Electronically Filed
11/30/2018 11:09 AM
Steven D. Grierson
CLERK OF THE COURT

HOWARD & HOWARD ATTORNEYS PLLC
Robert Hernquist, Nevada Bar No. 10616
rwh@h2law.com
Wells Fargo Tower, Suite 1000
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169-5980
Telephone: (702) 257-1483
Facsimile: (702) 567-1568

Attorneys for Plaintiff Marta Bauer

Electronically Filed
Dec 10 2018 11:24 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

HOWARD & HOWARD ATTORNEYS, PLLC
3800 Howard Hughes Parkway, Suite 1000
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DISTRICT COURT

CLARK COUNTY, NEVADA

MARTA BAUER, an individual; Plaintiff, vs. FRANK H. BAUER, an individual; MICHAEL BAUER, an individual; and DOES I through X and ROE CORPORATIONS I through X, and all other persons unknown claiming any legal or equitable right, title, estate, lien or interest in the real property described in the Complaint, Defendants.	Case No. A-15-723521-C Dept. No. 31 **NOTICE OF CROSS-APPEAL**

Notice is hereby given that on the 30th day of November, 20148, Plaintiff Marta Bauer, by filing this Notice of Cross-Appeal, hereby appeals the Findings of Fact and Conclusions of Law and Judgment entered on August 10, 2018 denying Marta Bauer's request for attorneys' fees pursuant to NRS 39.480 and an offset for costs paid by her to maintain the property, Defendant Frank Bauer having filed his Notice of Appeal regarding that same order on November 16, 2018.

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ Robert Hernquist
Robert Hernquist, Nevada Bar No. 10616

Attorneys for Plaintiff Marta Bauer

Docket 77499 Document 2018-907693

Case Number: A-15-723521-C

HOWARD & HOWARD ATTORNEYS, PLLC
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Las Vegas, Nevada 89169
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2,, the undersigned hereby certifies a true and correct copy of *Plaintiffs' Notice of Cross-Appeal* was electronically served on the 30th day of November, 2018, to the following:

Malcolm P. LaVergne
400 South 4th Street, Suite 500
Las Vegas, Nevada 89101

/s/ Angela Westlake
An Employee of Howard & Howard Attorneys PLLC

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Steven D. Grierson
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Attorneys for Plaintiff Marta Bauer

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARTA BAUER, an individual; Plaintiff, vs. FRANK H. BAUER, an individual; MICHAEL BAUER, an individual; and DOES I through X and ROE CORPORATIONS I through X, and all other persons unknown claiming any legal or equitable right, title, estate, lien or interest in the real property described in the Complaint, Defendants.	Case No. A-15-723521-C Dept. No. 31 **CASE APPEAL STATEMENT**

1. The name of cross-appellant filing this case appeal statament.

Marta Bauer.

2. The name of the judge who entered the order or judgment being appealed.

The Honorable Joanna S. Kishner.

3. The name of each cross-appellant and the name and address of counsel for each appellant.

Marta Bauer, Cross-Appellant
c/o Robert Hernquist
Howard & Howard Attorneys PLLC

Case Number: A-15-723521-C

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Las Vegas, Nevada 89169-5980

4. The name of each respondent and the name and address of appellate counsel, if known, for each respondent, but if the name of a respondent's appellate counsel is not known, then the name and address of that respondent's trial counsel.

Frank Bauer, Appellant / Cross-Respondent
c/o Malcolm P. LaVergne
400 South 4th Street, Suite 500
Las Vegas, Nevada 89101

5. Whether an attorney identified in response to subparagraph (D) is not licensed to practice law in Nevada, and if so, whether the district court granted that attorney permission to appear under SCR 42, including a copy of any district court order granting that permission.

No.

6. Whether the appellant was represented by appointed counsel in the district court, and whether the appellant is represented by appointed counsel on appeal.

No.

7. Whether the district court granted the appellant leave to proceed in forma pauperis, and if so, the date of the district court's order granting that leave.

No.

8. The date that the proceedings commenced in the district court.

Plaintiff's Complaint was filed on August 24, 2015.

9. A brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court.

This is a partition action involving a former marital residence located in Clark County, Nevada. Marta Bauer ("Marta") filed this partition action following years of delay and interference by Frank Bauer ("Frank") and Michael Bauer ("Michael"). Marta filed a divorce action in 2008,

and her divorce from Michael was finalized in 2010. One month after Marta filed for divorce, and just weeks after an order was entered by the divorce court freezing the couple's assets, Michael recorded a quitclaim deed which purported to transfer his half interest in the marital residence to his father, Frank. Unfortunately, that fraudulent transfer was not unwound in time. Consequently, rather than unwinding the fraudulent transfer Marta is instead limited to a partition claim.

Defendants fought the partition sale throughout the litigation of this case, and made numerous efforts to delay the sale of the home and, following the sale of the home, the division of the sale proceeds. Defendants filed improper counter-claims, which were dismissed. Marta moved for partial summary judgment of the home, which Defendants opposed.

Trial occurred from May 31, 2018 through June 4, 2018. The district court split the sale proceeds evenly, and did not provide any offset in favor of Marta for her attorney fees and or for costs to maintain the property paid solely by her including $18,659.71 for property taxes, $7,222.39 for homeowners insurance, $6,500 for homeowners association dues and $380 to replace a glass window. .

10. Whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding.

No.

11. Whether the appeal involves child custody or visitation.

No.

12. In civil cases, whether the appeal involves the possibility of settlement.

Yes.

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ Robert Hernquist
Robert Hernquist, Nevada Bar No. 10616

Attorneys for Plaintiff Marta Bauer

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2,, the undersigned hereby certifies a true and correct copy of *Plaintiffs' Case Appeal Statement* was electronically served on the 30th day of November, 2018, to the following:

Malcolm P. LaVergne
400 South 4th Street, Suite 500
Las Vegas, Nevada 89101

/s/ Angela Westlake
An Employee of Howard & Howard Attorneys PLLC

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-15-723521-C

Marta Bauer, Plaintiff(s)	§	Location:	**Department 31**
vs.	§	Judicial Officer:	**Kishner, Joanna S.**
Frank Bauer, Defendant(s)	§	Filed on:	**08/24/2015**
	§	Case Number History:	
	§	Cross-Reference Case Number:	**A723521**
	§	Supreme Court No.:	**77499**

CASE INFORMATION

Statistical Closures
09/20/2018 Judgment Reached (bench trial)

Case Type: **Other Title to Property**

Case Status: **09/20/2018 Closed**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	A-15-723521-C
Court	Department 31
Date Assigned	07/01/2017
Judicial Officer	Kishner, Joanna S.

PARTY INFORMATION

Plaintiff	**Bauer, Marta**	**Hernquist, Robert, ESQ** *Retained* 702-383-8972(W)
Defendant	**Bauer, Frank H**	**Lavergne, Malcolm P.** *Retained* 702-448-7981(W)
	Bauer, Michael Removed: 06/01/2018 Dismissed	
	The Frank Bauer Revocable Living Trust Dated April 26, 2016 Removed: 06/01/2018 Dismissed	
Counter Claimant	**Bauer, Frank H** Removed: 02/09/2016 Dismissed	**Lavergne, Malcolm P.** *Retained* 702-448-7981(W)
Counter Defendant	**Bauer, Marta** Removed: 02/09/2016 Dismissed	**Hernquist, Robert, ESQ** *Retained* 702-383-8972(W)

DATE — EVENTS & ORDERS OF THE COURT — INDEX

EVENTS

08/24/2015 Complaint
Filed By: Plaintiff Bauer, Marta
Complaint for Partition of Real Property

09/25/2015 Affidavit of Service
Filed By: Plaintiff Bauer, Marta
Affidavit of Service

09/25/2015	Affidavit of Service Filed By: Plaintiff Bauer, Marta *Affidavit of Service*
10/20/2015	Notice of Lis Pendens Filed by: Plaintiff Bauer, Marta *Notice of Lis Pendens*
10/28/2015	Motion for Partial Summary Judgment Filed By: Plaintiff Bauer, Marta *Plaintiff's Motion for Partial Summary Judgment*
11/16/2015	Three Day Notice of Intent to Default Filed by: Plaintiff Bauer, Marta *Three-Day Notice of Intent to Take Default*
11/16/2015	Three Day Notice of Intent to Default Filed by: Plaintiff Bauer, Marta *Three-Day Notice of Intent to Take Default*
11/20/2015	Answer and Counterclaim Filed By: Defendant Bauer, Frank H *Defendants' Answers and Counterclaim*
11/22/2015	Certificate of Service Filed by: Defendant Bauer, Frank H *Certificate of Service*
11/24/2015	Peremptory Challenge Filed by: Defendant Bauer, Frank H *Peremptory Challenge of a Judge*
11/25/2015	Notice of Department Reassignment *Notice of Department Reassignment*
11/30/2015	Opposition and Countermotion Filed By: Defendant Bauer, Frank H *Opposition to Motion for Partial Summary Judgment and Counter-Motion*
12/04/2015	Peremptory Challenge Filed by: Plaintiff Bauer, Marta *Peremptory Challenge of Judge*
12/07/2015	Notice of Department Reassignment Party: Plaintiff Bauer, Marta *Notice of Department Reassignment*
12/14/2015	Motion to Dismiss Filed By: Plaintiff Bauer, Marta *Plaintiff's Motion to Dismiss Frank Bauer's Counterclaims*
12/31/2015	Reply in Support

Filed By: Plaintiff Bauer, Marta
Plaintiff's Reply In Support Of Her Motion For Partial Summary Judgment And Opposition To Countermotion

01/05/2016 Individual Case Conference Report
Filed By: Defendant Bauer, Frank H
Individual Case Conference Report

01/12/2016 Notice of Early Case Conference
Filed By: Plaintiff Bauer, Marta
Notice of Early Case Conference

01/19/2016 Opposition
Filed By: Defendant Bauer, Frank H
Opposition to Motion to Dismiss

01/20/2016 Notice of Early Case Conference
Filed By: Plaintiff Bauer, Marta
Re-Notice of Early Case Conference

02/05/2016 Demand for Jury Trial
Filed By: Defendant Bauer, Frank H
Demand for Jury Trial

02/09/2016 Order
Filed By: Plaintiff Bauer, Marta
Order

02/09/2016 Order
Filed By: Plaintiff Bauer, Marta
Order

02/10/2016 Notice of Entry of Order
Filed By: Plaintiff Bauer, Marta
Notice of Entry of Order

02/10/2016 Notice of Entry of Order
Filed By: Plaintiff Bauer, Marta
Notice of Entry of Order

02/10/2016 Notice to Appear for Discovery Conference
Notice to Appear for Discovery Conference

02/12/2016 Joint Case Conference Report
Filed By: Plaintiff Bauer, Marta
Joint Case Conference Report

03/10/2016 Scheduling Order
Scheduling Order

03/17/2016 Order Setting Civil Jury Trial
Order Setting Civil Jury Trial

04/19/2016

	Stipulation and Order Filed by: Plaintiff Bauer, Marta *Stipulation and Order to Continue Hearing on Plaintiff's Motion for Partial Summary Judgment*
04/20/2016	Notice of Entry of Stipulation and Order Filed By: Plaintiff Bauer, Marta *Notice of Entry of Stipulation and Order to Continue Hearing on Plaintiff's Motion For Partial Summary Judgment*
06/09/2016	Findings of Fact, Conclusions of Law and Judgment Filed by: Plaintiff Bauer, Marta *Findings of Fact, Conclusions of Law and Order Granting Partial Summary Judgment*
06/13/2016	Notice of Entry Filed By: Plaintiff Bauer, Marta *Notice of Entry of Findings of Fact, Conclusions of Law and Order Granting Partial Summary Judgment*
06/24/2016	Disclosure of Documents and Witnesses Pursuant to NRCP 16.1 Filed By: Defendant Bauer, Frank H *Defendants' First Supplemental Discovery Disclosures Pursuant to NRCP 16.1 and 26(e)*
06/27/2016	Motion to Amend Judgment Filed By: Defendant Bauer, Frank H *Motion to Amend Findings of Fact, Conclusions of Law and Order Granting Partial Summary Judgment*
06/27/2016	Motion to Add Party Filed By: Defendant Bauer, Frank H *Motion to Join Necessary Party*
06/27/2016	Notice of Motion Filed By: Defendant Bauer, Frank H *Notice of Motion to Join Necessary Party*
06/27/2016	Notice of Motion Filed By: Defendant Bauer, Frank H *Notice of Motion to Amend Findings of Fact, Conclusions of Law and Order Granting Partial Summary Judgment*
07/13/2016	Opposition Filed By: Plaintiff Bauer, Marta *Plaintiff Marta Bauer's Limited Opposition to Defendants' Motion to Join Necessary Party*
07/13/2016	Opposition Filed By: Plaintiff Bauer, Marta *Plaintiff Marta Bauer's Opposition to Defendants' Motion to Amend Findings of Fact, Conclusions of Law and Order Granting Partial Summary Judgment*
07/27/2016	Reply Filed by: Defendant Bauer, Frank H *Defendant's Reply in Support of Motion to Join Necessary Party*
07/27/2016	Reply

Filed by: Defendant Bauer, Frank H
Defendant's Reply in Support of Motion Pursuant to NRCP 52(b) to Amend Findings of Fact, Conclusions of Law and Order Granting Partial Summary Judgment

09/14/2016 Stipulation and Order
Filed by: Plaintiff Bauer, Marta
Stipulation and Order Regarding Partition Sale of Real Property

09/15/2016 Notice of Entry of Stipulation and Order
Filed By: Plaintiff Bauer, Marta
Notice of Entry of Stipulation and Order Regarding Partition Sale of Real Property

09/24/2016 Motion to Strike
Filed By: Plaintiff Bauer, Marta
Plaintiff's Motion to Strike Jury Demand

10/18/2016 Notice
Filed By: Plaintiff Bauer, Marta
Notice of Release of Lis Pendens

12/01/2016 Order Setting Civil Non-Jury Trial
Order Setting Civil Non-Jury Trial

03/13/2017 Supplemental Disclosure of Witnesses & Documents
Party: Defendant Bauer, Frank H
Defendants' Second Supplemental Discovery Disclosures Pursuant to NRCP 16.1 and 26(e)

03/23/2017 Joint Pre-Trial Memorandum
Filed By: Plaintiff Bauer, Marta
Joint Pre-Trial Memorandum

04/27/2017 Certificate of Service
Filed by: Plaintiff Bauer, Marta
Certificate of Service

04/27/2017 Notice of Bankruptcy
Filed By: Defendant Bauer, Michael
Notice of Bankruptcy

06/29/2017 Notice of Change of Hearing
Notice of Change of Hearing

07/01/2017 Case Reassigned to Department 31
Civil Case Reassignment to Judge Joanna S. Kishner

12/14/2017 Notice
Filed By: Plaintiff Bauer, Marta
Notice of Stipulation and Order Lifting Automatic Bankruptcy Stay

01/30/2018 Motion
Filed By: Plaintiff Bauer, Marta
Plaintiff's Motion for Trial Setting

02/16/2018 Opposition and Countermotion

Filed By: Defendant Bauer, Frank H; Defendant Bauer, Michael
Defendants' Response to Motion for Trial Setting and Countermotion to Reopen Discovery

03/05/2018 Reply in Support
Filed By: Plaintiff Bauer, Marta
Plaintiff's Reply in Support of her Motion for Trial Setting and Opposition to Countermotion to Reopen Discovery

03/26/2018 Order
Filed By: Plaintiff Bauer, Marta
Order on Plaintiff's Motion for Trial Setting and Defendants' Countermotion to Reopen Discovery

03/26/2018 Amended Order Setting Civil Non-Jury Trial
Amended Order Setting Civil Non-Jury Trial, Calendar Call, Pre-Trial Conf.

03/28/2018 Notice of Entry of Order
Filed By: Plaintiff Bauer, Marta
Notice of Entry of Order on Plaintiff's Motion for Trial Setting and Defendants' Countermotion to Reopen Discovery

05/18/2018 Joint Pre-Trial Memorandum
Filed By: Plaintiff Bauer, Marta; Defendant Bauer, Frank H; Defendant Bauer, Michael
Joint Pre-Trial Memorandum

05/25/2018 Finding of Fact and Conclusions of Law
Filed By: Plaintiff Bauer, Marta
Plaintiff Marta Bauer's Proposed Findings of Fact and Conclusions of Law

05/28/2018 Trial Brief
Filed By: Defendant Bauer, Frank H; Defendant Bauer, Michael
Defendants' Trial Brief for Determination of Claims to Proceeds of Sale

06/04/2018 Memorandum
Filed By: Plaintiff Bauer, Marta
Plaintiff Marta Bauer's Bench Memorandum re: Defendant Frank Bauer's Improper Effort to Introduce Documents That Were Not Produced Until After Trial Commenced

06/29/2018 Trial Brief
Filed By: Plaintiff Bauer, Marta
Plaintiff Marta Bauer's Trial Brief

06/29/2018 Trial Brief
Filed By: Defendant Bauer, Frank H
Defendant Frank Bauer's Closing Arguments Trial Brief

08/09/2018 Findings of Fact, Conclusions of Law and Judgment
Findings of Fact, Conclusions of Law and Judgment

08/10/2018 Notice of Entry of Judgment
Filed By: Plaintiff Bauer, Marta
Notice of Entry of Judgment

08/24/2018 Motion for New Trial

Filed By: Defendant Bauer, Frank H
Defendant's Motion for New Trial and/or to Amend Judgment

09/05/2018 Receipt of Copy
Filed by: Defendant Bauer, Frank H
Receipt of Copy of Motion to Stay Enforcement of Judgment

09/05/2018 Motion to Stay
Filed By: Defendant Bauer, Frank H
Motion to Stay Enforcement of Judgment; Ex Parte Application for Order Shortening Time and Order

09/10/2018 Opposition to Motion
Filed By: Plaintiff Bauer, Marta
Opposition to Defendant Frank Bauer's Motion to Stay Enforcement of Judgment (On Shortened Tine)

09/10/2018 Opposition to Motion
Filed By: Plaintiff Bauer, Marta
Opposition to Defendant Frank Bauer's Motion for New Trial or to Amend Judgment

09/12/2018 Reply to Opposition
Filed by: Defendant Bauer, Frank H
Reply to Opposition to Motion to Stay Enforcement

09/12/2018 Transcript of Proceedings
Partial Transcript - Bench Trial - Day 3, Marta Bauer Testimony Only 6/4/18

09/12/2018 Transcript of Proceedings
Partial Transcript - Bench Trial - Day 3, Marta Bauer Testimony Only 6/4/18

09/20/2018 Order to Statistically Close Case
Civil Order to Statistically Close Case

09/25/2018 Order
Filed By: Plaintiff Bauer, Marta
Order on Defendant's Motion to Stay Enforcement of Judgment

09/25/2018 Notice of Entry of Order
Filed By: Plaintiff Bauer, Marta
Notice of Entry of Order

10/17/2018 Order
Filed By: Plaintiff Bauer, Marta
Order on Defendant's Motion for New Trial and/or to Amend Judgment

10/18/2018 Notice of Entry of Order
Filed By: Plaintiff Bauer, Marta
Notice of Entry of Order

11/16/2018 Notice of Appeal
Filed By: Defendant Bauer, Frank H
Defendant/Counterclaim Plaintiff Frank Bauer's Notice of Appeal

11/16/2018 Case Appeal Statement
Filed By: Defendant Bauer, Frank H
Case Appeal Statement

11/30/2018 Notice of Appeal
Filed By: Plaintiff Bauer, Marta
Notice of Cross-Appeal

11/30/2018 Case Appeal Statement
Filed By: Plaintiff Bauer, Marta
Case Appeal Statement

DISPOSITIONS

02/09/2016 **Order of Dismissal** (Judicial Officer: Herndon, Douglas W.)
Debtors: Frank H Bauer (Counter Claimant)
Creditors: Marta Bauer (Counter Defendant)
Judgment: 02/09/2016, Docketed: 02/17/2016
Comment: Certain Claims

06/09/2016 **Partial Summary Judgment** (Judicial Officer: Herndon, Douglas W.)
Debtors: Frank H Bauer (Defendant), Michael Bauer (Defendant)
Creditors: Marta Bauer (Plaintiff)
Judgment: 06/09/2016, Docketed: 06/16/2016

HEARINGS

01/06/2016 **Motion for Partial Summary Judgment** (9:00 AM) (Judicial Officer: Herndon, Douglas W.)
01/06/2016, 04/20/2016
Plaintiff's Motion for Partial Summary Judgment
Continued;
Granted;
Journal Entry Details:
Mr. Lavergne advised there will not be an issue with the title. Mr. Hernquist advised the sale price will be $270,000 and requested authority to move forward with realtor. Mr. Lavergne noted no opposition, except for the realtor fee. Discussion regarding fee. COURT ORDERED, motion GRANTED, noting if there are any issues with the fee, issue may be raised with the Court. Mr. Hernquist inquired as to if parties need to seek approval if they have a buyer. Court stated unless sale price is significantly lower than the list price and parties cannot agree, counsel may contact Court to place on calendar. Mr. Hernquist to prepare order and provide to opposing counsel for review prior to submitting for signature.;
Continued;
Granted;

01/06/2016 **Opposition and Countermotion** (9:00 AM) (Judicial Officer: Herndon, Douglas W.)
Defendant's Opposition to Motion for Partial Summary Judgment and Counter-Motion
Denied;

01/06/2016 **All Pending Motions** (9:00 AM) (Judicial Officer: Herndon, Douglas W.)
Matter Heard;
Journal Entry Details:
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT...OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTER MOTION Arguments by counsel. Court stated it is early in the litigation and noted his sense is that partition is appropriate, however, he will allow more time for limited discovery. Mr. Lavergne requested 120 days for discovery. Mr. Hernquist noted opposition to 120 days. Discussion regarding independent case conference. Court DENIED request for 120 days, and ORDERED matter CONTINUED ninety (90) days. As to Counter Motion to Dismiss Michael Bauer, COURT ORDERED, motion DENIED. Discussion regarding claim for civil conspiracy. Upon Court's inquiry, Mr. Hernquist noted they are not asserting a civil conspiracy claim, however, are

preserving their right. Mr. Hernquist to prepare order and provide to opposing counsel for review. 4/6/16 9:00 AM PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT;

01/20/2016 **Motion to Dismiss** (9:00 AM) (Judicial Officer: Herndon, Douglas W.)
Plaintiff's Motion to Dismiss Frank Bauer's Counterclaims
Granted;
Journal Entry Details:
Matter TRAILED and RECALLED. All parties present. Arguments by counsel. Court stated FINDINGS and ORDERED, motion GRANTED, noting Statute of Fraud and Statute of Limitations apply. Mr. Hernquist to prepare order and provide to opposing counsel for review. ;

03/08/2016 *CANCELED* **Discovery Conference** (9:00 AM) (Judicial Officer: Bulla, Bonnie)
Vacated - per Commissioner

08/03/2016 **Motion to Add Parties** (9:00 AM) (Judicial Officer: Herndon, Douglas W.)
Frank H. Bauer's Motion to Join Necessary Party
Granted;

08/03/2016 **Motion to Amend** (9:00 AM) (Judicial Officer: Herndon, Douglas W.)
Events: 06/27/2016 Notice of Motion
Frank H. Bauer's Motion Pursuant to NRCP 52(b) to Amend Findings of Fact, Conclusions of Law and Order Granting Partial Summary Judgment
Moot;

08/03/2016 **All Pending Motions** (9:00 AM) (Judicial Officer: Herndon, Douglas W.)
Matter Heard;
Journal Entry Details:
Also present: Mr. Schweinert, Court Appointed Broker FRANK H. BAUER'S MOTION TO JOIN NECESSARY PARTY...FRANK K. BAUER'S MOTION PURSUANT TO NRCP 52(B) TO AMEND FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER GRANTING PARTIAL SUMMARY JUDGMENT There being no opposition, COURT ORDERED, Frank H. Bauer's Motion to Join Necessary Party, GRANTED. As to Frank H. Bauer's Motion Pursuant to NRCP 52 (b) to Amend Findings of Fact, Conclusions of Law and Order Granting Partial Summary Judgment, Mr. Lavergne argued court has already retained jurisdiction over fees which moots the request to amend, noting parties do not have an exact costs for fees as to Mr. Schweinert. Mr. Hernquist agrees motion is premature, noting an offer has been accepted at $275,000. Discussion as to disbursement of funds. Statement by Mr. Schweinert as to requests by title company. Mr. Hernquist believes a stipulated order can be prepared and a hearing will not be needed. Court requested parties include in order any requests by title company, noting parties may contact Court if there are any issues. COURT ORDERED, Frank K. Bauer's Motion Pursuant to NRCP 52(b) to Amend Findings of Facts, Conclusions of Law and Order Granting Partial Summary Judgment, MOOT per prior Court ruling. ;

08/08/2016 *CANCELED* **Motion** (3:00 AM) (Judicial Officer: Herndon, Douglas W.)
Vacated - On in Error
ion to Amend Findings of Fact, Conclusions of Law and Order Granting Partial Summary Judgment

09/28/2016 **Calendar Call** (9:00 AM) (Judicial Officer: Herndon, Douglas W.)
Matter Heard;
Journal Entry Details:
Mr. Hernquist advised parties have reached an agreement, noting closing of the property is Friday. COURT ORDERED, Status Check SET, noting counsel may take off calendar if there are no issues and documents are filed. COURT FURTHER ORDERED, trial VACATED. 10/26/16 9:00 AM STATUS CHECK: SETTLEMENT DOCUMENTS;

10/10/2016 *CANCELED* **Jury Trial** (10:00 AM) (Judicial Officer: Herndon, Douglas W.)
Vacated - per Judge

10/26/2016 **Status Check: Settlement Documents** (9:00 AM) (Judicial Officer: Herndon, Douglas W.)

	10/26/2016, 11/30/2016 *Status Check: Settlement Documents* Continued; Matter Heard; Continued; Matter Heard; Journal Entry Details: *Mr. Lavergne advised that Mr. Hernquist is not present, noting he contacted his office who indicated that Mr. Hernquist is currently in an arbitration hearing. Further, Mr. Lavergne does not want to make any representations until Mr. Hernquist is present, noting there is also a November 2, 2016 hearing to Strike the Jury Demand. COURT ORDERED, matter CONTINUED, November 2 hearing RESET to next hearing date. 11/30/16 9:00 AM STATUS CHECK: SETTLEMENT DOCUMENTS...PLAINTIFF'S MOTION TO STRIKE JURY DEMAND;*
11/30/2016	**Motion to Strike** (9:00 AM) (Judicial Officer: Herndon, Douglas W.) *Plaintiff's Motion to Strike Jury Demand* Granted;
11/30/2016	**All Pending Motions** (9:00 AM) (Judicial Officer: Herndon, Douglas W.) Matter Heard; Journal Entry Details: *PLAINTIFF'S MOTION TO STRIKE JURY DEMAND...STATUS CHECK: SETTLEMENT DOCUMENTS Mr. Hernquist stated Mr. Lavergne had a conflict, therefore, is not present. Court stated it is understanding that case is not resolved on all matters. As to Plaintiff's Motion to Strike Jury Demand, COURT ORDERED, motion GRANTED, noting no opposition. Mr. Hernquist advised the property has been sold, however, parties have not reached an agreement on disbursement. Upon Court's inquiry, Mr. Hernquist does not have additional discovery to conduct and requested a hearing or bench trial for the unresolved issue. Court stated his Judicial Executive Assistant will send out a bench trial scheduling order for March. ;*
03/08/2017	**Calendar Call** (9:00 AM) (Judicial Officer: Herndon, Douglas W.) Trial Date Set; Journal Entry Details: *Mr. Hernquist advised the matter has not been settled. Mr. Lavergne stated they did an EDCR 2.67 6.27 last week. Mr. Hernquist further stated there will be about 3-4 witnesses and Mr. Lavergne informed trial should last about one day. COURT ORDERED, parties to get the proposed Findings of Fact. COURT FURTHER ORDERED, trial date VACATED and RESET. 03/24/17 10:00 AM BENCH TRIAL ;*
03/13/2017	*CANCELED* **Bench Trial** (10:00 AM) (Judicial Officer: Herndon, Douglas W.) *Vacated - per Judge*
03/24/2017	*CANCELED* **Bench Trial** (10:00 AM) (Judicial Officer: Herndon, Douglas W.) *Vacated - per Judge*
05/17/2017	**Status Check: Reset Trial Date** (9:00 AM) (Judicial Officer: Herndon, Douglas W.) Matter Heard; Journal Entry Details: *Discussion regarding bankruptcy notice. Mr. Lavergne requested case be stayed as meeting with creditors is next week. Mr. Hernquist argued in opposition, noting delays. Further arguments by Mr. Lavergne. COURT ORDERED, matter SET for Status Check. Court stated he is not inclined to stay matter, however, trial will not be heard prior to July 1, noting case will be reassigned to a new department as Court will not be hearing Civil matters after July 1, 2017. Counsel will be notified when matter is assigned to a new department. 7/05/17 9:00 AM STATUS CHECK: BANKRUPTCY/TRIAL SETTING;*
07/11/2017	**Status Check** (9:00 AM) (Judicial Officer: Saitta, Nancy) *STATUS CHECK: TRIAL SETTING/BANKRUPTCY* Matter Heard;

Journal Entry Details:
Colloquy regarding bankruptcy. Mr. Hernquist stated his client's ex-husband filed bankruptcy and argued regarding the real property and stated that does not stay does not apply here. Further, aside from the bankruptcy issues, Mr. Hernquist announced ready for trial. Mr. Lavergne made representations regarding the fraudulent transfer issue head by Judge Ritchie in Family Court and further stated all of statements by plaintiff's counsel are highly inaccurate. Court noted the bankruptcy issue and DIRECTED counsel to file a motion.;

03/06/2018 **Motion** (9:00 AM) (Judicial Officer: Kishner, Joanna S.)
Plaintiff's Motion for Trial Setting
Motion Granted; Plaintiff's Motion for Trial Setting

03/06/2018 **Response and Countermotion** (9:00 AM) (Judicial Officer: Kishner, Joanna S.)
Defendants' Response to Motion for Trial Setting and Countermotion to Reopen Discovery
Denied Without Prejudice; Defendants' Response to Motion for Trial Setting and Countermotion to Reopen Discovery

03/06/2018 **All Pending Motions** (9:00 AM) (Judicial Officer: Kishner, Joanna S.)
Trial Date Set;
Journal Entry Details:
PLAINTIFF'S MOTION FOR TRIAL SETTING...DEFENDANTS' RESPONSE TO MOTION FOR TRIAL SETTING AND COUNTERMOTION TO REOPEN DISCOVERY After the Court's consideration of the papers submitted by counsel in connection with this matter, and, having heard the oral arguments presented by both Mr. Hernquist and Mr. Lavergne, COURT ORDERED, Plaintiff's Motion for Trial Setting GRANTED; Defendants' Countermotion to Reopen Discovery DENIED WITHOUT PREJUDICE. Mr. Hernquist to the prepare the Order. 4/26/18 10:15 AM PRE TRIAL CONFERENCE 5/22/18 9:00 AM CALENDAR CALL 5/29/18 9:00 AM BENCH TRIAL ;

04/26/2018 **Pre Trial Conference** (10:15 AM) (Judicial Officer: Kishner, Joanna S.)
Trial Date Set;
Journal Entry Details:
Counsel anticipate 2 days for trial. Colloquy regarding trial setting. COURT ORDERED Trial Date SET as No. 2 for May 30 to June 1, 2018; Pre Trial Memorandum DUE May 18, 2018 by noon. 5/30/18 9:00 AM BENCH TRIAL;

05/22/2018 **Calendar Call** (9:00 AM) (Judicial Officer: Kishner, Joanna S.)
Matter Heard;
Journal Entry Details:
Counsel anticipate 2-3 days for trial. Colloquy regarding current trial setting and the Court's conflict on May 30, 2018. Pursuant to the agreement of counsel, COURT ORDERED May 30, 2018 Trial Date VACATED, trial will commence on May 31, 2018 at 1:00 p.m. Mr. Hernquist indicated exhibits will be provided on Friday, May 25, 2018; that plaintiff has no deposition transcripts or audio visual needs. Mr. Lavergne indicated he would have a need for some audio visual for demonstrative purposes. COURT FINDS parties IN COMPLIANCE with the Calendar Call and reminded counsel that Proposed Findings of Fact and Conclusions of Law are due May 25, 2018.;

05/31/2018 **Bench Trial** (1:00 PM) (Judicial Officer: Kishner, Joanna S.)
05/31/2018-06/01/2018, 06/04/2018, 08/10/2018
Trial Continues;
Trial Continues;
Continued for Chambers Decision;

Decision Made;
Journal Entry Details:
Decision and Order filed separately. See Findings of Fact, Conclusions of Law and Judgment dated 8/9/18.;

Trial Continues;
Trial Continues;
Continued for Chambers Decision;

Decision Made;
Journal Entry Details:
BENCH TRIAL - DAY 3 Mr. Hernquist stated that he received 42 pages of documents yesterday that Defendant wants to introduce today; that he filed a Bench Memorandum; and provided the Court with a courtesy copy. Mr. Hernquist stated the documents were untimely and should be excluded. Resume testimony of Frank Bauer. Testimony of Marta Bauer and exhibits presented (see Worksheets). Defense RESTED. Plaintiff had no rebuttal witnesses and RESTED. Counsel stipulated to file simultaneous briefing no later than 5:00 p.m. June 29, 2018 and COURT ORDERED, matter CONTINUED to Chambers for Decision. Exhibits not offered or admitted returned to counsel. 7/13/19 (CHAMBERS) BENCH TRIAL DECISION;

Trial Continues;
Trial Continues;
Continued for Chambers Decision;

Decision Made;
Journal Entry Details:
BENCH TRIAL - DAY 2 Plaintiff call plaintiff Marta Bauer in his case in Chief. Marta Bauer SWORN and TESTIFIED. Testimony and Exhibits presented (see Worksheets). Mr. Lavergne objected to the admission of Exhibit 53. Mr. Hernquist made an OFFER OF PROOF. Noting Michael Bauer is still a defendant, COURT ORDERED Exhibit ADMITTED over the objection of counsel and the Court will detemine what weight is to be given to the Exhibit. Further testimony and exhibits presented (see Worksheets). Further exhibit objections; arguments of counsel; and the Court's rulings thereon. At the request of counsel, the Court TAKES JUDICIAL NOTICE of the Order dated 7/15/15. Further testimony by Ms. Bauer. Witness excused subject to recall. PLAINTIFF RESTS. Mr. Lavergne made an Oral Rule 52 Motion to Dismiss Michael Bauer and the Frank Bsuer Irrevocable Family Trust. Following arguments by counsel, Mr. Hernquist stipulated to dismiss the Trust and requested the Court to rule on the Rule 52 motion as to Defendant Michael Bauer. COURT ORDERED, Oral Rule 52 Motion to Dismiss Michael Bauer GRANTED; FINDING Rule 52c had been met and Michael Bauer DISMISSED effective June 1, 2018. Mr. Lavergne calls his first witness in Defendant's case in chief. Frank Bauer SWORN and TESTIFIED. COURT ORDERED, Trial CONTINUED. 6/4/18 9:30 AM BENCH TRIAL CONTINUES;

Trial Continues;
Trial Continues;
Continued for Chambers Decision;

Decision Made;
Journal Entry Details:
BENCH TRIAL - DAY 1 Mr. Hernquist waived Opening Statement and reserved his response to Mr. Lavergne's Opening Statement. Opening Statement by Mr. Lavergne. Response to Opening Statement by Mr. Hernquist. The Court noted inconsistencies in the parties pleadings' captions and directed counsel to correct the case's caption prior to Closing Arguments. Mr. Lavergne stated the parties may stipulate to dismiss the Trust and Michael Bauer. Counsel will discuss the matter further. Mr. Hernquist calls Defendant Frank Bauer as his first witness in Plaintiff's case in chief. Frank Bauer SWORN and TESTIFIED. Testimony and Exhibits presented (see Worksheets). Witness excused subject to recall in Defendant's case in chief. Arthur Schweinert SWORN and TESTIFIED. Testimony and Exhibits presented (see Worksheets). Witness excused for all purposes and released from the subpoena. COURT ORDERED, Trial Continued. 6/1/18 9:00 AM BENCH TRIAL CONTINUES;

09/13/2018 **Motion to Stay** (10:00 AM) (Judicial Officer: Kishner, Joanna S.)
Defendant's Motion to Stay Enforcement of Judgment; Ex Parte Application for Order Shortening Time and Order
Motion Denied;
Journal Entry Details:
Court noted she has reviewed the pleadings and is inclined to deny the motion at this juncture as the basis set forth in the motion has previously been resolved by the Court. Further, Court noted she has reviewed the transcript for the day of testimony regarding the insurance check. Mr. Lavergne submitted on the motion. Mr. Hernquist advised there is a pending rule 59 motion and Defendant's moved for rule 62(b) stay after the 10 days time period and the funds had been disbursed. Further arguments. COURT ORDERED, motion DENIED; Mr. Hernquist to prepare and submit the appropriate order; Mr. Lavergne to review and sign off.;

09/25/2018 **Motion** (9:00 AM) (Judicial Officer: Kishner, Joanna S.)
Defendant's Motion for New Trial and/or to Amend Judgment

Motion Denied;
Journal Entry Details:
COURT NOTED, its inclination to deny the motion, as the parties could stipulate to amend the caption and it did not preclude it from ruling; ADDITIONALLY, as to the insurance matter it had jurisdiction, and as to the matter to amend, it was the finder of fact and as the trier of fact it found its ruling in that regard. As to the caption matter, COURT ADDITIONALLY NOTED, this was a bench trial, there wasn't confusion as to how it made its determination on the findings of fact and conclusions of law, and it articulated the relief due. Mr. LaVergne stated after Mike Bower and the trust were dismissed, he believed it to be an admonishment, not an order, to clean up the caption and that was where the confusion came from. COURT summarized the reasons it suggests the parties clean up the captions; however, NOTED, just because the caption was not cleaned up, that did not mean the court addressed additional claims, and it was only addressing the issues of Frank Bauer and Marta Bauer, but was not going into any underlying issues, that could have been within the purview of the family court division. Further argument by Mr. LaVergne regarding the provisions contained within the Findings of Fact, with respect to the child support and regarding the issue of the jurisdiction of the insurance check, as he was not requesting the Court to litigate the check. Mr. Hernquist argued the finding on the child support was relevant as he was arguing the equity, the insurance check was litigated pursuant to rule 15(a), and there was no reason to litigate that issue again. Further argument by Mr. LaVergne regarding Mr. Bauer getting behind on the child support which he did bring current; additionally, argued regarding the insurance check issue not being part of the relief requested, as it was just part of the background of the findings. COURT NOTED they were not two separate cases, the insurance matter was addressed as part of the trial, it viewed it by the consent of the parties, and it found it was not isolated; FURTHER, it was part of the house and the funds related, and that was the reason it was included in the findings of fact and conclusions of law. Further argument by Mr. LaVergne regarding subject matter jurisdiction; noting the pleadings were to partition the real property in this case. Mr. Hernquist argued that he was asking for relief and the failure to object is implied consent. COURT summarized some of the background matters it had to look at, the issues argued, and the contextual matters that it provided to show how the proceeds were to be distributed. COURT DOESN'T FIND there was an error in law, or that it was argued as a separate part as it was about the house, and there wasn't a change in the law or that there should be a new trial; ORDERED, motion for new trial and / or to amend the Judgment DENIED; Mr. Hernquist to prepare the order.;

DATE	FINANCIAL INFORMATION	
	Defendant Bauer, Michael	
	Total Charges	30.00
	Total Payments and Credits	30.00
	Balance Due as of 12/4/2018	**0.00**
	Defendant Bauer, Frank H	
	Total Charges	697.00
	Total Payments and Credits	697.00
	Balance Due as of 12/4/2018	**0.00**
	Plaintiff Bauer, Marta	
	Total Charges	987.50
	Total Payments and Credits	987.50
	Balance Due as of 12/4/2018	**0.00**

DISTRICT COURT CIVIL COVER SHEET A-15-723521-C

County, Nevada

Case No. XXV

(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
Marta Bauer	Frank H. Bauer; Michael Bauer
Attorney (name/address/phone):	Attorney (name/address/phone):
Robert Hernquist; Wade B. Gochnour	
Howard & Howard Attorneys PLLC, 3800 Howard Hughes Pkwy.	
Las Vegas, NV 89169 - 702-257-1483	

II. Nature of Controversy *(please select the one most applicable filing type below)*

Civil Case Filing Types

Real Property	Torts	
Landlord/Tenant	**Negligence**	**Other Torts**
☐ Unlawful Detainer	☐ Auto	☐ Product Liability
☐ Other Landlord/Tenant	☐ Premises Liability	☐ Intentional Misconduct
Title to Property	☐ Other Negligence	☐ Employment Tort
☐ Judicial Foreclosure	**Malpractice**	☐ Insurance Tort
☒ Other Title to Property	☐ Medical/Dental	☐ Other Tort
Other Real Property	☐ Legal	
☐ Condemnation/Eminent Domain	☐ Accounting	
☐ Other Real Property	☐ Other Malpractice	

Probate	Construction Defect & Contract	Judicial Review/Appeal
Probate *(select case type and estate value)*	**Construction Defect**	**Judicial Review**
☐ Summary Administration	☐ Chapter 40	☐ Foreclosure Mediation Case
☐ General Administration	☐ Other Construction Defect	☐ Petition to Seal Records
☐ Special Administration	**Contract Case**	☐ Mental Competency
☐ Set Aside	☐ Uniform Commercial Code	**Nevada State Agency Appeal**
☐ Trust/Conservatorship	☐ Building and Construction	☐ Department of Motor Vehicle
☐ Other Probate	☐ Insurance Carrier	☐ Worker's Compensation
Estate Value	☐ Commercial Instrument	☐ Other Nevada State Agency
☐ Over $200,000	☐ Collection of Accounts	**Appeal Other**
☐ Between $100,000 and $200,000	☐ Employment Contract	☐ Appeal from Lower Court
☐ Under $100,000 or Unknown	☐ Other Contract	☐ Other Judicial Review/Appeal
☐ Under $2,500		

Civil Writ		Other Civil Filing
Civil Writ		**Other Civil Filing**
☐ Writ of Habeas Corpus	☐ Writ of Prohibition	☐ Compromise of Minor's Claim
☐ Writ of Mandamus	☐ Other Civil Writ	☐ Foreign Judgment
☐ Writ of Quo Warrant		☐ Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

August 24, 2015

Date

Signature of initiating party or representative

See other side for family-related case filings.

Electronically Filed
8/9/2018 4:48 PM
Steven D. Grierson
CLERK OF THE COURT

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

MARTA BAUER, an individual;

Plaintiff,

vs.

FRANK H. BAUER, an individual; MICHAEL BAUER, an individual; and DOES I through X and ROE CORPORATIONS I through X, and all other persons unknown claiming any legal or equitable right, title, estate, lien or interest in the real property described in the Complaint,

Defendants.

Case No. A-15-723521-C

Dept. No. XXXI

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

I. FINDINGS OF FACT

1. The subject of this action is the real property located in the City of Las Vegas, County of Clark, commonly known as 9490 Magnificent Avenue, Las Vegas, Nevada 89148, APN 163-31-514-026 (hereinafter the "Magnificent Property").

2. Marta Bauer ("Plaintiff" or "Marta Bauer") and her ex-husband, Michael Bauer ("Michael Bauer"), purchased the Magnificent Property for $367,000.00 on August 16, 2005. (August 16, 2005, Grant, Bargain and Sale Deed, Trial Exhibit 1). It was undisputed that at least $10,000.00 of the $367,000.00 dollars came from Marta and Michael's funds.

3. Part of the funds used to purchase the house came from a bank

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LAS VEGAS, NEVADA 89155

account titled in Michael Bauer and Frank Bauer's ("Frank Bauer") name. There was insufficient evidence presented as to how much of the funds that were used to purchase the house came from Marta Bauer and Michael Bauer's funds versus how much of the funds came from accounts titled in Michael and Frank's names. There was also evidence that part of the funds came from the sale of houses in New York, but there was not sufficient evidence presented as to who owned the houses. Frank Bauer is Michael Bauer's father and is Marta Bauer's ex-father-in-law.

4. Frank Bauer testified that his bank statements showed that Michael and Marta Bauer were loaned the money to purchase the house at issue and were paying back the loan in, *inter alia*, $500.00 increments. Marta Bauer denied that the payments were for any loan related to the house, but she did not recall what the payments were for. Michael Bauer did not testify or participate in the litigation.[1]

5. The Magnificent Property is a single-family residence and is not susceptible to physical division. (*See* photographs of the Magnificent Property, Exhibit 3; Property Detail, Exhibit 9). As reflected in the August 16, 2005, Grant, Bargain, and Sale Deed; title and ownership of the Magnificent Property was conveyed to "Michael Bauer and Marta Bauer, Husband and Wife, as Joint Tenants." (Trial Exhibit 1).

6. In October of 2008, Marta Bauer filed a Complaint for Divorce against Michael (the "Divorce Action").

7. On October 21, 2008, a Joint Preliminary Injunction was issued in the Divorce Action which enjoined Michael, *inter alia*, from transferring,

[1] Michael Bauer filed for Bankruptcy in the Northern District of New York in April 2017. (Exhibit 54) As he had already quit-claimed his interest in the property as set forth herein, his filing of bankruptcy did not impact the instant partition action or the allocation of the proceeds thereof as conceded by both parties.

encumbering, concealing, selling, or otherwise disposing of any joint, common, or community property of the parties or property which was the subject of any claim of community interest. (Joint Preliminary Injunction dated 10/21/2008; Trial Exhibit 3).

8. On November 10, 2008, Michael recorded a Quitclaim Deed with the Clark County Recorder's Office which transferred his "undivided one-half (1/2) interest" in the Magnificent Property to Frank Bauer. (November 10, 2008, Quitclaim Deed; Trial Exhibit 2).

9. Marta Bauer was granted exclusive possession of the Magnificent Property at a hearing in the Divorce Action conducted in December of 2008, and she continued to reside in the home with her children until it was sold. The only testimony presented was that from a time period in 2008 until 2016, Marta Bauer paid 100 percent (100%) of all household expenses including property taxes and homeowners association fees. (Order; Trial Exhibit 4 at P. 5).

10. From a time period in 2008 through September of 2016, Marta Bauer made all payments for property taxes on the Magnificent Property and the payments totaled $18,659.71. There was no testimony provided as to what was the source of those funds or receipts showing who paid the funds.

11. From 2008 through September of 2016, Marta Bauer made all payments for homeowner's insurance on the Magnificent Property and those payments totaled $7,222.39. There was no testimony provided as to what was the source of those funds or receipts showing who paid the funds. Neither Frank Bauer nor Michael made any homeowner's insurance payments during that time.

12. There was conflicting testimony as to whether at some point of time during the 2008 to 2016 time period, Marta Bauer allowed her male companion/boyfriend, Alpay Cam, to live at the house or whether he just visited the house. There was documentary and testimonial evidence that Marta Bauer

received rental payments of $450.00 per month during a particular time period. (Exhibit 51) Marta Bauer testified that the payments were from a female friend who lived at the residence for a year.

13. A trial was held in the Divorce Action in January of 2010, and Marta Bauer was awarded a judgment against Michael for $141,333.00 representing her one-half interest in the community assets as well as for spousal support arrearages.[2] (Divorce Decree; Trial Exhibit 5).

14. Following entry of the divorce decree, Michael did not timely fulfill his child support obligations.

15. Following entry of the divorce decree, Michael did not make any payments toward the judgment (the "Divorce Judgment") until 2016. (Trial Exhibit 53). On March 20, 2017, the Family Court conducted an Evidentiary Hearing and determined that Michael had concealed income and ordered that he make monthly payments of $750.00 toward the Divorce Judgment, and also determined that the amount owed at that time was $186,778.69. (Trial Exhibits 52 & 53).

16. Although Marta Bauer had lived with Frank Bauer and his family when she was younger due to her friendship with another of the Bauer children, after her divorce to Michael Bauer, discord developed between Marta Bauer and Frank Bauer. As a result of the tension, the parties agreed that it was no longer practical for Marta Bauer and Frank Bauer to be co-owners of the Magnificent Property which precipitated the instant litigation and other litigation matters between the parties.

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[2] The Decree was not entered until 23 months after the Trial. (Exhibit 5).

17. In June of 2014, there was a break-in at the Magnificent Property and numerous items were stolen including cash, cameras, jewelry, and all of the electronics belonging to Marta Bauer and Michael's three children such as iPads, iPods, video game systems, etc.

18. Following the break in, Marta Bauer's home insurance company issued a check as reimbursement for the stolen items. However, the insurer issued the check payable to both Marta Bauer and Frank Bauer in the amount of $5,410.61, in accordance with the names listed on the title to the home.

19. Marta Bauer testified that she immediately contacted both Michael and Frank Bauer and requested their cooperation in endorsing the insurance check so that the children's items could be replaced. In response, Frank Bauer stated he would not endorse the insurance check unless Marta Bauer executed a lease agreement whereby she would pay rent in the amount of $700.00 per month for her and the children to remain at the Magnificent Property. Likewise, Marta Bauer testified that Michael Bauer stated he would not cooperate unless Marta Bauer released the outstanding judgments entered against him and also bought him out of the Magnificent Property via a cash payment. In September 2016, Frank Bauer endorsed the insurance check and those funds have been held in trust by Marta Bauer's counsel since then. Frank Bauer asserted via his counsel (see Exhibit 13) in 2016 that he should be entitled to $1200 of the funds received from insurance since he replace some of the stolen electronics. No receipts or other evidence was presented supporting the payments.

20. Frank Bauer has never resided at the Magnificent Property or otherwise been in possession of the Magnificent Property. It was disputed whether the Order from the divorce between Marta Bauer and Michael Bauer excluded both Frank and Michael Bauer from the property or just Michael Bauer. As a result of his not being able to reside at the property, Frank Bauer testified

that he felt that he was due rent as an excluded co-tenant. Marta Bauer disputed his claim.

21. No written lease has ever been executed between Marta Bauer and Frank Bauer.

22. Evidence was presented that since Marta Bauer would not enter into a lease or pay rent yet maintained exclusive control of the premises, Frank Bauer initiated an eviction action against her. In that matter, on February 27, 2015, Frank Bauer posted a 5-Day Notice to Quit or Pay Rent on the front door of the Magnificent Property, which stated that past-due rent in the amount of $1,400.00 was owed to Frank Bauer as the landlord. (Notice to Quit or Pay Rent; Trial Exhibit 6) Marta Bauer testified that she felt harmed due to her difficulty in finding a rental home and that should be taken into consideration in the evaluation of the partition amount awarded each party. (Trial Exhibit 50).

23. On or about September 14, 2016, a Stipulation and Order Regarding Partition Sale of Real Property was electronically filed and entered. (Exhibit 46) The Stipulation and Order provided that it was pursuant to NRS 39.010 and detailed how the property would be sold and commissions paid. The actual partitioning of the funds was left to this Court in the instant action.

24. Marta Bauer initiated this partition action when she filed her Complaint on August 24, 2015.

25. Michael was served with the Summons and Complaint on September 14, 2015, and Frank Bauer was served with the Summons and Complaint on September 17, 2015.

26. Defendants responded by filing a Counterclaim asserting claims for: (a) Breach of Contract; (b) Unjust Enrichment; and (c) Equitable Lien. (Counterclaim filed 11/20/2015).

27. On February 9, 2016, an Order was entered dismissing all of Defendants' counterclaims. (See Order entered 2/9/2016).

28. On October 28, 2015, Marta Bauer filed a Motion for Partial Summary Judgment seeking authorization to market and sell the Magnificent Property. (Plaintiff's Motion for Partial Summary Judgment filed 10/28/2015). Defendants opposed the Motion and requested 56(f) relief to conduct additional discovery. (Defendants' Opposition filed 11/30/2015). Judge Herndon granted that request but Defendants did not pursue any additional discovery.

29. On June 9, 2016, an Order was entered granting Plaintiff's Motion for Partial Summary Judgment. (See Order entered 6/9/2016). Pursuant to that Order, Art Schweinert was appointed by the Court to market and sell the Magnificent Property.

30. On June 27, 2016, Frank Bauer filed a Motion to Amend the Summary Judgment Order asking the Court to appoint a different broker to market and sell the Magnificent Property, which Marta Bauer opposed. (Motion to Amend Judgment filed 6/27/2016 and Opposition to Motion to Amend Judgment filed 7/13/2016). At a hearing on August 3, 2016, Frank Bauer's counsel agreed the Motion was moot. (Minute Order dated 8/3/2016). Judge Herndon agreed and denied the Motion. (*Id.*).

31. On June 27, 2016, Frank Bauer filed a Motion to Join Necessary Party, wherein he disclosed that he had transferred his interest in the Magnificent Property to his Trust in April 2016. (Motion to Join Necessary Party filed 6/27/2016). Marta Bauer filed a limited Opposition, noting that this transfer should have been disclosed in a timely manner, that the Motion did not identify the proper procedural method for adding a party, and the Trust could have been added via stipulation rather than a motion that imposed additional legal fees. (Opposition filed 7/13/2016).

32. From June 9, 2016, through the closing of the sale, Art Schweinert diligently communicated with the parties and their counsel regarding his efforts to market and sell the property. (Trial Exhibits 10-43).

33. In order to market the Magnificent Property for sale, Marta Bauer was required to make certain repairs including replacing a broken window at a cost of $300.00. Those costs were paid solely by Marta Bauer.

34. The Magnificent Property sold on July 16, 2016, for a purchase price of $275,000.00. (Trial Exhibit 43). The sale proceeds have been held in Trust by Marta Bauer's counsel since then. (Trial Exhibit 46).

35. On September 24, 2016, Marta Bauer filed a Motion to Strike Frank Bauer's jury demand. The Motion was unopposed, and was granted on November 30, 2016. (Minute Order entered 11/30/2016).

36. On April 27, 2017, Defendant Michael Bauer filed for bankruptcy in New York. (Trial Exhibit 54).

37. On December 14, 2017, a Stipulation and Order Lifting Automatic Bankruptcy Stay was filed with this Court. (Stipulation and Order Lifting Automatic Bankruptcy Stay filed 12/14/2017).

38. Marta Bauer has asserted that she incurred $15,419.00 in legal fees and $1,252.70 in costs in this action. (Trial Exhibit 47). She also asserted that she has incurred $13,176.00 in legal fees in Michael Bauer's bankruptcy action. (Trial Exhibits 48 & 49). Frank Bauer did not provide any documentation relating to attorney fees or costs; and instead, set forth that such fees and costs should be deferred for a separate hearing and Order.

39. Trial in this matter took place in May and June 2018. The parties subsequently requested that they do their closing arguments via written briefs. The Court then reviewed all the evidence including reviewing the closing briefs of the parties.

II. CONCLUSIONS OF LAW

A. THE PARTIES ARE EACH ENTITLED TO A FIFTY PERCENT PROPORTIONATE SHARE OF THE SALE PROCEEDS WITH NO OFFSETS

1. Nevada has a statutory partition process (NRS 39.010-.490). A partition action is an equitable one in which the courts will apply the broad principles of equity. *Kent v. Kent*, 108 Nev. 398, 402, 835 P.2d 8, 10 (1992), citing *Dall v. Confidence Mining Co.*, 3 Nev. 485 (1868). "While sitting in its equitable capacity, a court may avail itself of powers broad, flexible and capable of being expanded to deal with novel cases and conditions." *MacFarlane v. Peters*, 103 Cal. App. 3d 627, 631, 163 Cal. Rptr. 655, 657 (Cal. Ct. App. 1980). Lack of precedent is no deterrent to equitable relief. *Id.* at 632, 163 Cal. Rptr. at 657. The court's equitable power has been utilized to adjudicate wrongs concerning real property. *Id.* at 629, 163 Cal. Rptr. at 655 (affirming the lower court's use of equitable powers to reform a treasurer's deed, adjust certain monetary claims, reject two claimed easements and quiet title to five contiguous unimproved lots forming a 125-foot square parcel fronting on Archer Street in Pacific Beach.)

2. Here, equity commands that Marta Bauer and Frank Bauer be awarded equal shares of the sale proceeds as neither has established that they are entitled to an amount above and beyond fifty percent (50%). While each party asked the Court to take into account testimony or documents from other proceedings including the divorce proceeding, the Justice Court Eviction proceeding, and the New York Bankruptcy of Michael Bauer, the Court cannot revisit rulings and determinations made in those proceedings. Instead, the Court has to look at what evidence was presented in the instant case and whether that evidence demonstrates that Plaintiff has met her burden or if Defendant has prevailed on his defenses. The Court also has to look at the equities to determine

how to partition and allocate the funds in accordance with NRS 39.010-490. In so doing, as set forth herein, the Court finds that the sale proceeds of $257,986.65 from the sale of the Magnificent Property should be divided equally. To the extent that the realtors have not been paid, the commission amount set forth in the exhibits is appropriate and there should not be any deduction from that amount as Frank Bauer did not establish that the sum was unreasonable or should be reduced. To the extent that the realtors have already been paid then the remaining sale proceeds shall be split so that each party shall receive half. The Court also finds that since there was no evidence presented that the insurance funds were to reimburse any property of Frank Bauer the insurance proceeds in the amount of $5,410.61 should be distributed to Marta Bauer. Finally, per the stipulation of the parties and the resultant Order of the Court which previously had the case, the fees expended to market and sell the property by the realtor were appropriate and should not be reduced.

3. Specifically, the Court finds that Plaintiff did not prevail in this case on her claim that the source of the funds to purchase the property was from the community assets of Michael and Marta Bauer. Instead, the issue of what was and what was not community property was determined by the Family Court in the divorce proceeding. In the instant proceeding, this Court had to determine the rights between Marta Bauer and Frank Bauer, who as the father of the ex-husband, Michael, was not a party to the divorce proceeding.

4. The bank statements, as well as the testimony presented, demonstrates more likely than not that part of the funds used to purchase the house was a loan from Frank Bauer. Frank Bauer, however, did not show exactly how much was a loan, how much were co-mingled funds with his son Michael, or how much of the loan was paid back. Thus, in light of the totality of the evidence including that Michael Bauer quit-claimed what he termed his half interest in the

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property to Frank and Frank did not challenge that determination, the Court finds that Frank Bauer is entitled to a 50 percent (50%) interest in the house. Based on the evidence presented, this is the more likely than not the allocation that was intended by the parties. Further in equity, the same result would occur.

5. Frank Bauer contended that he was a tenant-in-common and was excluded from the premises. Generally, each tenant-in-common has a right to occupy the whole of the property. *Rasmussen v. Thomas,* 98 Nev. 216, 644 P.2d 1030 (1982). However, if one owner takes possession of the property adversely to the other's interest, or otherwise ousts the nonresident owner of his or her right to use and enjoy the property, the nonresident is entitled to be paid his or her proportionate share of the property's fair rental value. *Thomas v. Thomas,* 712 So.2d 822, 823 (Fla. 1998). On the other hand, if the resident owner does not occupy the property adversely or as the result of an ouster, the property is deemed to be occupied on behalf of both owners. *Id.* In that case, the nonresident is not entitled to rent except as an offset against the resident owner's claim for a contribution to property expenses. *Id.*

6. An "ouster," in the law of tenancy-in-common, is the wrongful dispossession or exclusion by one tenant of his co-tenant or co-tenants from the common property of which they are entitled to possession. *Hacienda Ranch Homes v. Superior Court*, 131 Cal.Rptr.3d 498 (Cal. 2011); *Estate of Hughes*, 5 Cal. App. 4th 1607, 1612, 7 Cal. Rptr. 2d 742 (Cal. Ct. App. 1992). If one tenant ousts the other co-tenant, then the tenant who committed the ousting must pay the fair market value for the property for the duration of time that he or she remained on the property as a result of the ouster. *Estate of Hughes*, 5 Cal. App.4th at 1611 ("Absent an ouster a cotenant out of possession has no right to recover the rental value of the property from a cotenant in possession.").

7. "The rule in Nevada "is that in the absence of an agreement to pay,

or ouster by the co-tenant in possession, a tenant in common who occupies all or more than his proportionate share of the common premises is not liable, because of such occupancy alone, to his co-tenant for rent or the use and occupation of the premises." *Lanigir v. Arden*, 85 Nev. 79, 80, 450 P.2d 148, 149 (1969) (citation omitted)(emphasis added). *See also Rasmussen,* 98 Nev. at 220, 644 P.2d at 1033 (same

8. Here, Frank Bauer has admitted there was never a lease between Marta Bauer and Frank Bauer or an agreement that Marta Bauer would pay rent to Frank Bauer.

9. Instead, it was disputed whether Frank Bauer ever asked to move into the property or whether the Family Court Order precluded him from occupying the premises. As neither Marta Bauer nor Frank Bauer sought clarification of the intent of that Order, and there was not sufficient evidence presented that meet the other criteria of ouster; thus, as a matter of law, Frank Bauer cannot prevail on his argument that he is entitled to an additional portion of the sale proceeds based on Marta Bauer's exclusive possession of the Magnificent Property. At the same time Marta Bauer did not meet her burden to show that she was entitled to have Frank pay expenses, taxes or other sums while she maintained exclusive possession.

10. Second, Frank Bauer's theory is barred by the statute of frauds. Pursuant to Nevada law, no estate or interest in land can be created unless reflected in writing. NRS 111.205 & NRS 111.210. The Nevada Supreme Court has held that these requirements for writing include the creation or surrender of a security interest in real property. *Summa Corp. v. Greenspun*, 96 Nev. 247, 252, 607 P.2d 569, 572 (1980) ("we heretofore have ruled that a document, whether viewed as a deed or deed of trust, is a conveyance of an interest in land within the statute of frauds"). There is no written document reflecting Frank Bauer's

claimed security interest; and thus, his claim is barred. Furthermore, the statute of frauds provides that any agreement is void, unless in writing, which is not to be performed within one year. NRS 111.220(1). Here, Frank Bauer alleges he made a loan in 2005 and that it was not breached until a few years later. (Counterclaim at ¶¶ 2, 5, 17-18). Thus, based upon Frank Bauer's own allegations, this purported agreement was not to be fully performed within one year and it is, therefore, also void pursuant to the statute of frauds on these separate grounds.

11. Frank Bauer's claim for equitable lien fares no better. First, it is barred by the governing four-year statute of limitations. NRS 11.190(2)(c); *Saylor v. Arcotta*, 126 Nev. Adv. Op. 9, 225 P.3d 1276, 1279-80 (2010) (holding NRS 11.190(2)(c) applies to claims for equitable indemnity because such a claim, like a claim for an equitable lien, is based upon a theory of implied contract).

12. Additionally, Frank Bauer's claim for an equitable lien is also barred by the statute of frauds. NRS 111.205 & NRS 111.210. Frank Bauer alleges that Marta Bauer promised to convey her interest in the Magnificent Property to him, but there is no written agreement that corroborates Frank Bauer's claim that he loaned funds to Marta Bauer and Michael Bauer for the purchase of the Magnificent Property, and there is also no writing to memorialize Frank Bauer's alleged security interest in the Magnificent Property (assuming Frank Bauer's allegations are true, which Marta Bauer disputes). With no written instrument, any such agreement is unenforceable and pursuant to the statute of frauds, Frank Bauer is barred by Nevada law from claiming an interest in this real property. NRS 111.205 & NRS 111.210. *See also Summa Corp. v. Greenspun*, 96 Nev. 247, 252, 607 P.2d 569, 572 (1980) (holding that a verbal promise to surrender an interest in real property is unenforceable unless it is in writing and

that an agreement to rescind a deed of trust or to transfer an interest in land must meet the requirements of NRS 111.205 and NRS 111.210); *Schultz v. Schultz*, 324 N.W.2d 48, 51 (Mich. App. Ct. 1982) (holding trial committed reversible error when it failed to dismiss plaintiff's claim alleging an oral mortgage agreement because the claim was barred by the statute of frauds).

13. The doctrine of equitable liens, also sometimes referred to as equitable mortgages, evolved to allow the holder of a deed an equitable mortgage entitling the grantor to redeem. The doctrine allows a court to infer that when the written note or deed was created, the parties intended to provide the creditor with a security interest in the property. *Bidart v. American Title Ins. Co.*, 103 Nev. 175, 179, 734 P.2d 732, 734 (1987), citing *Robinson v. Durston*, 83 Nev. 337, 432 P.2d 75 (1967). However, there must be a writing of some nature to create the equitable lien. *See Topaz Mutual Co. v. Marsh*, 108 Nev. 845, 855, 839 P.2d 606, 612-13 (1992) (explaining that "[i]n order for an *agreement* to give a mortgage to be considered an equitable mortgage it must clearly describe or point out the property intended to be charged with the lien" and that "an equitable lien is created on a particular fund when a *written contract* indicates an intention for it to secure a debt") (quoting 59 C.J.S. Mortgages § 16 and citing *Sundheim v. School Dist.*, 311 Pa. 90, 166 A. 365 (1933)) (emphasis added); *Werner v. Mormon*, 85 Nev. 662, 666-67, 462 P.2d 42, 45 (1969) (stating that "in the absence of an agreement that the lender is to have a security interest, he has no such lien" and holding that there could be no equitable lien because there was no document which clearly stated an intent to create a security interest).

14. In *Werner*, the Nevada Supreme Court rejected an argument that an equitable lien was created when money was loaned for the purchase of real property:

> On this point Professor Austin Wakeman Scott has stated: "Whether one who advances the purchase price by way of loan to the grantee gets an equitable security interest in the land depends upon whether the doctrine giving an unpaid vendor an equitable lien is accepted, and whether that doctrine, if accepted, is extended so as to give an equitable lien to one who is not the vendor but who advances the purchase price. ***The doctrine is anomalous, and probably should not be so extended***." 40 HARV. L. REV. 669, 681 (1927). ***Accordingly, in the absence of an agreement that the lender is to have a security interest, he has no such lien***. *Aaron Frank Bauer Clothing Co. v. Deegan*, 204 S.W. 471 (Tex. Civ. App. 1918); 4 Pomeroy, Equity Jurisprudence § 1235 (5th ed. 1941). ***The intention to create such a lien must clearly appear***. *Commercial Credit Corp. v. Matthews*, 77 Nev. 377, 386, 365 P.2d 303 (1961); *Union Indemnity Co. v. A.D. Drumm, Jr., Inc.*, 57 Nev. 242, 62 P.2d 698 (1936), affirmed on rehearing 57 Nev. 252, 70 P.2d 767.

Id. at 45 (emphasis added).

15. In *Werner*, a written agreement existed between the parties yet the Court determined that the writing failed to adequately express an intent to create a security interest in the real property. *Id.* Consequently, the Court held that the equitable lien claim failed as a matter of law because there was no such writing. *Id.*

16. Likewise, here there is no such writing which would suggest that Marta Bauer intended to grant Frank Bauer a security interest in the Magnificent Property. Consequently, as a matter of law, there can be no equitable lien and Frank Bauer's claim is barred by the statute of frauds. *Id.* *See also Greenspun*, 96 Nev. at 252, 607 P.2d at 572; *Topaz Mutual Co.*, 108 Nev. at 855, 839 P.2d at 612-13; *Schultz*, 324 N.W.2d at 51

17. An equal distribution is also an appropriate result as to Marta Bauer. Marta Bauer was not able to meet her burden that she and Michael

Bauer paid for the house with their own funds entirely. Further, Marta had sole and exclusive use of the house from 2008 until 2016 and paid no rent. While Frank Bauer could not legally establish that he was owed rent, Marta Bauer did not establish that the house was paid for with funds which would entitle her to more than 50 percent (50%) of the house.

18. Additionally, Marta Bauer stated that she collected $450.00 per month for a year for a female tenant who lived in the house. There was also evidence that another individual often spent time in the house.

19. To award Marta Bauer an equal 50 percent (50%) interest in the house is also consistent with the divorce proceeding Orders and equity. While Marta paid the property taxes and other bills during her exclusive possession of the property, she also received rental income and the benefit of living in the property without any rent or mortgage. Thus, while she contends that she paid taxes and insurance, the fact that she lived in house exclusively contrary to the wishes of Frank Bauer according to the disputed testimony, means that equitably distributing the sale proceeds without an offset or deduction (other than to the extent there may be unpaid realtor fees already approved by the Court), is fair and just as to Marta Bauer as well as Frank Bauer.

20. To the extent that Marta Bauer contends that the house was a community asset, that issue was to be resolved in the divorce proceeding and there was no evidence presented to this Court that such a determination was made. Thus, based on all the testimony presented, and in accordance with statutory authority, Marta and Frank Bauer are each entitled to 50 percent (50%) of the sales proceeds of the house without any offset or reduction.

21. The next issue presented was who should receive the insurance proceeds due to the break in at the house. Marta Bauer presented undisputed evidence that main items taken were personal property of her children as well as

some other items that were not Frank Bauer's property. Frank Bauer did not dispute the testimony, but stated that he replace some of his grandchildren's electronics rather than waiting for insurance reimbursement. He did not, however, present any receipts nor even appear to claim that he was to be paid back for voluntarily replacing the items. Accordingly, the Court finds that the insurance proceeds should be provided to Marta Bauer.

22. Frank Bauer contends that the broker fees and costs associated with the sale of the Magnificent Property are unreasonable. The Court finds that the fees received by Mr. Schweinert and the buyer's broker are reasonable, based upon what is considered customary in the Las Vegas market. The Court also notes that due to the nature of this sale, Mr. Schweinert was required to spend more time and effort on the Magnificent Property than a typical sale.

23. Marta Bauer also requests that the Court award her a portion of her legal fees from Frank Bauer's share of the proceeds. In support of her contention, she cites:

> **NRS 39.480 Cost of partition is lien upon several shares.** The costs of partition, fees of the master and other disbursements and also, in the discretion of the court, reasonable counsel fees expended by the parties for the common benefit, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. If the costs and fees are included in the judgment, there is a lien on the several shares, and the judgment may be enforced by execution against the shares and against other property held by the respective parties. When litigation arises between some of the parties only, the court may require the expenses of the litigation to be paid by the parties to the litigation or any of them.

24. The allowance of attorney fees under NRS 39.480 is generally

determined by whether the services rendered by counsel were for the common benefit of all parties, and whether all parties benefited from the service of counsel. *Rasmussen v. Thomas*, 98 Nev. 216, 221, 644 P.2d 1030, 1034 (1982). Additionally, the allowance of attorney fees in a partition action is a matter for the exercise of the trial court's discretion. *Id.*

25. Here, all of the fees incurred by Marta Bauer in this action and the bankruptcy action were for her own benefit in support of her claims either to unpaid funds due to the divorce action or in support of her claims to obtain what she deemed her share of the funds from the partition action. While the Court finds counsel in the present action to be experienced and litigated the case to the benefit of his client, the Court does not find that there was any evidence that Marta Bauer's claims in the bankruptcy action had any benefit to Frank Bauer. Indeed, her claiming that she was entitled to the property, either in its entirety or disproportionality to Frank Bauer, was adverse to Frank Bauer. Similarly, while the instant case did result in the sale of the underlying property, Marta Bauer did not demonstrate that the fees she incurred benefited Frank Bauer rather than benefited her claims to the amounts received from the sale. As such, the Court cannot find that Marta Bauer's attorney fees should be deducted from Frank Bauer's portion of the sales proceeds.

ORDER

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the proceeds of the sale of the Magnificient Property are to be disbursed to Marta and Frank Bauer and each are entitled to 50 percent (50%) of the sales proceeds of the Property without any offset or reduction as neither has established that they are entitled to an amount above and beyond fifty percent (50%).

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the insurance check, which is currently held in Plaintiff's counsel's trust account, in the amount of $5,410.61, is hereby released to Marta Bauer.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Marta Bauer's request for her attorney fees, taxes or insurance to be deducted from Frank Bauer's portion of the sale proceeds is hereby DENIED.

Dated this 9th day of August, 2018.

HON. JOANNA S. KISHNER
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was provided to all counsel, and/or parties listed below, as a courtesy not comprising formal written notice of entry, via one or more of the following manners: Email, Facsimile, U.S. mail, Electronic Service (E-Service) if the Attorney/Party has signed up as required, and/or a copy of this Order was placed in the attorney's file located at the Regional Justice Center:

ROBERT HERNQUIST, ESQ.
HOWARD & HOWARD ATTORNEYS PLLC.

MALCOLM P. LaVERGNE, ESQ.
MALCOLM P. LaVERGNE & ASSOCIATES

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Attorneys for Plaintiff Marta Bauer

DISTRICT COURT

CLARK COUNTY, NEVADA

MARTA BAUER, an individual; Plaintiff, vs. FRANK H. BAUER, an individual; MICHAEL BAUER, an individual; and DOES I through X and ROE CORPORATIONS I through X, and all other persons unknown claiming any legal or equitable right, title, estate, lien or interest in the real property described in the Complaint, Defendants.	Case No. A-15-723521-C Dept. No. XXXI **NOTICE OF ENTRY OF JUDGMENT**

NOTICE IS HEREBY GIVEN that a Findings of Fact and Conclusions of Law and Judgment was entered on the 9th day of August, 2018, a copy of which is attached hereto.

Dated this 10th day of August, 2018.

HOWARD & HOWARD ATTORNEYS PLLC

By: */s/ Robert Hernquist*
Robert Hernquist, Nevada Bar No. 10616

Attorneys for Plaintiff Marta Bauer

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(702) 257-1483 FAX: (702) 567-1568

Case Number: A-15-723521-C

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, the undersigned hereby certifies that a true and correct copy of the *Notice of Entry of Judgment* was electronically served on the 10th day of August 2018, to the following:

Malcolm P. LaVergne
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mlavergne@lavergnelaw.com

Attorney for Michael Bauer and Frank Bauer

/s/ Angela Westlake
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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

MARTA BAUER, an individual;

Plaintiff,

vs.

FRANK H. BAUER, an individual; MICHAEL BAUER, an individual; and DOES I through X and ROE CORPORATIONS I through X, and all other persons unknown claiming any legal or equitable right, title, estate, lien or interest in the real property described in the Complaint,

Defendants.

Case No. A-15-723521-C

Dept. No. XXXI

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

I. FINDINGS OF FACT

1. The subject of this action is the real property located in the City of Las Vegas, County of Clark, commonly known as 9490 Magnificent Avenue, Las Vegas, Nevada 89148, APN 163-31-514-026 (hereinafter the "Magnificent Property").

2. Marta Bauer ("Plaintiff" or "Marta Bauer") and her ex-husband, Michael Bauer ("Michael Bauer"), purchased the Magnificent Property for $367,000.00 on August 16, 2005. (August 16, 2005, Grant, Bargain and Sale Deed, Trial Exhibit 1). It was undisputed that at least $10,000.00 of the $367,000.00 dollars came from Marta and Michael's funds.

3. Part of the funds used to purchase the house came from a bank

JO ANN A S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

account titled in Michael Bauer and Frank Bauer's ("Frank Bauer") name. There was insufficient evidence presented as to how much of the funds that were used to purchase the house came from Marta Bauer and Michael Bauer's funds versus how much of the funds came from accounts titled in Michael and Frank's names. There was also evidence that part of the funds came from the sale of houses in New York, but there was not sufficient evidence presented as to who owned the houses. Frank Bauer is Michael Bauer's father and is Marta Bauer's ex-father-in-law.

4. Frank Bauer testified that his bank statements showed that Michael and Marta Bauer were loaned the money to purchase the house at issue and were paying back the loan in, *inter alia*, $500.00 increments. Marta Bauer denied that the payments were for any loan related to the house, but she did not recall what the payments were for. Michael Bauer did not testify or participate in the litigation.[1]

5. The Magnificent Property is a single-family residence and is not susceptible to physical division. (*See* photographs of the Magnificent Property, Exhibit 3; Property Detail, Exhibit 9). As reflected in the August 16, 2005, Grant, Bargain, and Sale Deed; title and ownership of the Magnificent Property was conveyed to "Michael Bauer and Marta Bauer, Husband and Wife, as Joint Tenants." (Trial Exhibit 1).

6. In October of 2008, Marta Bauer filed a Complaint for Divorce against Michael (the "Divorce Action").

7. On October 21, 2008, a Joint Preliminary Injunction was issued in the Divorce Action which enjoined Michael, *inter alia*, from transferring,

[1] Michael Bauer filed for Bankruptcy in the Northern District of New York in April 2017. (Exhibit 54) As he had already quit-claimed his interest in the property as set forth herein, his filing of bankruptcy did not impact the instant partition action or the allocation of the proceeds thereof as conceded by both parties.

encumbering, concealing, selling, or otherwise disposing of any joint, common, or community property of the parties or property which was the subject of any claim of community interest. (Joint Preliminary Injunction dated 10/21/2008; Trial Exhibit 3).

8. On November 10, 2008, Michael recorded a Quitclaim Deed with the Clark County Recorder's Office which transferred his "undivided one-half (1/2) interest" in the Magnificent Property to Frank Bauer. (November 10, 2008, Quitclaim Deed; Trial Exhibit 2).

9. Marta Bauer was granted exclusive possession of the Magnificent Property at a hearing in the Divorce Action conducted in December of 2008, and she continued to reside in the home with her children until it was sold. The only testimony presented was that from a time period in 2008 until 2016, Marta Bauer paid 100 percent (100%) of all household expenses including property taxes and homeowners association fees. (Order; Trial Exhibit 4 at P. 5).

10. From a time period in 2008 through September of 2016, Marta Bauer made all payments for property taxes on the Magnificent Property and the payments totaled $18,659.71. There was no testimony provided as to what was the source of those funds or receipts showing who paid the funds.

11. From 2008 through September of 2016, Marta Bauer made all payments for homeowner's insurance on the Magnificent Property and those payments totaled $7,222.39. There was no testimony provided as to what was the source of those funds or receipts showing who paid the funds. Neither Frank Bauer nor Michael made any homeowner's insurance payments during that time.

12. There was conflicting testimony as to whether at some point of time during the 2008 to 2016 time period, Marta Bauer allowed her male companion/boyfriend, Alpay Cam, to live at the house or whether he just visited the house. There was documentary and testimonial evidence that Marta Bauer

received rental payments of $450.00 per month during a particular time period. (Exhibit 51) Marta Bauer testified that the payments were from a female friend who lived at the residence for a year.

13. A trial was held in the Divorce Action in January of 2010, and Marta Bauer was awarded a judgment against Michael for $141,333.00 representing her one-half interest in the community assets as well as for spousal support arrearages.[2] (Divorce Decree; Trial Exhibit 5).

14. Following entry of the divorce decree, Michael did not timely fulfill his child support obligations.

15. Following entry of the divorce decree, Michael did not make any payments toward the judgment (the "Divorce Judgment") until 2016. (Trial Exhibit 53). On March 20, 2017, the Family Court conducted an Evidentiary Hearing and determined that Michael had concealed income and ordered that he make monthly payments of $750.00 toward the Divorce Judgment, and also determined that the amount owed at that time was $186,778.69. (Trial Exhibits 52 & 53).

16. Although Marta Bauer had lived with Frank Bauer and his family when she was younger due to her friendship with another of the Bauer children, after her divorce to Michael Bauer, discord developed between Marta Bauer and Frank Bauer. As a result of the tension, the parties agreed that it was no longer practical for Marta Bauer and Frank Bauer to be co-owners of the Magnificent Property which precipitated the instant litigation and other litigation matters between the parties.

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[2] The Decree was not entered until 23 months after the Trial. (Exhibit 5).

17. In June of 2014, there was a break-in at the Magnificent Property and numerous items were stolen including cash, cameras, jewelry, and all of the electronics belonging to Marta Bauer and Michael's three children such as iPads, iPods, video game systems, etc.

18. Following the break in, Marta Bauer's home insurance company issued a check as reimbursement for the stolen items. However, the insurer issued the check payable to both Marta Bauer and Frank Bauer in the amount of $5,410.61, in accordance with the names listed on the title to the home.

19. Marta Bauer testified that she immediately contacted both Michael and Frank Bauer and requested their cooperation in endorsing the insurance check so that the children's items could be replaced. In response, Frank Bauer stated he would not endorse the insurance check unless Marta Bauer executed a lease agreement whereby she would pay rent in the amount of $700.00 per month for her and the children to remain at the Magnificent Property. Likewise, Marta Bauer testified that Michael Bauer stated he would not cooperate unless Marta Bauer released the outstanding judgments entered against him and also bought him out of the Magnificent Property via a cash payment. In September 2016, Frank Bauer endorsed the insurance check and those funds have been held in trust by Marta Bauer's counsel since then. Frank Bauer asserted via his counsel (see Exhibit 13) in 2016 that he should be entitled to $1200 of the funds received from insurance since he replace some of the stolen electronics. No receipts or other evidence was presented supporting the payments.

20. Frank Bauer has never resided at the Magnificent Property or otherwise been in possession of the Magnificent Property. It was disputed whether the Order from the divorce between Marta Bauer and Michael Bauer excluded both Frank and Michael Bauer from the property or just Michael Bauer. As a result of his not being able to reside at the property, Frank Bauer testified

that he felt that he was due rent as an excluded co-tenant. Marta Bauer disputed his claim.

21. No written lease has ever been executed between Marta Bauer and Frank Bauer.

22. Evidence was presented that since Marta Bauer would not enter into a lease or pay rent yet maintained exclusive control of the premises, Frank Bauer initiated an eviction action against her. In that matter, on February 27, 2015, Frank Bauer posted a 5-Day Notice to Quit or Pay Rent on the front door of the Magnificent Property, which stated that past-due rent in the amount of $1,400.00 was owed to Frank Bauer as the landlord. (Notice to Quit or Pay Rent; Trial Exhibit 6) Marta Bauer testified that she felt harmed due to her difficulty in finding a rental home and that should be taken into consideration in the evaluation of the partition amount awarded each party. (Trial Exhibit 50).

23. On or about September 14, 2016, a Stipulation and Order Regarding Partition Sale of Real Property was electronically filed and entered. (Exhibit 46) The Stipulation and Order provided that it was pursuant to NRS 39.010 and detailed how the property would be sold and commissions paid. The actual partitioning of the funds was left to this Court in the instant action.

24. Marta Bauer initiated this partition action when she filed her Complaint on August 24, 2015.

25. Michael was served with the Summons and Complaint on September 14, 2015, and Frank Bauer was served with the Summons and Complaint on September 17, 2015.

26. Defendants responded by filing a Counterclaim asserting claims for: (a) Breach of Contract; (b) Unjust Enrichment; and (c) Equitable Lien. (Counterclaim filed 11/20/2015).

27. On February 9, 2016, an Order was entered dismissing all of Defendants' counterclaims. (See Order entered 2/9/2016).

28. On October 28, 2015, Marta Bauer filed a Motion for Partial Summary Judgment seeking authorization to market and sell the Magnificent Property. (Plaintiff's Motion for Partial Summary Judgment filed 10/28/2015). Defendants opposed the Motion and requested 56(f) relief to conduct additional discovery. (Defendants' Opposition filed 11/30/2015). Judge Herndon granted that request but Defendants did not pursue any additional discovery.

29. On June 9, 2016, an Order was entered granting Plaintiff's Motion for Partial Summary Judgment. (See Order entered 6/9/2016). Pursuant to that Order, Art Schweinert was appointed by the Court to market and sell the Magnificent Property.

30. On June 27, 2016, Frank Bauer filed a Motion to Amend the Summary Judgment Order asking the Court to appoint a different broker to market and sell the Magnificent Property, which Marta Bauer opposed. (Motion to Amend Judgment filed 6/27/2016 and Opposition to Motion to Amend Judgment filed 7/13/2016). At a hearing on August 3, 2016, Frank Bauer's counsel agreed the Motion was moot. (Minute Order dated 8/3/2016). Judge Herndon agreed and denied the Motion. (*Id.*).

31. On June 27, 2016, Frank Bauer filed a Motion to Join Necessary Party, wherein he disclosed that he had transferred his interest in the Magnificent Property to his Trust in April 2016. (Motion to Join Necessary Party filed 6/27/2016). Marta Bauer filed a limited Opposition, noting that this transfer should have been disclosed in a timely manner, that the Motion did not identify the proper procedural method for adding a party, and the Trust could have been added via stipulation rather than a motion that imposed additional legal fees. (Opposition filed 7/13/2016).

32. From June 9, 2016, through the closing of the sale, Art Schweinert diligently communicated with the parties and their counsel regarding his efforts to market and sell the property. (Trial Exhibits 10-43).

33. In order to market the Magnificent Property for sale, Marta Bauer was required to make certain repairs including replacing a broken window at a cost of $300.00. Those costs were paid solely by Marta Bauer.

34. The Magnificent Property sold on July 16, 2016, for a purchase price of $275,000.00. (Trial Exhibit 43). The sale proceeds have been held in Trust by Marta Bauer's counsel since then. (Trial Exhibit 46).

35. On September 24, 2016, Marta Bauer filed a Motion to Strike Frank Bauer's jury demand. The Motion was unopposed, and was granted on November 30, 2016. (Minute Order entered 11/30/2016).

36. On April 27, 2017, Defendant Michael Bauer filed for bankruptcy in New York. (Trial Exhibit 54).

37. On December 14, 2017, a Stipulation and Order Lifting Automatic Bankruptcy Stay was filed with this Court. (Stipulation and Order Lifting Automatic Bankruptcy Stay filed 12/14/2017).

38. Marta Bauer has asserted that she incurred $15,419.00 in legal fees and $1,252.70 in costs in this action. (Trial Exhibit 47). She also asserted that she has incurred $13,176.00 in legal fees in Michael Bauer's bankruptcy action. (Trial Exhibits 48 & 49). Frank Bauer did not provide any documentation relating to attorney fees or costs; and instead, set forth that such fees and costs should be deferred for a separate hearing and Order.

39. Trial in this matter took place in May and June 2018. The parties subsequently requested that they do their closing arguments via written briefs. The Court then reviewed all the evidence including reviewing the closing briefs of the parties.

II. CONCLUSIONS OF LAW

A. THE PARTIES ARE EACH ENTITLED TO A FIFTY PERCENT PROPORTIONATE SHARE OF THE SALE PROCEEDS WITH NO OFFSETS

1. Nevada has a statutory partition process (NRS 39.010-.490). A partition action is an equitable one in which the courts will apply the broad principles of equity. *Kent v. Kent*, 108 Nev. 398, 402, 835 P.2d 8, 10 (1992), citing *Dall v. Confidence Mining Co.*, 3 Nev. 485 (1868). "While sitting in its equitable capacity, a court may avail itself of powers broad, flexible and capable of being expanded to deal with novel cases and conditions." *MacFarlane v. Peters*, 103 Cal. App. 3d 627, 631, 163 Cal. Rptr. 655, 657 (Cal. Ct. App. 1980). Lack of precedent is no deterrent to equitable relief. *Id.* at 632, 163 Cal. Rptr. at 657. The court's equitable power has been utilized to adjudicate wrongs concerning real property. *Id.* at 629, 163 Cal. Rptr. at 655 (affirming the lower court's use of equitable powers to reform a treasurer's deed, adjust certain monetary claims, reject two claimed easements and quiet title to five contiguous unimproved lots forming a 125-foot square parcel fronting on Archer Street in Pacific Beach.)

2. Here, equity commands that Marta Bauer and Frank Bauer be awarded equal shares of the sale proceeds as neither has established that they are entitled to an amount above and beyond fifty percent (50%). While each party asked the Court to take into account testimony or documents from other proceedings including the divorce proceeding, the Justice Court Eviction proceeding, and the New York Bankruptcy of Michael Bauer, the Court cannot revisit rulings and determinations made in those proceedings. Instead, the Court has to look at what evidence was presented in the instant case and whether that evidence demonstrates that Plaintiff has met her burden or if Defendant has prevailed on his defenses. The Court also has to look at the equities to determine

how to partition and allocate the funds in accordance with NRS 39.010-490. In so doing, as set forth herein, the Court finds that the sale proceeds of $257,986.65 from the sale of the Magnificent Property should be divided equally. To the extent that the realtors have not been paid, the commission amount set forth in the exhibits is appropriate and there should not be any deduction from that amount as Frank Bauer did not establish that the sum was unreasonable or should be reduced. To the extent that the realtors have already been paid then the remaining sale proceeds shall be split so that each party shall receive half. The Court also finds that since there was no evidence presented that the insurance funds were to reimburse any property of Frank Bauer the insurance proceeds in the amount of $5,410.61 should be distributed to Marta Bauer. Finally, per the stipulation of the parties and the resultant Order of the Court which previously had the case, the fees expended to market and sell the property by the realtor were appropriate and should not be reduced.

3. Specifically, the Court finds that Plaintiff did not prevail in this case on her claim that the source of the funds to purchase the property was from the community assets of Michael and Marta Bauer. Instead, the issue of what was and what was not community property was determined by the Family Court in the divorce proceeding. In the instant proceeding, this Court had to determine the rights between Marta Bauer and Frank Bauer, who as the father of the ex-husband, Michael, was not a party to the divorce proceeding.

4. The bank statements, as well as the testimony presented, demonstrates more likely than not that part of the funds used to purchase the house was a loan from Frank Bauer. Frank Bauer, however, did not show exactly how much was a loan, how much were co-mingled funds with his son Michael, or how much of the loan was paid back. Thus, in light of the totality of the evidence including that Michael Bauer quit-claimed what he termed his half interest in the

property to Frank and Frank did not challenge that determination, the Court finds that Frank Bauer is entitled to a 50 percent (50%) interest in the house. Based on the evidence presented, this is the more likely than not the allocation that was intended by the parties. Further in equity, the same result would occur.

5. Frank Bauer contended that he was a tenant-in-common and was excluded from the premises. Generally, each tenant-in-common has a right to occupy the whole of the property. *Rasmussen v. Thomas,* 98 Nev. 216, 644 P.2d 1030 (1982). However, if one owner takes possession of the property adversely to the other's interest, or otherwise ousts the nonresident owner of his or her right to use and enjoy the property, the nonresident is entitled to be paid his or her proportionate share of the property's fair rental value. *Thomas v. Thomas,* 712 So.2d 822, 823 (Fla. 1998). On the other hand, if the resident owner does not occupy the property adversely or as the result of an ouster, the property is deemed to be occupied on behalf of both owners. *Id.* In that case, the nonresident is not entitled to rent except as an offset against the resident owner's claim for a contribution to property expenses. *Id.*

6. An "ouster," in the law of tenancy-in-common, is the wrongful dispossession or exclusion by one tenant of his co-tenant or co-tenants from the common property of which they are entitled to possession. *Hacienda Ranch Homes v. Superior Court*, 131 Cal.Rptr.3d 498 (Cal. 2011); *Estate of Hughes*, 5 Cal. App. 4th 1607, 1612, 7 Cal. Rptr. 2d 742 (Cal. Ct. App. 1992). If one tenant ousts the other co-tenant, then the tenant who committed the ousting must pay the fair market value for the property for the duration of time that he or she remained on the property as a result of the ouster. *Estate of Hughes*, 5 Cal. App.4th at 1611 ("Absent an ouster a cotenant out of possession has no right to recover the rental value of the property from a cotenant in possession.").

7. "The rule in Nevada "is that in the absence of an agreement to pay,

or ouster by the co-tenant in possession, a tenant in common who occupies all or more than his proportionate share of the common premises is not liable, because of such occupancy alone, to his co-tenant for rent or the use and occupation of the premises." *Lanigir v. Arden*, 85 Nev. 79, 80, 450 P.2d 148, 149 (1969) (citation omitted)(emphasis added). *See also Rasmussen,* 98 Nev. at 220, 644 P.2d at 1033 (same

8. Here, Frank Bauer has admitted there was never a lease between Marta Bauer and Frank Bauer or an agreement that Marta Bauer would pay rent to Frank Bauer.

9. Instead, it was disputed whether Frank Bauer ever asked to move into the property or whether the Family Court Order precluded him from occupying the premises. As neither Marta Bauer nor Frank Bauer sought clarification of the intent of that Order, and there was not sufficient evidence presented that meet the other criteria of ouster; thus, as a matter of law, Frank Bauer cannot prevail on his argument that he is entitled to an additional portion of the sale proceeds based on Marta Bauer's exclusive possession of the Magnificent Property. At the same time Marta Bauer did not meet her burden to show that she was entitled to have Frank pay expenses, taxes or other sums while she maintained exclusive possession.

10. Second, Frank Bauer's theory is barred by the statute of frauds. Pursuant to Nevada law, no estate or interest in land can be created unless reflected in writing. NRS 111.205 & NRS 111.210. The Nevada Supreme Court has held that these requirements for writing include the creation or surrender of a security interest in real property. *Summa Corp. v. Greenspun*, 96 Nev. 247, 252, 607 P.2d 569, 572 (1980) ("we heretofore have ruled that a document, whether viewed as a deed or deed of trust, is a conveyance of an interest in land within the statute of frauds"). There is no written document reflecting Frank Bauer's

claimed security interest; and thus, his claim is barred. Furthermore, the statute of frauds provides that any agreement is void, unless in writing, which is not to be performed within one year. NRS 111.220(1). Here, Frank Bauer alleges he made a loan in 2005 and that it was not breached until a few years later. (Counterclaim at ¶¶ 2, 5, 17-18). Thus, based upon Frank Bauer's own allegations, this purported agreement was not to be fully performed within one year and it is, therefore, also void pursuant to the statute of frauds on these separate grounds.

11. Frank Bauer's claim for equitable lien fares no better. First, it is barred by the governing four-year statute of limitations. NRS 11.190(2)(c); *Saylor v. Arcotta*, 126 Nev. Adv. Op. 9, 225 P.3d 1276, 1279-80 (2010) (holding NRS 11.190(2)(c) applies to claims for equitable indemnity because such a claim, like a claim for an equitable lien, is based upon a theory of implied contract).

12. Additionally, Frank Bauer's claim for an equitable lien is also barred by the statute of frauds. NRS 111.205 & NRS 111.210. Frank Bauer alleges that Marta Bauer promised to convey her interest in the Magnificent Property to him, but there is no written agreement that corroborates Frank Bauer's claim that he loaned funds to Marta Bauer and Michael Bauer for the purchase of the Magnificent Property, and there is also no writing to memorialize Frank Bauer's alleged security interest in the Magnificent Property (assuming Frank Bauer's allegations are true, which Marta Bauer disputes). With no written instrument, any such agreement is unenforceable and pursuant to the statute of frauds, Frank Bauer is barred by Nevada law from claiming an interest in this real property. NRS 111.205 & NRS 111.210. *See also Summa Corp. v. Greenspun*, 96 Nev. 247, 252, 607 P.2d 569, 572 (1980) (holding that a verbal promise to surrender an interest in real property is unenforceable unless it is in writing and

that an agreement to rescind a deed of trust or to transfer an interest in land must meet the requirements of NRS 111.205 and NRS 111.210); *Schultz v. Schultz*, 324 N.W.2d 48, 51 (Mich. App. Ct. 1982) (holding trial committed reversible error when it failed to dismiss plaintiff's claim alleging an oral mortgage agreement because the claim was barred by the statute of frauds).

13. The doctrine of equitable liens, also sometimes referred to as equitable mortgages, evolved to allow the holder of a deed an equitable mortgage entitling the grantor to redeem. The doctrine allows a court to infer that when the written note or deed was created, the parties intended to provide the creditor with a security interest in the property. *Bidart v. American Title Ins. Co.*, 103 Nev. 175, 179, 734 P.2d 732, 734 (1987), citing *Robinson v. Durston*, 83 Nev. 337, 432 P.2d 75 (1967). However, there must be a writing of some nature to create the equitable lien. *See Topaz Mutual Co. v. Marsh*, 108 Nev. 845, 855, 839 P.2d 606, 612-13 (1992) (explaining that "[i]n order for an *agreement* to give a mortgage to be considered an equitable mortgage it must clearly describe or point out the property intended to be charged with the lien" and that "an equitable lien is created on a particular fund when a *written contract* indicates an intention for it to secure a debt") (quoting 59 C.J.S. Mortgages § 16 and citing *Sundheim v. School Dist.*, 311 Pa. 90, 166 A. 365 (1933)) (emphasis added); *Werner v. Mormon*, 85 Nev. 662, 666-67, 462 P.2d 42, 45 (1969) (stating that "in the absence of an agreement that the lender is to have a security interest, he has no such lien" and holding that there could be no equitable lien because there was no document which clearly stated an intent to create a security interest).

14. In *Werner*, the Nevada Supreme Court rejected an argument that an equitable lien was created when money was loaned for the purchase of real property:

> On this point Professor Austin Wakeman Scott has stated: "Whether one who advances the purchase price by way of loan to the grantee gets an equitable security interest in the land depends upon whether the doctrine giving an unpaid vendor an equitable lien is accepted, and whether that doctrine, if accepted, is extended so as to give an equitable lien to one who is not the vendor but who advances the purchase price. ***The doctrine is anomalous, and probably should not be so extended.***" 40 HARV. L. REV. 669, 681 (1927). ***Accordingly, in the absence of an agreement that the lender is to have a security interest, he has no such lien***. *Aaron Frank Bauer Clothing Co. v. Deegan*, 204 S.W. 471 (Tex. Civ. App. 1918); 4 Pomeroy, Equity Jurisprudence § 1235 (5th ed. 1941). ***The intention to create such a lien must clearly appear.*** *Commercial Credit Corp. v. Matthews*, 77 Nev. 377, 386, 365 P.2d 303 (1961); *Union Indemnity Co. v. A.D. Drumm, Jr., Inc.*, 57 Nev. 242, 62 P.2d 698 (1936), affirmed on rehearing 57 Nev. 252, 70 P.2d 767.

Id. at 45 (emphasis added).

15. In *Werner*, a written agreement existed between the parties yet the Court determined that the writing failed to adequately express an intent to create a security interest in the real property. *Id.* Consequently, the Court held that the equitable lien claim failed as a matter of law because there was no such writing. *Id.*

16. Likewise, here there is no such writing which would suggest that Marta Bauer intended to grant Frank Bauer a security interest in the Magnificent Property. Consequently, as a matter of law, there can be no equitable lien and Frank Bauer's claim is barred by the statute of frauds. *Id. See also Greenspun*, 96 Nev. at 252, 607 P.2d at 572; *Topaz Mutual Co.*, 108 Nev. at 855, 839 P.2d at 612-13; *Schultz*, 324 N.W.2d at 51

17. An equal distribution is also an appropriate result as to Marta Bauer. Marta Bauer was not able to meet her burden that she and Michael

Bauer paid for the house with their own funds entirely. Further, Marta had sole and exclusive use of the house from 2008 until 2016 and paid no rent. While Frank Bauer could not legally establish that he was owed rent, Marta Bauer did not establish that the house was paid for with funds which would entitle her to more than 50 percent (50%) of the house.

18. Additionally, Marta Bauer stated that she collected $450.00 per month for a year for a female tenant who lived in the house. There was also evidence that another individual often spent time in the house.

19. To award Marta Bauer an equal 50 percent (50%) interest in the house is also consistent with the divorce proceeding Orders and equity. While Marta paid the property taxes and other bills during her exclusive possession of the property, she also received rental income and the benefit of living in the property without any rent or mortgage. Thus, while she contends that she paid taxes and insurance, the fact that she lived in house exclusively contrary to the wishes of Frank Bauer according to the disputed testimony, means that equitably distributing the sale proceeds without an offset or deduction (other than to the extent there may be unpaid realtor fees already approved by the Court), is fair and just as to Marta Bauer as well as Frank Bauer.

20. To the extent that Marta Bauer contends that the house was a community asset, that issue was to be resolved in the divorce proceeding and there was no evidence presented to this Court that such a determination was made. Thus, based on all the testimony presented, and in accordance with statutory authority, Marta and Frank Bauer are each entitled to 50 percent (50%) of the sales proceeds of the house without any offset or reduction.

21. The next issue presented was who should receive the insurance proceeds due to the break in at the house. Marta Bauer presented undisputed evidence that main items taken were personal property of her children as well as

JO ANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS NEVADA 89155

some other items that were not Frank Bauer's property. Frank Bauer did not dispute the testimony, but stated that he replace some of his grandchildren's electronics rather than waiting for insurance reimbursement. He did not, however, present any receipts nor even appear to claim that he was to be paid back for voluntarily replacing the items. Accordingly, the Court finds that the insurance proceeds should be provided to Marta Bauer.

22. Frank Bauer contends that the broker fees and costs associated with the sale of the Magnificent Property are unreasonable. The Court finds that the fees received by Mr. Schweinert and the buyer's broker are reasonable, based upon what is considered customary in the Las Vegas market. The Court also notes that due to the nature of this sale, Mr. Schweinert was required to spend more time and effort on the Magnificent Property than a typical sale.

23. Marta Bauer also requests that the Court award her a portion of her legal fees from Frank Bauer's share of the proceeds. In support of her contention, she cites:

> **NRS 39.480 Cost of partition is lien upon several shares.** The costs of partition, fees of the master and other disbursements and also, in the discretion of the court, reasonable counsel fees expended by the parties for the common benefit, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. If the costs and fees are included in the judgment, there is a lien on the several shares, and the judgment may be enforced by execution against the shares and against other property held by the respective parties. When litigation arises between some of the parties only, the court may require the expenses of the litigation to be paid by the parties to the litigation or any of them.

24. The allowance of attorney fees under NRS 39.480 is generally

determined by whether the services rendered by counsel were for the common benefit of all parties, and whether all parties benefited from the service of counsel. *Rasmussen v. Thomas*, 98 Nev. 216, 221, 644 P.2d 1030, 1034 (1982). Additionally, the allowance of attorney fees in a partition action is a matter for the exercise of the trial court's discretion. *Id.*

25. Here, all of the fees incurred by Marta Bauer in this action and the bankruptcy action were for her own benefit in support of her claims either to unpaid funds due to the divorce action or in support of her claims to obtain what she deemed her share of the funds from the partition action. While the Court finds counsel in the present action to be experienced and litigated the case to the benefit of his client, the Court does not find that there was any evidence that Marta Bauer's claims in the bankruptcy action had any benefit to Frank Bauer. Indeed, her claiming that she was entitled to the property, either in its entirety or disproportionality to Frank Bauer, was adverse to Frank Bauer. Similarly, while the instant case did result in the sale of the underlying property, Marta Bauer did not demonstrate that the fees she incurred benefited Frank Bauer rather than benefited her claims to the amounts received from the sale. As such, the Court cannot find that Marta Bauer's attorney fees should be deducted from Frank Bauer's portion of the sales proceeds.

ORDER

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the proceeds of the sale of the Magnificient Property are to be disbursed to Marta and Frank Bauer and each are entitled to 50 percent (50%) of the sales proceeds of the Property without any offset or reduction as neither has established that they are entitled to an amount above and beyond fifty percent (50%).

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the insurance check, which is currently held in Plaintiff's counsel's trust account, in the amount of $5,410.61, is hereby released to Marta Bauer.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Marta Bauer's request for her attorney fees, taxes or insurance to be deducted from Frank Bauer's portion of the sale proceeds is hereby DENIED.

Dated this 9th day of August, 2018.

HON. JOANNA S. KISHNER
DISTRICT COURT JUDGE

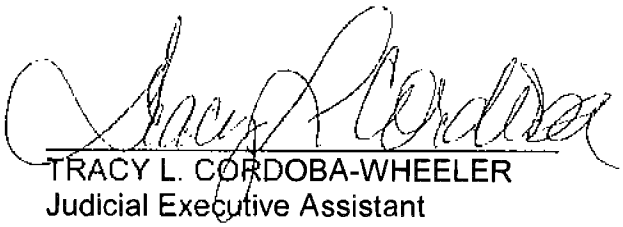
JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was provided to all counsel, and/or parties listed below, as a courtesy not comprising formal written notice of entry, via one or more of the following manners: Email, Facsimile, U.S. mail, Electronic Service (E-Service) if the Attorney/Party has signed up as required, and/or a copy of this Order was placed in the attorney's file located at the Regional Justice Center:

ROBERT HERNQUIST, ESQ.
HOWARD & HOWARD ATTORNEYS PLLC.

MALCOLM P. LaVERGNE, ESQ.
MALCOLM P. LaVERGNE & ASSOCIATES



TRACY L. CORDOBA-WHEELER
Judicial Executive Assistant

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property **COURT MINUTES** **January 06, 2016**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

January 06, 2016 **9:00 AM** **All Pending Motions**

HEARD BY: Herndon, Douglas W. **COURTROOM:** RJC Courtroom 16C

COURT CLERK: Deborah Miller

RECORDER: Sara Richardson

REPORTER:

PARTIES PRESENT:

Bauer, Frank H	Defendant Counter Claimant
Bauer, Marta	Plaintiff Counter Defendant
Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT...OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTER MOTION

Arguments by counsel. Court stated it is early in the litigation and noted his sense is that partition is appropriate, however, he will allow more time for limited discovery. Mr. Lavergne requested 120 days for discovery. Mr. Hernquist noted opposition to 120 days. Discussion regarding independent case conference. Court DENIED request for 120 days, and ORDERED matter CONTINUED ninety (90) days.

As to Counter Motion to Dismiss Michael Bauer, COURT ORDERED, motion DENIED. Discussion regarding claim for civil conspiracy. Upon Court's inquiry, Mr. Hernquist noted they are not asserting a civil conspiracy claim, however, are preserving their right. Mr. Hernquist to prepare order and provide to opposing counsel for review.

4/6/16 9:00 AM PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**January 20, 2016**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

January 20, 2016 **9:00 AM** **Motion to Dismiss**

HEARD BY: Herndon, Douglas W. **COURTROOM:** RJC Courtroom 16C

COURT CLERK: Deborah Miller

RECORDER: Sara Richardson

REPORTER:

PARTIES PRESENT: Hernquist, Robert, ESQ Attorney

JOURNAL ENTRIES

- Matter TRAILED and RECALLED. All parties present. Arguments by counsel. Court stated FINDINGS and ORDERED, motion GRANTED, noting Statute of Fraud and Statute of Limitations apply. Mr. Hernquist to prepare order and provide to opposing counsel for review.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**April 20, 2016**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

April 20, 2016 **9:00 AM** **Motion for Partial Summary Judgment**

HEARD BY: Herndon, Douglas W. **COURTROOM:** RJC Courtroom 16C

COURT CLERK: Deborah Miller

RECORDER: Sara Richardson

REPORTER:

PARTIES PRESENT:

Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- Mr. Lavergne advised there will not be an issue with the title. Mr. Hernquist advised the sale price will be $270,000 and requested authority to move forward with realtor. Mr. Lavergne noted no opposition, except for the realtor fee. Discussion regarding fee. COURT ORDERED, motion GRANTED, noting if there are any issues with the fee, issue may be raised with the Court. Mr. Hernquist inquired as to if parties need to seek approval if they have a buyer. Court stated unless sale price is significantly lower than the list price and parties cannot agree, counsel may contact Court to place on calendar. Mr. Hernquist to prepare order and provide to opposing counsel for review prior to submitting for signature.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property **COURT MINUTES** **August 03, 2016**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

August 03, 2016 **9:00 AM** **All Pending Motions**

HEARD BY: Herndon, Douglas W. **COURTROOM:** RJC Courtroom 16C

COURT CLERK: Deborah Miller

RECORDER: Sara Richardson

REPORTER:

PARTIES PRESENT:

Bauer, Frank H	Defendant Counter Claimant
Bauer, Marta	Plaintiff Counter Defendant
Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- Also present: Mr. Schweinert, Court Appointed Broker

FRANK H. BAUER'S MOTION TO JOIN NECESSARY PARTY...FRANK K. BAUER'S MOTION PURSUANT TO NRCP 52(B) TO AMEND FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER GRANTING PARTIAL SUMMARY JUDGMENT

There being no opposition, COURT ORDERED, Frank H. Bauer's Motion to Join Necessary Party, GRANTED.

As to Frank H. Bauer's Motion Pursuant to NRCP 52 (b) to Amend Findings of Fact, Conclusions of Law and Order Granting Partial Summary Judgment, Mr. Lavergne argued court has already retained jurisdiction over fees which moots the request to amend, noting parties do not have an exact

costs for fees as to Mr. Schweinert. Mr. Hernquist agrees motion is premature, noting an offer has been accepted at $275,000. Discussion as to disbursement of funds. Statement by Mr. Schweinert as to requests by title company. Mr. Hernquist believes a stipulated order can be prepared and a hearing will not be needed. Court requested parties include in order any requests by title company, noting parties may contact Court if there are any issues. COURT ORDERED, Frank K. Bauer's Motion Pursuant to NRCP 52(b) to Amend Findings of Facts, Conclusions of Law and Order Granting Partial Summary Judgment, MOOT per prior Court ruling.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**September 28, 2016**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

September 28, 2016 9:00 AM Calendar Call

HEARD BY: Herndon, Douglas W. **COURTROOM:** RJC Courtroom 16C

COURT CLERK: Deborah Miller

RECORDER: Patti Slattery

REPORTER:

PARTIES PRESENT:

Bauer, Frank H	Defendant Counter Claimant
Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- Mr. Hernquist advised parties have reached an agreement, noting closing of the property is Friday. COURT ORDERED, Status Check SET, noting counsel may take off calendar if there are no issues and documents are filed. COURT FURTHER ORDERED, trial VACATED.

10/26/16 9:00 AM STATUS CHECK: SETTLEMENT DOCUMENTS

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**October 26, 2016**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

October 26, 2016 **9:00 AM** **Status Check: Settlement Documents**

HEARD BY: Herndon, Douglas W. **COURTROOM:** RJC Courtroom 16C

COURT CLERK: Deborah Miller

RECORDER:

REPORTER:

PARTIES PRESENT: Lavergne, Malcolm P. Attorney

JOURNAL ENTRIES

- Mr. Lavergne advised that Mr. Hernquist is not present, noting he contacted his office who indicated that Mr. Hernquist is currently in an arbitration hearing. Further, Mr. Lavergne does not want to make any representations until Mr. Hernquist is present, noting there is also a November 2, 2016 hearing to Strike the Jury Demand. COURT ORDERED, matter CONTINUED, November 2 hearing RESET to next hearing date.

11/30/16 9:00 AM STATUS CHECK: SETTLEMENT DOCUMENTS...PLAINTIFF'S MOTION TO STRIKE JURY DEMAND

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**November 30, 2016**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

November 30, 2016 9:00 AM All Pending Motions

HEARD BY: Herndon, Douglas W. **COURTROOM:** RJC Courtroom 16C

COURT CLERK: Deborah Miller

RECORDER: Sara Richardson

REPORTER:

PARTIES PRESENT: Hernquist, Robert, ESQ Attorney

JOURNAL ENTRIES

- PLAINTIFF'S MOTION TO STRIKE JURY DEMAND...STATUS CHECK: SETTLEMENT DOCUMENTS

Mr. Hernquist stated Mr. Lavergne had a conflict, therefore, is not present. Court stated it is understanding that case is not resolved on all matters. As to Plaintiff's Motion to Strike Jury Demand, COURT ORDERED, motion GRANTED, noting no opposition. Mr. Hernquist advised the property has been sold, however, parties have not reached an agreement on disbursement. Upon Court's inquiry, Mr. Hernquist does not have additional discovery to conduct and requested a hearing or bench trial for the unresolved issue. Court stated his Judicial Executive Assistant will send out a bench trial scheduling order for March.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**March 08, 2017**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

March 08, 2017 **9:00 AM** **Calendar Call**

HEARD BY: Herndon, Douglas W. **COURTROOM:** RJC Courtroom 16C

COURT CLERK: Deborah Miller
Brynn Griffiths

RECORDER: Sara Richardson

REPORTER:

PARTIES PRESENT:

Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- Mr. Hernquist advised the matter has not been settled. Mr. Lavergne stated they did an EDCR 2.67 6.27 last week. Mr. Hernquist further stated there will be about 3-4 witnesses and Mr. Lavergne informed trial should last about one day. COURT ORDERED, parties to get the proposed Findings of Fact. COURT FURTHER ORDERED, trial date VACATED and RESET.

03/24/17 10:00 AM BENCH TRIAL

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**May 17, 2017**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

May 17, 2017 **9:00 AM** **Status Check: Reset Trial Date**

HEARD BY: Herndon, Douglas W. **COURTROOM:** RJC Courtroom 16C

COURT CLERK: Deborah Miller

RECORDER: Sara Richardson

REPORTER:

PARTIES PRESENT:

Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- Discussion regarding bankruptcy notice. Mr. Lavergne requested case be stayed as meeting with creditors is next week. Mr. Hernquist argued in opposition, noting delays. Further arguments by Mr. Lavergne. COURT ORDERED, matter SET for Status Check. Court stated he is not inclined to stay matter, however, trial will not be heard prior to July 1, noting case will be reassigned to a new department as Court will not be hearing Civil matters after July 1, 2017. Counsel will be notified when matter is assigned to a new department.

7/05/17 9:00 AM STATUS CHECK: BANKRUPTCY/TRIAL SETTING

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**July 11, 2017**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

July 11, 2017 **9:00 AM** **Status Check**

HEARD BY: Saitta, Nancy **COURTROOM:** RJC Courtroom 12B

COURT CLERK: Shelly Landwehr

RECORDER: Sandra Harrell

REPORTER:

PARTIES PRESENT:

Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- Colloquy regarding bankruptcy. Mr. Hernquist stated his client's ex-husband filed bankruptcy and argued regarding the real property and stated that does not stay does not apply here. Further, aside from the bankruptcy issues, Mr. Hernquist announced ready for trial. Mr. Lavergne made representations regarding the fraudulent transfer issue head by Judge Ritchie in Family Court and further stated all of statements by plaintiff's counsel are highly inaccurate. Court noted the bankruptcy issue and DIRECTED counsel to file a motion.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**March 06, 2018**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

March 06, 2018 **9:00 AM** **All Pending Motions**

HEARD BY: Kishner, Joanna S. **COURTROOM:** RJC Courtroom 12B

COURT CLERK: Tena Jolley

RECORDER: Sandra Harrell

REPORTER:

PARTIES PRESENT:

Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- PLAINTIFF'S MOTION FOR TRIAL SETTING...DEFENDANTS' RESPONSE TO MOTION FOR TRIAL SETTING AND COUNTERMOTION TO REOPEN DISCOVERY

After the Court's consideration of the papers submitted by counsel in connection with this matter, and, having heard the oral arguments presented by both Mr. Hernquist and Mr. Lavergne, COURT ORDERED, Plaintiff's Motion for Trial Setting GRANTED; Defendants' Countermotion to Reopen Discovery DENIED WITHOUT PREJUDICE. Mr. Hernquist to the prepare the Order.

4/26/18 10:15 AM PRE TRIAL CONFERENCE

5/22/18 9:00 AM CALENDAR CALL

5/29/18 9:00 AM BENCH TRIAL

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**April 26, 2018**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

April 26, 2018 **10:15 AM** **Pre Trial Conference**

HEARD BY: Kishner, Joanna S. **COURTROOM:** RJC Courtroom 12B

COURT CLERK: Tena Jolley

RECORDER: Sandra Harrell

REPORTER:

PARTIES PRESENT:

Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- Counsel anticipate 2 days for trial. Colloquy regarding trial setting. COURT ORDERED Trial Date SET as No. 2 for May 30 to June 1, 2018; Pre Trial Memorandum DUE May 18, 2018 by noon.

5/30/18 9:00 AM BENCH TRIAL

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**May 22, 2018**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

May 22, 2018 **9:00 AM** **Calendar Call**

HEARD BY: Kishner, Joanna S. **COURTROOM:** RJC Courtroom 12B

COURT CLERK: Tena Jolley

RECORDER: Sandra Harrell

REPORTER:

PARTIES PRESENT:

Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- Counsel anticipate 2-3 days for trial. Colloquy regarding current trial setting and the Court's conflict on May 30, 2018. Pursuant to the agreement of counsel, COURT ORDERED May 30, 2018 Trial Date VACATED, trial will commence on May 31, 2018 at 1:00 p.m. Mr. Hernquist indicated exhibits will be provided on Friday, May 25, 2018; that plaintiff has no deposition transcripts or audio visual needs. Mr. Lavergne indicated he would have a need for some audio visual for demonstrative purposes. COURT FINDS parties IN COMPLIANCE with the Calendar Call and reminded counsel that Proposed Findings of Fact and Conclusions of Law are due May 25, 2018.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**May 31, 2018**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

May 31, 2018 **1:00 PM** **Bench Trial**

HEARD BY: Kishner, Joanna S. **COURTROOM:** RJC Courtroom 12B

COURT CLERK: Tena Jolley

RECORDER: Sandra Harrell

REPORTER:

PARTIES PRESENT:

Bauer, Frank H	Defendant Counter Claimant
Bauer, Marta	Plaintiff Counter Defendant
Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- BENCH TRIAL - DAY 1

Mr. Hernquist waived Opening Statement and reserved his response to Mr. Lavergne's Opening Statement. Opening Statement by Mr. Lavergne. Response to Opening Statement by Mr. Hernquist.

The Court noted inconsistencies in the parties pleadings' captions and directed counsel to correct the case's caption prior to Closing Arguments. Mr. Lavergne stated the parties may stipulate to dismiss the Trust and Michael Bauer. Counsel will discuss the matter further.

Mr. Hernquist calls Defendant Frank Bauer as his first witness in Plaintiff's case in chief. Frank Bauer SWORN and TESTIFIED. Testimony and Exhibits presented (see Worksheets). Witness excused subject to recall in Defendant's case in chief. Arthur Schweinert SWORN and TESTIFIED. Testimony and Exhibits presented (see Worksheets). Witness excused for all purposes and released from the

subpoena.

COURT ORDERED, Trial Continued.

6/1/18 9:00 AM BENCH TRIAL CONTINUES

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**June 01, 2018**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

June 01, 2018 **9:00 AM** **Bench Trial**

HEARD BY: Kishner, Joanna S. **COURTROOM:** RJC Courtroom 12B

COURT CLERK: Tena Jolley

RECORDER: Sandra Harrell

REPORTER:

PARTIES PRESENT:

Bauer, Frank H	Defendant
Bauer, Marta	Plaintiff
Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- BENCH TRIAL - DAY 2

Plaintiff call plaintiff Marta Bauer in his case in Chief. Marta Bauer SWORN and TESTIFIED. Testimony and Exhibits presented (see Worksheets). Mr. Lavergne objected to the admission of Exhibit 53. Mr. Hernquist made an OFFER OF PROOF. Noting Michael Bauer is still a defendant, COURT ORDERED Exhibit ADMITTED over the objection of counsel and the Court will detemine what weight is to be given to the Exhibit. Further testimony and exhibits presented (see Worksheets). Further exhibit objections; arguments of counsel; and the Court's rulings thereon. At the request of counsel, the Court TAKES JUDICIAL NOTICE of the Order dated 7/15/15. Further testimony by Ms. Bauer. Witness excused subject to recall. PLAINTIFF RESTS.

Mr. Lavergne made an Oral Rule 52 Motion to Dismiss Michael Bauer and the Frank Bsuer Irrevocable Family Trust. Following arguments by counsel, Mr. Hernquist stipulated to dismiss the Trust and requested the Court to rule on the Rule 52 motion as to Defendant Michael Bauer. COURT ORDERED, Oral Rule 52 Motion to Dismiss Michael Bauer GRANTED; FINDING Rule 52c had been

met and Michael Bauer DISMISSED effective June 1, 2018.

Mr. Lavergne calls his first witness in Defendant's case in chief. Frank Bauer SWORN and TESTIFIED. COURT ORDERED, Trial CONTINUED.

6/4/18 9:30 AM BENCH TRIAL CONTINUES

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property **COURT MINUTES** **June 04, 2018**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

June 04, 2018 **9:30 AM** **Bench Trial**

HEARD BY: Kishner, Joanna S. **COURTROOM:** RJC Courtroom 12B

COURT CLERK: Tena Jolley

RECORDER: Sandra Harrell

REPORTER:

PARTIES PRESENT:

Bauer, Frank H	Defendant
Bauer, Marta	Plaintiff
Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- BENCH TRIAL - DAY 3

Mr. Hernquist stated that he received 42 pages of documents yesterday that Defendant wants to introduce today; that he filed a Bench Memorandum; and provided the Court with a courtesy copy. Mr. Hernquist stated the documents were untimely and should be excluded.

Resume testimony of Frank Bauer. Testimony of Marta Bauer and exhibits presented (see Worksheets). Defense RESTED. Plaintiff had no rebuttal witnesses and RESTED. Counsel stipulated to file simultaneous briefing no later than 5:00 p.m. June 29, 2018 and COURT ORDERED, matter CONTINUED to Chambers for Decision. Exhibits not offered or admitted returned to counsel.

7/13/19 (CHAMBERS) BENCH TRIAL DECISION

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property **COURT MINUTES** **August 10, 2018**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

August 10, 2018 **3:00 AM** **Bench Trial**

HEARD BY: Kishner, Joanna S. **COURTROOM:** Chambers

COURT CLERK: Tena Jolley

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Decision and Order filed separately. See Findings of Fact, Conclusions of Law and Judgment dated 8/9/18.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property **COURT MINUTES** **September 13, 2018**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

September 13, 2018 10:00 AM Motion to Stay

HEARD BY: Kishner, Joanna S. **COURTROOM:** RJC Courtroom 12B

COURT CLERK: Tena Jolley

RECORDER: Sandra Harrell

REPORTER:

PARTIES PRESENT:

Bauer, Frank H	Defendant
Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- Court noted she has reviewed the pleadings and is inclined to deny the motion at this juncture as the basis set forth in the motion has previously been resolved by the Court. Further, Court noted she has reviewed the transcript for the day of testimony regarding the insurance check. Mr. Lavergne submitted on the motion. Mr. Hernquist advised there is a pending rule 59 motion and Defendant's moved for rule 62(b) stay after the 10 days time period and the funds had been disbursed. Further arguments. COURT ORDERED, motion DENIED; Mr. Hernquist to prepare and submit the appropriate order; Mr. Lavergne to review and sign off.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property | **COURT MINUTES** | **September 25, 2018**

A-15-723521-C Marta Bauer, Plaintiff(s)
vs.
Frank Bauer, Defendant(s)

September 25, 2018 9:00 AM Motion

HEARD BY: Kishner, Joanna S. **COURTROOM:** RJC Courtroom 12B

COURT CLERK: Tena Jolley

RECORDER: Sandra Harrell

REPORTER:

PARTIES PRESENT:

Hernquist, Robert, ESQ	Attorney
Lavergne, Malcolm P.	Attorney

JOURNAL ENTRIES

- COURT NOTED, its inclination to deny the motion, as the parties could stipulate to amend the caption and it did not preclude it from ruling; ADDITIONALLY, as to the insurance matter it had jurisdiction, and as to the matter to amend, it was the finder of fact and as the trier of fact it found its ruling in that regard. As to the caption matter, COURT ADDITIONALLY NOTED, this was a bench trial, there wasn't confusion as to how it made its determination on the findings of fact and conclusions of law, and it articulated the relief due. Mr. LaVergne stated after Mike Bower and the trust were dismissed, he believed it to be an admonishment, not an order, to clean up the caption and that was where the confusion came from. COURT summarized the reasons it suggests the parties clean up the captions; however, NOTED, just because the caption was not cleaned up, that did not mean the court addressed additional claims, and it was only addressing the issues of Frank Bauer and Marta Bauer, but was not going into any underlying issues, that could have been within the purview of the family court division. Further argument by Mr. LaVergne regarding the provisions contained within the Findings of Fact, with respect to the child support and regarding the issue of the jurisdiction of the insurance check, as he was not requesting the Court to litigate the check. Mr. Hernquist argued the finding on the child support was relevant as he was arguing the equity, the insurance check was litigated pursuant to rule 15(a), and there was no reason to litigate that issue again. Further argument by Mr. LaVergne regarding Mr. Bauer getting behind on the child support

which he did bring current; additionally, argued regarding the insurance check issue not being part of the relief requested, as it was just part of the background of the findings. COURT NOTED they were not two separate cases, the insurance matter was addressed as part of the trial, it viewed it by the consent of the parties, and it found it was not isolated; FURTHER, it was part of the house and the funds related, and that was the reason it was included in the findings of fact and conclusions of law. Further argument by Mr. LaVergne regarding subject matter jurisdiction; noting the pleadings were to partition the real property in this case. Mr. Hernquist argued that he was asking for relief and the failure to object is implied consent. COURT summarized some of the background matters it had to look at, the issues argued, and the contextual matters that it provided to show how the proceeds were to be distributed. COURT DOESN'T FIND there was an error in law, or that it was argued as a separate part as it was about the house, and there wasn't a change in the law or that there should be a new trial; ORDERED, motion for new trial and / or to amend the Judgment DENIED; Mr. Hernquist to prepare the order.

EXHIBIT(S) LIST

Case No.: **A723521**

Dept. No.: **XXXI**

Trial Date: **MAY 31, 2018**

Judge: **JOANNA S. KISHNER**

Court Clerk: **TENA M. JOLLEY**

Recorder: **SANDRA HARRELL**

MARTA BAUER,

PLAINTIFF,

vs.

FRANK H. BAUER, ET AL.,

DEFENDANTS.

Counsel for Plaintiff: **ROBERT HERNQUIST, ESQ.**

Counsel for Defendant: **MALCOLM P. LAVERGNE, ESQ.**

TRIAL BEFORE THE COURT

PLAINTIFF'S EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted	
1	Grant Bargain Sale Deed recorded 8/16/2005 MARTA 0001-0004	6-1-18	NO	6-1-18	WA
2	Quitclaim Deed recorded 11/10/2008 MARTA 0006-0008	6-1-18	NO	6-1-18	WA
3	Joint Preliminary Injunction filed 10/24/2008 MARTA 0009	6-1-18	NO	6-1-18	WA
4	Order Filed 6/23/2009 MARTA 0010-0016	6-1-18	STIP	6-1-18	WA
5	Decree of Divorce filed 11/8/2011 MARTA 0017-0023	6-1-18	NO	6-1-18	WA
6	5-Day Notice dated 2/2/2015 MARTA 0024	5-31-18	NO	5-31-18	WA
7	Photographs of Magnificent Property from 2005 purchase MARTA 0025-0026	returned to Counsel			
8	Notice of Lis Pendens recorded 10/21/2015 MARTA 0027-0029	returned to Counsel			
9	Nevada Bar Counsel Report re: Charles Odgers MARTA 0030-0033	returned to Counsel			
10	Email from Art Schweinert dated 6/26/2016 with attachments MARTA 0034-0060	5-31-18	NO	5-31-18	WA
11	Email from Art Schweinert dated 6/30/2016 with attachments MARTA 0061-0063	5-31-18	NO	5-31-18	WA
12	Email from Art Schweinert dated 7/17/2016 with attachments MARTA 0064-0091	5-31-18	NO	5-31-18	WA
13	Email from Art Schweinert dated 7/19/2016 MARTA 0092-0095	5-31-18	NO	5-31-18	WA
14	Email from Art Schweinert dated 7/19/2016 with attachments MARTA 0096-0108	5-31-18	NO	5-31-18	WA

EXHIBIT(S) LIST

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted	
15	Email from Art Schweinert dated 7/20/2016 MARTA 0109-0110	5-31-18	No	5-31-18	WA
16	Email from Art Schweinert dated 7/20/2016 with attachments MARTA 0111-0123	5-31-18	No	5-31-18	WA
17	Email from Art Schweinert dated 7/22/2016 with attachments MARTA 0124-0126	5-31-18	No	5-31-18	WA
18	Email from Art Schweinert dated 7/22/2016 MARTA 0127-0130	returned to Counsel			
19	Email from Art Schweinert dated 7/22/2016 MARTA 0131-0136	returned to Counsel			
20	Email from Art Schweinert dated 7/26/2016 with attachments MARTA 0137-0198	5-31-18	No	5-31-18	WA
21	Email from Art Schweinert dated 7/28/2016 with attachments MARTA 0199-0204	5-31-18	No	5-31-18	WA
22	Email from Art Schweinert dated 7/29/2016 MARTA 0205-0206	5-31-18	No	5-31-18	WA
23	Email from Art Schweinert dated 7/30/2016 with attachments MARTA 0207-0228	5-31-18	No	5-31-18	WA
24	Email from Art Schweinert dated 7/31/2016 with attachments MARTA 0229-0238	5-31-18	No	5-31-18	WA
25	Email from Art Schweinert dated 8/9/2016 MARTA 0239-0240	returned to Counsel			
26	Email from Art Schweinert dated 8/1/2016 MARTA 0241	5-31-18	No	5-31-18	WA
27	Email from Art Schweinert dated 8/22/2016 with attachments MARTA 0242-9243	5-31-18	No	5-31-18	WA
28	Email from Art Schweinert dated 8/23/2016 MARTA 0244-0246	returned to Counsel			
29	Email from Art Schweinert dated 8/22/2016 MARTA 0247	5-31-18	No	5-31-18	WA
30	Email from Art Schweinert dated 8/25/2016 MARTA 0248-0251	5-31-18	No	5-31-18	WA
31	Email from Art Schweinert dated 9/12/2016 with attachment MARTA 0252-0255	5-31-18	No	5-31-18	WA
32	Email from Art Schweinert dated 9/15/2016 MARTA 0256-0257	returned to Counsel			
33	Email from Art Schweinert dated 9/16/2016 MARTA 0258-0260	↓	↓	↓	
34	Email from Art Schweinert dated 9/20/2016 MARTA 0261-0265				
35	Email from Art Schweinert dated 9/27/2016 MARTA 0266-0267	returned to Counsel			
36	Email from Art Schweinert dated 9/27/2016 with attachment MARTA 0268-0284	5-31-18	No	5-31-18	WA
37	Email from Art Schweinert dated 9/27/2016 MARTA 0285	returned to Counsel			
38	Email from Art Schweinert dated 9/28/2016 with attachment MARTA 0286-0287	6-1-18	No	6-1-18	WA
39	Email from Art Schweinert dated 9/29/2016 MARTA 0288-0289	5-31-18	No	5-31-18	WA

EXHIBIT(S) LIST

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted	
40	Email from Art Schweinert dated 9/30/2016 with attachment MARTA 0290-0292	returned to Counsel			
41	Email from Art Schweinert dated 9/30/2016 MARTA 0293-0294	returned to Counsel			
42	Email from Art Schweinert dated 10/3/2016 with attachment MARTA 0295-0300	5-31-18	NO	5-31-18	WA
* 43	Email from Art Schweinert dated 10/10/2016 MARTA 0301-0303	5-31-18	NO	5-31-18	WA
44	Letter from Old Replublic Title Co. dated 10/5/2016 with attachments MARTA 0304-0309	returned to Counsel			
45	Lender's Closing Instructions MARTA 0310-0313	returned to Counsel			
46	Stipulation & Order Regarding Partition Sale of Real Property entered 9/14/2016 MARTA 0314-0351	5-31-18	NO	5-31-18	WA
47	Invoices for legal services provided to Marta Bauer in this litigation MARTA 0352-0382; MARTA 00478-00494	6-1-18	NO	6-1-18	WA
48	Marta Bauer's Retainer Agreement with O'Connell Aronowitz MARTA 00451-00455	returned to Counsel			
49	O'Connell Aronowitz invoices for legal services provided to Marta Bauer MARTA 00456-00474	6-1-18	obj	6-1-18	WA
50	Email from H. Bautista to Marta Bauer re: Rental Application MARTA 00450	6-1-18	obj	NOT	WA
51	Marta Bauer's Opposition to Frank Bauer's Summary Eviction MARTA 00441-00449	6-1-18	NO	6-1-18	WA
52	Order granting Marta Bauer attorney fees and costs filed 4/17/2017 MARTA 00475-00477	returned to Counsel			
53	Order from Evidentiary Hearing filed 5/1/2017 MARTA 00383-00388	6-1-18	obj.	6-1-18	WA
54	Michael Bauer's Bankruptcy Petition filed 4/26/2017 MARTA 003890-00433	6-1-18	Stip	6-1-18	WA
55	Michael Bauer's Chapter 13 Plan filed 4/26/2017 MARTA 00434-00440	returned to Counsel			
* 43A	Final Settlement Statement 10-5-16	5-31-18	NO	5-31-18	WA

EXHIBIT(S) LIST

Case No.: **A723521**

Trial Date: **MAY 31, 2018**

Dept. No.: **XXXI**

Judge: **JOANNA S. KISHNER**

Court Clerk: **TENA M. JOLLEY**

MARTA BAUER,

Recorder: **SANDRA HARRELL**

PLAINTIFF,

Counsel for Plaintiff: **ROBERT HERNQUIST, ESQ.**

vs.

FRANK H. BAUER, ET AL.,

Counsel for Defendant: **MALCOLM P. LAVERGNE, ESQ.**

DEFENDANTS.

TRIAL BEFORE THE COURT

DEFENDANTS' EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted	
A	November 10, 2008 Quitclaim Deed BAUER0001-BAUER0004	returned to Counsel			
B	July 19, 2005 through January 17, 2008 Bank of America Checking Account Statements BAUER0017-BAUER0072	6-4-18	YES	6-4-18	WA
C	April 26, 2016 Quitclaim Deed BAUER0073-BAUER0074	returned to Counsel			
D	October 20, 2008 Motion for Temporary Orders BAUER0080-BAUER0114	↓	↓	↓	
E	December 8, 2008 Marta Bauer Financial Disclosure Form BAUER0115-BAUER0120	↓	↓	↓	
F	January 14, 2010 Marta Bauer Financial Disclosure Form BAUER0121-BAUER0127	returned to Counsel			
G	January 14, 2010 Pre-Trial Memorandum BAUER0128-BAUER0146	6-1-18	NO	6-1-18	WA
H	August 17, 2012 Marta Bauer Financial Disclosure Form BAUER0147-BAUER0155	6-1-18	NO	6-1-18	WA
I	May 22, 2012 motion to Modify Child Custody BAUER0156-BAUER0167	6-1-18	NO	6-1-18	WA
J	October 29, 2012 Order BAUER0168-BAUER0169	returned to Counsel			
K	December 13, 2012 Order on October 23, 2012 Hearing BAUER0170-BAUER0171	returned to Counsel			
L	December 27, 2013 Order BAUER0172-BAUER0174	6-1-18	NO	6-1-18	WA
M	March 9, 2015 Motion or Joinder of Necessary Party BAUER0175-BAUER0213	6-1-18	NO	6-1-18	WA
N	July 15, 2015 Order BAUER0214-BAUER0215	6-1-18	NO	6-1-18	WA

EXHIBIT(S) LIST

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted
O	October 28, 2015 Motion for Partial Summary Judgment BAUER0216-BAUER0297	6-1-18	No	6-1-18
P	January 14, 2010 JAVS trial videos	returned to Counsel		
Q	May 12, 2015 JAVS hearing video on Motion for Joinder	↓	↓	↓
R	Marta Bauer Proof of Claim in NY Bankruptcy Case No. 17-10768-1	↓	↓	↓
S	June 5, 2017 Marta Bauer Objection to Confirmation Plan	returned to Counsel		
T	May 12, 2015 Transcript of Hearing in Divorce Case D-08-401541-D	6-1-18	YES	NOT

EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE

NOTICE OF DEFICIENCY

ON APPEAL TO NEVADA SUPREME COURT

ROBERT HERNQUIST, ESQ.
3800 HOWARD HUGHES PKWY
LAS VEGAS, NV 89169

DATE: December 4, 2018
CASE: A-15-723521-C

RE CASE: MARTA BAUER vs. FRANK H. BAUER

NOTICE OF APPEAL FILED: November 30, 2018

YOUR APPEAL <u>HAS</u> BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT** TRANSMITTED HAVE BEEN MARKED:

☒ $250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
- If the $250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.

☒ $24 – District Court Filing Fee (Make Check Payable to the District Court)**

☒ $500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
- NRAP 7: Bond For Costs On Appeal in Civil Cases

☐ Case Appeal Statement
- NRAP 3 (a)(1), Form 2

☐ Order

☐ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. **<u>The district court clerk shall apprise appellant of the deficiencies in writing</u>**, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (e) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

***Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.*

Certification of Copy

State of Nevada
County of Clark } **SS:**

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF CROSS-APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT; NOTICE OF ENTRY OF JUDGMENT; DISTRICT COURT MINUTES; EXHIBITS LIST; NOTICE OF DEFICIENCY

MARTA BAUER,

Plaintiff(s),

vs.

FRANK H. BAUER,

Defendant(s),

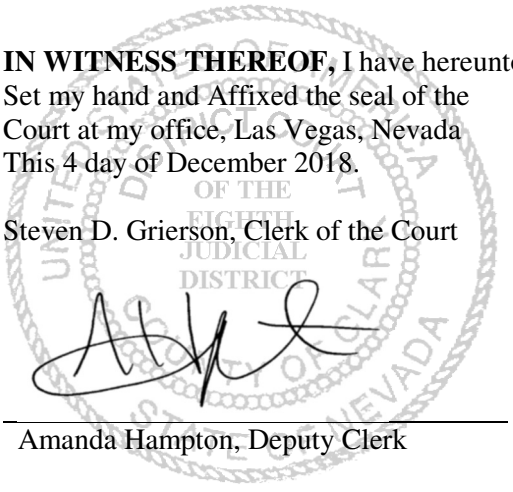
Case No: A-15-723521-C

Dept No: XXXI

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 4 day of December 2018.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk