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 SWEETLAND INDUSTRIAL REALTY
 INC
 Douglas County - NV
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 Page: 1 Of 16 Fee: 29.00
 BK-0705 PG- 7735 RPTT: 0.00



**FINDINGS OF FACT, CONCLUSIONS OF LAW,
 JUDGMENT & DECREE**

(Title of Document)

Case No. 02-CV-0080

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**DOUGLAS COUNTY
DISTRICT COURT CLERK**

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

ERNEST JOHN SWEETLAND, III,

Plaintiff,

vs.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
JUDGMENT AND DECREE

MARK SWEETLAND and RUTH
SWEETLAND, Individually and as
Co-Trustees of the Testamentary
Trust of Jack Sweetland;
DOUGLAS COUNTY, NEVADA, Does
1-10, Blue Corporations 1-10;
and Black Partnerships 1-10,

Defendants.

MARK SWEETLAND and RUTH
SWEETLAND, Individually and as
Co-Trustees of the Testamentary
Trust of Jack Sweetland;

Counterclaimants,

vs.

ERNEST JOHN SWEETLAND and PETER
SWEETLAND, and DOEX I-X,

Counterdefendant/
Third Party Defendants.



BK- 0705
PG- 7736

0649826 Page: 2 of 16 07/18/2005

1 THIS MATTER came before the Court for a trial which commenced on July 13, 2004,
2 and concluded on July 20, 2004. Present in court were Mark Sweetland and Ruth Sweetland,
3 represented by Joan C. Wright, Esq. Also present were Ernest John Sweetland (John),
4 represented by G. David Robertson, Esq., Peter Sweetland, represented by Bradley Paul Elley,
5 Esq., and Melvin Schwake, represented by T. Scott Brooke, Esq.
6

7 After hearing testimony and argument from counsel, the Court makes the following
8 findings of fact in the above captioned actions:

9 That the property is located totally within the County of Douglas, State of Nevada.

10 That the subject parcel of real property consists of two lots that front U.S. 50 on the
11 East and Lake Tahoe on the West.

12 That the Northerly parcel APN #01-120-120, (Lot B) consists of approximately 1
13 acre.
14

15 That the Southerly parcel APN #01-120-110. (Lot A) consists of approximately 3
16 acres.

17 That the aforementioned parcels were originally owned by Nellie Sweetland and were
18 derived from a subdivision that was created by deed and map in 1955.

19 That Nellie Sweetland conveyed Lot A to her son, Ernest John Sweetland, Jr. (Jack
20 Sweetland) in 1955.
21

22 That Nellie Sweetland conveyed Lot B to her son, William Sweetland.

23 That William Sweetland conveyed the southerly one half of Lot B to his brother Jack
24 Sweetland.

25 That no objection pursuant to the deed restrictions was raised by family members
26 regarding this transfer of ownership.
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That separate APN numbers were assigned to these lots at a later time by the Douglas County Assessor.

That Jack Sweetland made gift deeds to each of his four children equal to 4/90 interest in the subject parcels.

That pursuant to stipulation, all four siblings have a 25% interest in the trust property.

That these gifts were done for estate planning to effect a reduction of any estate taxes that may have been due at his death.

That Jack Sweetland intended to convey a portion of the real property to his children; therefore, the deeds were valid.

That Jack Sweetland required that each child execute an irrevocable power of attorney in order to maintain control of the entire property.

That this power of attorney was never exercised during the life of the trust.

The balance of the property interest retained by Jack Sweetland was conveyed to a trust which was terminated just prior to his death.

That Jack Sweetland willed all of his interest in the property to a testamentary trust.

That Ruth and Mark Sweetland were appointed Trustees of this testamentary trust.

That the Trustees knew that the trust was not the sole owner of the property.

That the estate tax return filed after his death revealed ownership in 78/90 interest in the property. This was corrected later by an amended filing showing 74/90 interest.

That an easement has existed over the property belonging to SS Tahoe LLC/Schwake and its predecessors in interest since at least 1955 and was used by all since subdivided by Nellie Sweetland.

1 That of necessity any easement must be 12-feet wide in order to accommodate
2 emergency vehicles.

3 That the property on Lake Tahoe has been designated a fish habitat by the TRPA.

4 That TRPA may require an Environmental Impact Review (EIR) if a three-parcel
5 partition/lot-line adjustment is granted.

6 That because of the misrepresentations associated with the boathouse application, the
7 tentative approval issued by TRPA is subject to revocation.

8 That any adjusting of the lot lines by the court would require balancing the coverage of
9 approximately 36,000 square feet between the two parcels.

10 That the Trustees wished to add extra rooms to the existing structure to enhance the
11 rental value of the property and wished to secure financing to do so.

12 That the Trustees were advised that John and Peter objected to the addition, but
13 proceeded nonetheless.

14 That no agreement was ever reached between the beneficiaries not to record their gift
15 deeds.

16 That in 1993 John recorded 3 of his gift deeds.

17 That Peter recorded his gift deeds in 1999.

18 That the lending institution discovered that John's deeds had been recorded and
19 refused to loan any funds until the title was clear.

20 That the Trustees convinced John to convey his interest to the trust in order for the
21 construction to proceed.

22 That this addition added considerable value to the property but was built over the
23 common lot line and encroached on Lot B.

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That a shed (boathouse) was built by Jack Sweetland in 1970 and was utilized as a residence while he constructed the main house.

That the boathouse was used from that time on by the Sweetlands as a residence as needed, although it lacked the usual amenities.

That there is insufficient evidence for the court to determine whether the boathouse actually would meet TRPA's definition of a residence.

That the Trustees failed to file an annual accounting with the California Court as required in that they had not been advised by the California probate attorney to do so.

That when Mark became associated with Jenny Sweetland (a California attorney) in 1997/98, the Trustees learned of the requirement.

That an accounting was submitted and approved by the California Court thereafter.

That to sell the property in a two-parcel configuration without a lot-line adjustment would necessitate demolishing the existing residence or at least the encroachment.

That it would be to the advantage of a purchaser to occupy or rent the existing residence while obtaining the necessary approval to construct any new structures.

That the temporary structures erected by Peter Sweetland next to or added to the boathouse are unsightly and severely detract from the appearance and value of the property.

That these appurtenant items were erected without the consent of the Trustees, or without proper permits.

That these items can be readily removed.

That Peter moved onto the trust property without trustee permission and collected rental income and did not abide by the Trustees' scheduling and notification policy.

That Peter did not remit any of the rental funds to the Trustees.

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That there is certain personal property of Peter's on the premises that should be removed.

That there are furniture and other appliances in the main house which are the property of the trust, including furniture made or bought by Peter.

That if there are any personal expenses, e.g., telephone, cable, etc., to the boathouse, they are chargeable to Peter as long as he resides therein.

Peter paid a \$500 one-time rental fee which was 1/2 of the rental price claiming a set-off for work done on the property.

That Peter harassed cleaning personnel and other persons legally on the property by authority of the Trustees during the time that he was living on the property.

That Peter's actions have caused substantial loss of rental income to the trust.

That although there were clear breaches of fiduciary duties by the Trustees, they were not sufficient to warrant punitive damages.

That the Schwakes (SS Tahoe LLC) do not contest the existence of an easement over their land benefitting the parcels in question as they now stand.

That the Schwakes have withdrawn and dismissed their causes of action in that regard.

That no ancillary probate proceeding was initiated in Nevada. That the California Court specifically found in the probate proceeding that the Nevada property interests would have to be adjudicated in the Nevada courts.

That the California Court gave the Trustees broad powers to do whatever was necessary in their judgment to manage or sell the property.

Water and sewer were hooked up to the boathouse in 1999. No permit was obtained by the Trustees.

1 That the Trustees managed the property, scheduled the use by all siblings on a rotating
2 basis, and generally fulfilled their obligation to the other beneficiaries to a point in time where
3 a subdivision was undertaken.

4 Trustee fees were \$8,238.45 in 1991 and, based on subsequent appraisals, rose to
5 \$67,730.01 in 2001, based on 1% of the value of the estate.

6 That the increases in trustee fees sought by Ruth and Mark based on the 1% of the
7 appraised value of the trust property are not reasonable or justified as their duties have
8 remained basically the same over the life of the trust.

9 That to date the days of occupancy by the parties were as follows: Ruth - 149 days;
10 Mark - 150 days; John - 160 days; and Peter - 720 days.

11 Ruth and Mark paid rental on occasion to guarantee usage of the main house during
12 the peak rental season.

13 Peter requested to be cashed out of his interest in the property in 1998/99.

14 An MAI appraisal was acquired and determined the value at that time of \$3,900,000.

15 That the Trustees offered Peter \$555,000 for his interest, which was rejected by Peter.

16 That the offer was grossly unfair based on the appraisals.

17 That Peter should have been offered 1/4 of the appraisal minus 1/4 of the trust
18 expenses.

19 That TRPA currently has a moratorium on the installation of piers and buoys in Lake
20 Tahoe.

21 That one parcel provides more flexibility for locating a pier or buoys.

22 That the TRPA permit to expand the property to 3 parcels expired on May 17, 2004,
23 and an extension has been applied for.



1 That asphalt had been in place on the driveway on Lot E (Schwake) which was
2 replaced with concrete by Eugene Sweetland's father in the early 1970's without objection of
3 the current owners.

4 That by stipulation the propane tank currently on Lot D will be moved to Lot E, which
5 it services.

6 That the division of the parcel in a four-parcel configuration as sought by the Trustees
7 to afford equal value, while providing substantially equal coverage, cannot be accomplished.

8 That it is beyond TRPA's authority to grant approval of a four parcel subdivision as it
9 is inconsistent with TRPA's zoning.

10 That the Trustees appointed Jenny Sweetland (wife of Mark Sweetland) as their agent
11 in pursuing the subdivision of the property.

12 That the Trustees hired Gary Midkiff to assist in the application process with the
13 TRPA, as he was an expert in that field to pursue the subdivision.

14 That Gary Midkiff later expressed his opinion to the Trustees that the subdivision
15 approval from TRPA was doubtful and did no further work in this regard.

16 That Jenny Sweetland prepared an application to the TRPA for the subdivision that
17 was signed by the Trustees as sole owners of the property.

18 That the aforementioned application was not signed by all persons or entities with a
19 legal interest in the property.

20 That deed restrictions required the approval of all of the other parcel owners to concur
21 in any further division of an existing lot.

22 That TRPA requires that such applications be signed by all persons with a legal
23 interest in the property in question.

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That John and Peter objected to the subdivision of the property.

The application for subdivision that was tentatively approved by the TRPA was replete with misrepresentations.

That the TRPA questioned the designation of the boathouse as a primary residence and requested additional information in that regard.

That the pictures submitted to TRPA by Jenny Sweetland in order to obtain the tentative permit were of improvements to the residence, not the boathouse.

That other representations were made by Jenny Sweetland to the TRPA that were inaccurate or false.

That the actions of the Trustees in pursuing the subdivision of the property without the concurrence of all beneficiaries was not in the best interests of the trust beneficiaries.

That Mark and Ruth breached their fiduciary duties to the other beneficiaries in pursuing the subdivision.

That any funds expended in pursuing the subdivision, e.g., appraisals, consultant fees, surveys, are not properly chargeable to the trust, but should be borne by Mark and Ruth individually.

That it would be unjust to diminish John or Peter's interest for fees incurred in pursuing the subdivision.

That the Trustees petitioned the court in California for direction as to the extent of their authority to pursue subdivision or sale of the trust property.

That John appeared at these proceedings and protested the subdivision.

That the sale of the trust property as one piece would be very desirable as it would provide more privacy than other configurations.



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That the property would lend itself to an estate site insofar as it now has greater coverage as a result of the TRPA land capability challenge that was successful.

That leaving the two parcels as they currently are configured and selling as one property would give the buyer greater flexibility in the use of the property.

That changing the lot line and corresponding width of the parcels could also require a review under TRPA's scenic ordinance.

That a two-parcel split would require an additional driveway and that there would be considerable impact upon the coverage of both parcels by the construction of two driveways.

That the property, as is, has a value of ten million to fourteen million dollars..

That a fair asking price is twelve million dollars.

That the court cannot conduct an adequate marketing scheme that would be comparable to a listing with a realtor.

That the property, to be properly marketed, needs to be listed with a reputable realtor to insure that the highest selling price is obtained.

That the parties stipulated to retain McCall Realty to market the property after receiving two other bids that required a higher commission.

CONCLUSION OF LAW

That each sibling has a 25% vested interest as tenants in common in the property. *Karow v. Mitchell, et al.*, 110 Nev. 958, 963 (1994), (full faith and credit clause of U.S. Constitution requires that a final judgment entered by a sister state be respected by the courts of this state).

That the causes of action before the court, regardless of how denominated, pertain to real property located in Nevada, i.e., they involve title to, or possession of said property.

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Nevada district courts are vested with jurisdiction thereover. Nev. Const. Art. 6, Section 6; *Girola v. Roussille*, 81 Nev. 661, 662 (1965); NRS 13.010(2); *Perry v. Edmonds*, 59 Nev. 60, 66 (1938).

That, by clear and convincing evidence, an easement by implication arose by operation of law over the parcel owned by SS Tahoe LLC/Schwake's predecessors in interest upon Nellie Sweetland's division of her property into six lots for the benefit of her children in 1955. *Boyd v. McDonald*, 81 Nev. 642, 649 (1981).

That Nellie intended, and her children reasonably expected to continue to use the servient estate eventually conveyed to SS Tahoe LLC/Schwake, after the subdivided parcels were formed from the original property, thereby giving rise to an easement by implication. *Jackson v. Nash*, 109 Nev. 1202, 1214 (1993).

That the Sweetland family's addition of concrete over the disputed section of SS Tahoe LLC/Schwake's property occurred without objection, which further evidences the understanding of the parties as to the existence of an easement over the property now owned by SS Tahoe LLC/Schwake. Further, that the owners of lots A and B had a right to maintain the easement in good repair as owners of the easement. *Sinkey v. Board of County Commissioners*, 80 Nev. 526, 529 (1964).

That SS Tahoe LLC/Schwake conceded the existence of an easement for the use of neighboring owners of parcels which once formed part of the aggregate Nellie Sweetland parcel and further stipulated that the dominant easement owners shall enjoy the corresponding rights as provided by law.

That if the addition of concrete to that part of the driveway had constituted a trespass or injury to real property, the statute of limitations has long since run. NRS 11.190(3)(b).

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That the trustees did not act in good faith toward their fellow beneficiaries as was their duty so to do, once they began the process of subdividing the trust property without the concurrence of all beneficiaries. *Bank of Nevada v. Speirs*, 95 Nev. 870, 873 (1979); *Riley v. Rockwell*, 103 Nev. 698, 701-02 (1987).

Mark, Ruth, John, and Peter were in a fiduciary relationship with one another as sibling tenants in common. *Lanigir v. Arden*, 82 Nev. 28, 35 (1966).

That it is not possible to divide the property in distinct parcels for the benefit of each of the four siblings such that there would not be great prejudice to the rights and interests of some of them. NRS 39.010; *Kent v. Kent*, 108 Nev. 398, 402 (1992).

That partition of the aggregate property into smaller units would result in inequitable distribution of the value of the parcels such that some of the parties would suffer great prejudice. *Dondero v. Vansickle*, 11 Nev. 389, 393 (1876).

That the award of attorney fees incident to the partition action is discretionary with the court. *Rasmussen v. Thomas*, 98 Nev. 216, 221 (1982).

That the partition action in question benefitted all parties to that action such that the award of attorney fees, to or against any particular party is unwarranted. *Id.*

That, insofar as no partition of the land was ordered, no fees may be assessed against a particular party pursuant to NRS 39.480. *Kovacs v. Acosta*, 107 Nev. 57, 60 (1990).

JUDGMENT

That the property Lots B & A shall be sold as a whole without any lot-line adjustment. Mark, Ruth, John and Peter shall be entitled to an equal share in the proceeds, i.e, 25%, subject to the court's ruling herein and the California court's testamentary supervision.

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That the property shall be placed for sale, for an initial period of sixty (60) days through McCall Realty at a four-percent commission rate, to the highest bidder at a minimum price of twelve million dollars. Competing bids shall be in \$100,000 increments.

That the proceeds of the sale shall be deposited with the Douglas County Clerk in an interest bearing account to be distributed by approval of this court after the testamentary trust proceedings are closed in California.

That the amount distributable to Peter Sweetland shall be offset by the total funds collected by him for the rent of the property, which sum shall revert to the trust.

That the proceeds distributable to Mark Sweetland and Ruth Reed shall be offset by the amount of funds charged in pursuit of the subdivision of the property, as those expenses were not incurred for the benefit of the trust.

That Peter Sweetland shall remove his personal property, except furniture in the main house, from the property, including the sheds: only the main house, boathouse with the little addition shall remain. The furniture, appliances, etc., shall remain in the main house as property of the trust.

That the deed evidencing the easement over SS Tahoe LLC/Schwake's property is incorporated herein by reference.

That pending sale, Mark, Ruth, and John shall be entitled to occupy the property for two weeks at a time according to a schedule maintained by Ruth. John shall have first choice in this regard. Peter shall not occupy the main residence, as he occupies the boathouse. He shall cooperate in all respects with the other family members, realtors and guests during his residency.



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IT IS HEREBY ORDERED that a copy of this Judgment and Decree be transmitted by the Clerk to the TRPA and Contra Costa County Superior Court for inclusion in Case No. P.99-01415 - In Re: The Jack Sweetland Trust.

DATED this 23rd day of July, 2004.



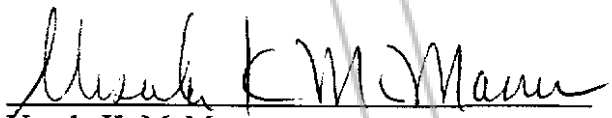
NORMAN C. ROBISON
Senior District Judge

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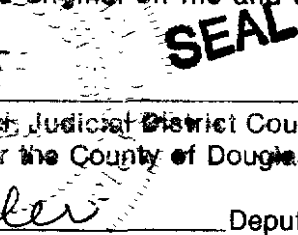
Copies served by mail this 23rd day of July, 2004, to: Joan C. Wright, Esq., P. O. Box 646-402, Carson City, NV 89702; Bradley Paul Elley, Esq., 120 Country Club Drive, Suite 5, Incline Village, NV 89451; G. David Robertson, Esq., 50 West Liberty Street, Suite 600, Reno, NV 89501; T. Scott Brooke, Esq., P. O. Box 2860, Minden, NV 89423.


Ursula K. McManus



CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: 7/7/05
 **SEAL**
Breed Clerk of the 9th Judicial District Court of the State of Nevada, in and for the County of Douglas,

By J. Thaler Deputy