were protected and not wasted in the event something happened to her. AA Vol. 2 at 0234. Lastly, he testified that HOWARD was very alert and lucid during this conversation. AA Vol. 2 at 0233.

Following a lunch recess, the bench trial resumed with HOWARD putting on her case. She alone testified on her behalf and her only testimony with regard to the acquisition of the Property and the circumstances of her execution and recording of the quitclaim deed to herself and HUGHES as joint tenants was that she did not remember any of it. AA Vol. 2 at 0257-0259. She claimed that the medication she was taking caused her to have "blank spots" in her memory. AA Vol. 2 at 0257. However, the only things she could not remember were (a) her acquisition of the Property, (b) her subsequent quitclaim deed to herself and HUGHES, and (c) conversations with HUGHES and his father about the transferring the Property to HUGHES. She was able to recall virtually everything before, during, and after those events, including specifically her purchase of a washer and dryer. AA Vol. 2 at 0259. Later, on cross examination, she confirmed that she remembered going to Best Buy to purchase the washer and dryer. AA Vol. 2 at 0278. When confronted with the receipt for this purchase at a Best Buy in Sparks, she backtracked and stated that her memory of that time was "blurry." AA Vol. 2 at 0280. The date on the receipt is July 11, 2012, which is the same day she executed the quitclaim deed – earlier in the day – transferring title to herself and HUGHES as joint tenants. AA Vol. 2 at 0280. HOWARD also testified that she had traveled to and from the Bay Area on her own in July 2012, despite being on medication that allegedly affected her so much that she could not recall simple,

but important tasks while remembering other, less relevant details from the same time period. AA Vol. 2 at 0280-0284.

HOWARD called no corroborating witnesses to substantiate any of her testimony, including her alleged heavy medication or her memory loss. HOWARD was on the stand for a relatively brief time and the transcript of her testimony consists of only 35 pages.

As a rebuttal witness, HUGHES' daughter, Fallon Hughes, was called to the stand and she testified to being present at the Churchill Recorder's Office when HOWARD executed and caused to be recorded the quitclaim deed transferring title to HOWARD and HUGHES as joint tenants. AA Vol. 2 at 0289. She testified that HOWARD confirmed with HUGHES that he wanted to be on title before executing the deed. AA Vol. 2 at 0289-0290. She testified that she never witnessed HOWARD taking any medication and had no reason to believe HOWARD was anything but lucid before, during, or after her purchase of the Property and subsequent transfer to herself and HUGHES. AA Vol. 2 at 0291.

Needless to say, the District Court found HOWARD's testimony not to be credible concerning her lack of memory about the events surrounding her execution of the quitclaim deed. AA Vol. 3 at 0307. The District Court found that HOWARD "knowingly executed the deed with the intent to transfer an equal interest in the property to Mr. Hughes." AA Vol. 3 at 0307.

VI.

SUMMARY OF ARGUMENT

A. NRS Chapter 39 Authorized HUGHES to seek partition.

The provisions of NRS Chapter 39 govern this case and specifically authorize any person holding property as a joint tenant to file an action for partition of real property. NRS Chapter 39 further directs the District Court to determine the rights of all parties claiming an interest in the property and then to either order a partition of the property or a sale and a division of the proceeds in accordance with the parties' rights.

B. Distinctions between property held as joint tenants and property held as tenants in common.

HOWARD created a valid joint tenancy in the Property by executing and recording a quitclaim deed in favor of herself and HUGHES on June 11, 2012. In order for a valid joint tenancy to exist, the four common law unities of title must exist and they do exist here. Those unities are the unity of time, of title, of interest, and of possession. Therefore, HUGHES, as a joint tenant, had the right to sue for partition pursuant to the provisions of NRS Chapter 39.

C. There are several rebuttable presumptions created by HOWARD's execution and recording of the June 11, 2012 quitclaim deed.

By executing and recording the quitclaim deed in favor of HUGHES and HOWARD, it is presumed that (a) HOWARD intended the natural consequences

of that action, (b) that she intended a gift of one-half the value of the Property, (c) that joint tenants own property in equal shares, and (d) that the Property was transferred with donative intent. She failed to rebut any of these presumptions.

D. HUGHES' contributions to the improvement of the Property is <u>further evidence of his ownership interests</u>.

HUGHES quit his job and devoted substantially all of his time for a period of more than a year to cleaning the Property, installing fencing, moving a driveway, installing various accessory buildings, and assisting in the construction of an accessory dwelling for HOWARD's mother. HUGHES' daughter assisted him in this effort and his father contributed some of the finances to pay for the many improvements added to the Property. HUGHES and HOWARD each contributed financially to the materials as well. While HOWARD contributed more of the finances, HUGHES performed the bulk of the labor, which is evidence of their intent to jointly own the Property and reap the benefits thereof.

E. <u>HOWARD's argument that *Langevin* overruled *Sack* is false</u>.

HOWARD asserted that *Sack v. Tomlin*, 110 Nev. 204, 871 P.2d 298 (1994) was overruled by *Langevin v. York*, 111 Nev. 1481, 907 P.2d 981 (1995). There is nothing in *Langevin* to suggest that it has in any way overruled *Sack*. Instead, *Langevin* stands for the proposition that the holding in *Sack*, which dealt with partition of property held as tenants in common, applies to joint tenancy.

Moreover, HOWARD did not make this argument in the District Court and she is, therefore, precluded from making it here.

VII.

STANDARD OF REVIEW

The Nevada Supreme Court "has stated on numerous occasions [that] findings of fact and conclusions of law, supported by substantial evidence, will not be set aside unless clearly erroneous." *Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996). In addition, "where the trial court, sitting without a jury, makes a determination predicated upon conflicting evidence, that determination will not be disturbed on appeal where supported by substantial evidence." *Id.* (internal quotations omitted). Substantial evidence is that which a reasonable mind can accept as sufficient to support a conclusion. *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 761, 291 P.3d 114, 118 (2012).

VIII.

ARGUMENT

A. NRS Chapter 39 Authorized HUGHES to seek partition of the Property and the District Court had the duty, in equity, to ascertain and determine the rights of the parties.

This case concerned only a single claim for relief – HUGHES' claim for partition of real property pursuant to NRS Chapter 39. NRS 39.010 provides that any person holding title to real property as joint tenant may bring an action for

partition of said real property according to the rights of the persons holding title thereto. HUGHES and HOWARD hold title to the Property as joint tenants. RA Vol. 3 at 0651-0653.

The District Court was tasked with ascertaining and determining the shares or rights of the parties in the Property. NRS 39.010 and 39.080. If "partition cannot be made without great prejudice to the owners or if the owners consent to a sale," the Court may order a sale of the real property and a division of the proceeds in accordance with the parties' respective interests. NRS 39.010 and 39.120.

HUGHES suggested and the District Court agreed that partition of the Property could not be made without prejudice to the parties. AA Vol. 3 at 0310. The District Court concluded that the parties were entitled to an equal share of the Property and, therefore, ordered HOWARD, the only party then occupying the Property, to buy HUGHES out of his interest or, in the alternative, to work with HUGHES to sell the property and evenly divide the proceeds. AA Vol. 3 at 0310-0311.

The District Court's conclusions were based on a review of the totality of the evidence presented, including the quitclaim deed, conflicting testimony of the parties and other witnesses, and the documentary evidence presented at trial. AA Vol. 3 at 0310. The District Court's conclusions must be upheld because they are based on substantial evidence. Contrary to HOWARD's contention that there was

no evidence of HUGHES' contributions to the Property, there is substantial evidence of HUGHES' contributions to the Property, both in terms of financial contributions in the form of actual cash paid to third party laborers and payment of property taxes and homeowners insurance premiums and in his own significant labor in improving the Property. That evidence was uncontroverted by HOWARD.

B. This Court may wish to clarify the presumptions attached to parties holding property as joint tenants as compared to those holding property as tenants in common.

In Nevada, two unmarried cohabitants owning real property can hold title to property in one of two ways: joint tenancy or as tenants in common. Here, the parties hold title to the Property as joint tenants, which may be created by deed and in accordance with the provisions of NRS 111.065, which specifically allows for a sole owner to transfer to herself and others real property in joint tenancy. By executing the June 11, 2012 Quitclaim Deed to herself and HUGHES, HOWARD created a valid joint tenancy.

The Nevada Supreme Court recognizes the statutory method of creating a joint tenancy, but also the common law aspects of joint tenancy. *Smolen for Smolen v. Smolen*, 114 Nev. 342, 344, 956 P.2d 128, 130 (1998). At common law, joint tenancy exists when the following four unities exist: (1) unity of time, (2) unity of title, (3) unity of interest, and (4) unity of possession. *Id.* Nevada

courts have not clearly expounded on the definitions of these interests as such, but outside jurisdictions lay out the definitions plainly.

Unity of time refers to the requirement that the joint tenants acquire title as joint tenants at the same time. *Edwin Smith, L.L.C. v. Synergy Operating, L.L.C.*, 285 P.3d 656, 662 (N.M. 2012). Unity of title means that joint tenants must acquire their interest by the same conveyance. *Id.* Here, HUGHES and HOWARD acquired title as joint tenants pursuant to a quitclaim deed dated July 11, 2012, thus satisfying the unities of time and title.

Unity of interest refers to the requirement that joint tenants' shares in the property are equal and that the duration of their estates are the same. *Id.* Nevada Courts have recognized the principle of joint tenants presumably holding equal shares. *See Gorden v. Gorden*, 93 Nev. 494, 569 P.2d 397 (1977). Further, in Nevada, placing of property by one party into joint tenancy with another party, as is the situation here, is presumed to be a gift of one-half the value of the property. *Id.* at 497.[2] These presumptions are overcome only by clear and convincing evidence to the contrary. *Id.*

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[2] HOWARD may argue that *Gorden* does not apply here as it involved married joint tenants in process of divorce. However, there is no authority to suggest that joint tenancy is altered in any way by marriage. Married cohabitants have the option of owning real property as community property, as joint tenants, or as tenants in common. Unmarried cohabitants have only the latter two options. There is nothing to suggest that married cohabitants holding title as joint tenants

Finally, unity of possession exists when each joint tenant has the right to possess the entire estate and also refers to the right of each joint tenant to an equal undivided share of the whole. *Edwin Smith*, 285 P.3d at 662. HUGHES and HOWARD each have the right to possession of the subject property, although HOWARD infringed on HUGHES' right to possession by locking him out.

At common law, a tenancy in common exists and a joint tenancy may be terminated when any of the four unities is not present. *See e.g.*, *Alexander v. Boyer*, 253 Md. 511, 519-20, 253 A.2d 359, 364 (1969). Each of the four unities is present in this case, thus reinforcing the joint tenancy interests of HUGHES and HOWARD.

C. <u>HUGHES' view of applicable rebuttable presumptions</u>.

This is a case to which several rebuttable presumptions apply. First, as set forth above, when one party transfers real property to herself and another as joint tenants without consideration, there is a presumption that said transfer is a gift of one-half the value of the property. *Gorden*, 93 Nev. at 497. Further, this presumption is overcome only by clear and convincing proof. *Id.* This presumption is bolstered by the statutory presumption that "a person intends the ordinary consequences of that person's voluntary act." NRS 47.250.

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have any additional rights relating to such ownership as unmarried cohabitants holding title as joint tenants.

Here, as noted above, HOWARD executed a quitclaim deed transferring title to herself and HUGHES as joint tenants. The ordinary consequence of that voluntary action is that she and HUGHES hold title to the Property as joint tenants. The presumption of joint tenancy is that they own the property in equal shares. The deed at issue here was duly recorded and, once admitted into evidence, proves the transfer and the burden is shifted to HOWARD to prove, by clear and convincing evidence, that she did not intend a transfer of one-half the value of the Property. At trial, her only evidence on this point was that she did not recall executing the deed and the District Court properly found that such evidence was not credible.

Next, there is case law to suggest that principles from one of the seminal Nevada partition cases involving tenants in common are also applicable to cases involving joint tenants. That case is *Sack v. Tomlin*, 110 Nev. 204, 871 P.2d 298 (1994), in which the Nevada Supreme Court noted that fractional shares held by tenants in common are presumed to be equal shares unless circumstances indicate otherwise. In *Sack*, the Supreme Court found that "unequal contributions to the acquisition of property by tenants in common who are not related and show no donative intent can rebut the presumption of equal shares." *Id.* at 213. Unlike *Sack*, where the original owner deeded title to herself and another as tenants in common for the express purpose of seeking refinancing, the presumption here,

applying *Gorden*, is that HOWARD had donative intent. Therefore, even under *Sack*, the parties are presumed to hold equal shares and this presumption can only be overcome on showing clearly and convincingly that HOWARD had no donative intent.

Lastly, *Langevin v. York*, 111 Nev. 1481, 907 P.2d 981 (1995) stands for the proposition that the presumptions contained in *Sack* are generally applicable to joint tenancy. However, a recitation and exploration of those presumptions was not made in *Langevin* at least in part because it was clear that one joint tenant was entitled to the bulk of the ownership interests at issue therein. *Langevin* concerns four properties held by unmarried cohabitants, Norman and Laurie. *Langevin*, 111 Nev. at 1482. There are several distinguishing factors between *Langevin* and the matter at hand. First, Norman sold property he owned as his separate property in order that he could move in with Laurie. *Langevin*, 111 Nev. at 1482.

The Supreme Court noted that the nature of the relationship between Norman and Laurie was unclear – Norman was much older than Laurie and Laurie was a real estate agent. *Id.* After moving in together, Laurie found two parcels for which Norman paid the entire purchase price. Laurie received real estate

commissions from these transactions from the sellers and Norman and Laurie were listed on the deed as joint tenants. *Id.*[3]

A third parcel was acquired jointly by the parties after a widow deeded it to them when she could no longer make payments under an encumbrance on the property. *Id.* Norman and Laurie "took over the payments" but Norman paid all of the closing costs associated with the acquisition of the property and subsequently made all of the monthly mortgage payments. *Id.*

The property into which Norman moved to live with Laurie was owned by Laurie, her mother, and her stepfather. *Id.* Norman paid Laurie's mother and stepfather to transfer their interests to Laurie, who then transferred the property to herself and Norman as joint tenants. *Id.* Norman subsequently made nearly all of the mortgage payments associated with this property. *Id.*

Thus, it is clear that all four properties were acquired by Norman and Laurie as joint tenants at the time of purchase and that the purchase prices, closing costs, and mortgage payments were made by Norman almost without exception. In contrast, title to the property at issue here was acquired in joint tenancy by

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[3] Counsel for HUGHES noted in the District Court and notes again here that under *Gorden* and NRS 47.250, there must be consequences for holding property as joint tenants. It is not clear why the Supreme Court, in *Langevin*, did not explore the presumptions attached to joint tenancy as set forth in *Gorden* and NRS 47.250. Similarly, it is not clear that the parties in *Langevin* raised those presumptions in their briefs. Nevertheless, those presumptions should certainly apply and, furthermore, the matter at hand is distinguishable from the facts set forth in *Langevin*.

HUGHES and HOWARD AFTER the purchase thereof by HOWARD. This is an important distinction because, as noted above, the law in Nevada is that when one party places property she owns into joint tenancy with another party, as is the situation here, such a transfer is presumed to be a gift of one-half the value of the property. *Gorden*, *supra*, 93 Nev. at 497.

Perhaps, the legal principle set out in *Gorden* does not apply to the situation laid out in *Langevin* because title was taken by the parties to that case as joint tenants at the time of purchase rather than after, as here. Thus, the Supreme Court applied the principles laid out in *Sack*, and concluded that Norman was entitled to share in proportion to his contributions to the acquisition of the property. *Langevin*, 111 Nev. at 1485-86.

The Supreme Court noted the major distinction between *Sack* and *Langevin* being that in *Sack* the parties held title as tenants in common and in *Langevin* the parties held title as joint tenants. *Id.* at 1485. The basis for applying the principles of *Sack* in spite of this distinction was that the Supreme Court in *Sack* had relied on a California decision in which the parties held title as joint tenants. *Id.*; *see also Kershman v. Kershman*, 192 Cal.App.2d 23 (1961).

However, the California Appellate Court in *Kershman* provides an additional distinction from the case at hand. That court recognized that property may be found to be held other than what is provided in the deed only where there is

an agreement, whether oral or verbal, as to the intended ownership thereof or where such understanding may be inferred from the conduct of the parties. 192 Cal.App.2d at 26 (citing *Thomasset v. Thomasset*, 122 Cal.App.2d 116, 133, 264, P.2d 626, 637 (1953)). In *Kershman*, the evidence showed that the parties had an agreement to share ownership of the property in proportion to their contributions until such time as the party who had contributed less than the other had reimbursed the other party.

Here, there is no agreement, written or verbal, between the parties that would indicate that the subject property should be held other than as joint tenants with presumed equal ownership interests. Moreover, the actions of the parties, in particular HUGHES' actions to devote substantially all of his time and energy towards improving the Property in addition to paying the real property taxes, would indicate that they intended joint and equal ownership of the Property.

Here, in sum there is a presumption that the parties own the Property in joint tenancy and with equal shares. There is a presumption that HOWARD intended the consequences of her execution of the quitclaim deed in favor of herself and HUGHES. There is a presumption that she had donative intent when she executed the quitclaim deed. HUGHES was not required to prove donative intent or that he owns the Property equally with HOWARD although the evidence presented at trial was more than enough to support the District Court's agreement that donative

intent clearly existed. The burden shifted to HOWARD to overcome these presumptions by clear and convincing evidence and, again, her only offer of proof was that she did not recall executing the quitclaim deed and the District Court properly found that her testimony on that point was not credible.

The District Court applied these or similar rebuttable presumptions to the facts at issue here and properly found that the parties held title to the Property as joint tenants with equal shares. To the extent that the District Court's application of the rebuttable presumptions differs slightly from the application urged by HUGHES, HUGHES asserts that the District Court's conclusions were correct and that, either way, its findings should be upheld. *See Dynamic Transit*, 128 Nev. at fn. 3 (citing *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981).

D. Even if this Court concludes that HOWARD somehow overcame each of the applicable presumptions, HUGHES contributed substantially toward the improvement of the Property.

Even if this Court somehow finds reason to support a conclusion that HOWARD's intent was something other than donative and that she has otherwise overcome all other applicable presumptions, the actions of the parties clearly indicates a belief that they owned the Property equally as joint tenants. HUGHES testified that he terminated his employment in order to devote substantially all of his time to cleaning up the Property and then installing numerous improvements on

the Property. These efforts and HUGHES' testimonial evidence thereof was supported by dozens of photographs admitted into evidence. If he did not own the Property or at least believe that HOWARD had transferred an ownership interest in the Property to him, why would he take such drastic steps and expend so much effort in turning the Property from something worth only $67,000 at acquisition to something that was worth $225,000 in January 2017. He may not have contributed funds towards the actual original purchase price of the Property, but he clearly made substantial contributions towards the value of the Property.

This Court should uphold the District Court's conclusion that the parties' actions evidenced intent of jointly working towards a common goal of increasing the value of the Property, which in turn evidences intent by both parties to share in the benefit of ownership of the Property equally. AA Vol. 3 at 0310.

E. HOWARD's argument that *Langevin* overruled *Sack* concerning the presumption of donative intent should be rejected because it is false and because she did not make that argument in the District Court.

In her Opening Brief, HOWARD asserts that the presumption of donative intent set forth in *Sack* was done away by the Supreme Court in *Langevin*. Opening Brief, pp. 8-10. This is nothing short of absurd when considering that HOWARD herself asserts that the Supreme Court, in *Langevin,* concluded that *Sack* controlled its findings therein. Opening Brief, p. 8. The fact of the matter is that there is nothing in *Langevin* to suggest that the element of donative intent,

considered by the Court in *Sack*, ought to be removed from the equation. To do so would lead to absurd results. Furthermore, HOWARD did not make this argument in the District Court and is, therefore, precluded from making it here. *See Bower v. Harrah's Laughlin*, 125 Nev. 470, 479, 215 P.3d 709, 717 (2009) (internal quotations omitted).

In this case, HOWARD transferred an ownership interest to herself and HUGHES without consideration. Under the argument advanced by HOWARD, such an action would never have any effect. According to HOWARD, the action to transfer title without consideration to another person should always simply be ignored. Where the donative transfer occurred here just mere days after HOWARD's initial acquisition of title, there may be a question about HOWARD's intent. Therefore, HUGHES presented substantial amounts of evidence concerning HOWARD's intent, including his own testimonial evidence and that of his father and his daughter. The District Court accepted that evidence as credible, especially in light of HOWARD's incredible rebuttal evidence only that she could not recall executing the deed.

Moreover, extending the logic of HOWARD's asserted standard here, consider a scenario in which a person transferred title she had held for, say, twenty years, to herself and another person as joint tenants without any consideration. Under such a scenario, pursuant to the logic advanced by HOWARD, such a

transfer would be null and void *ab initio* because, she says, presumptive donative intent should not be considered.

HUGHES urges adoption (continuation) of the more logical approach, which is that *Sack* and *Langevin* can and should be read together and that a presumption of donative intent should apply where one person transfers title to herself and another as joint tenants without consideration.

IX.

CONCLUSION

For the reasons stated herein, HUGHES respectfully requests that the District Court's Order After February 6, 2017 Hearing be affirmed.

DATED this 8th day of February, 2018.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,854 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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DATED this 8th day of February, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

✓ Nevada Supreme Court's e-Flex System

as follows:

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DATED this 8th day of February, 2018.

/s/ Nancy Fontenot
NANCY FONTENOT

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