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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THERESA MARIE WARD,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>ANITA M. MUNOZ, individually and as Trustee, etc.,<br><br>Defendant and Respondent. | B211764<br><br>(Los Angeles County Super. Ct. No. BC377611) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Reversed.

Law Offices of Glenn Ward Calsada and Glenn Ward Calsada for Plaintiff and Appellant.

Hinojosa & Wallet, Lynard C. Hinojosa, Katerina F. Perreault and Kelly L. Hinojosa for Defendant and Respondent.

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Theresa Marie Ward, who owned real property in joint tenancy with her mother, Hortence Luna, filed a lawsuit to cancel the transfer of her mother's interest in the home to the Family Trust of Hortense [*sic*] Luna (Trust), a transfer that would result in the extinction of Ward's right of survivorship. The trial court entered judgment against Ward. On appeal Ward contends the court erred in concluding the transfer complied with Civil Code section 683.2, subdivision (c),[1] which requires any instrument unilaterally severing a joint tenancy either be recorded before the transferor's death or be notarized not earlier than three days before the death and recorded not later than seven days after the death. We agree with Ward and reverse.

## FACTUAL AND PROCEDURAL BACKGROUND

In December 1992 Luna executed a grant deed conveying her El Monte home to herself and Ward as joint tenants. Luna and Ward continued to own the property as joint tenants until March 2007.

On March 12, 2007 Luna, suffering from cancer, became critically ill and entered the hospital. Several days later Luna was released to hospice care at her home, where she lived until her death on March 29, 2007. On March 19, 2007, 10 days before her death, Luna asked her granddaughter, Anita Munoz, for assistance in planning her estate. Munoz had a close relationship with Luna, having lived with her for seven years (between the ages of 15 and 22) after Munoz's mother (Ward's sister) had relinquished Munoz's care to Luna. Munoz had once again moved in with Luna in February 2007 to assist her during her illness. Munoz contacted an attorney, Scott Darling, who prepared a will, a document creating the Trust and a quitclaim deed transferring Luna's interest in the house to the Trust.

On March 21, 2007 the documents were presented to Luna, who executed them before witnesses and a notary public.[2] Luna was named trustee of the Trust, and Munoz

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1 Statutory references are to the Civil Code unless otherwise indicated.

2 The terms of the Trust and the quitclaim deed were consistent with the terms of a holographic will simultaneously executed by Luna. The will is not at issue in this action.

was nominated as co-trustee and successor trustee. Munoz was also named as the specific benefiary of the El Monte property and as the residual beneficiary of all of Luna's estate after certain other specific gifts. Luna died eight days later on March 29, 2007.

On April 13, 2007 Ward executed and recorded an instrument entitled "Affidavit—Death of Joint Tenant," seeking to effect her right of survivorship in the joint tenancy. On June 21, 2007 the quitclaim deed transferring Luna's interest in the property to the Trust was recorded by the Los Angeles County Recorder.

On September 17, 2007 Ward filed this quiet title action against Munoz individually and as trustee of the Trust, as well as against the Trust itself, seeking cancellation of the quitclaim deed and alleging Munoz had exercised undue influence over Luna, who was 81 years old and dying of cancer at the time she executed the deed. In July 2008 the case was tried to the court on two disputed issues: whether Munoz had obtained the deed through undue influence and whether the deed had been recorded in compliance with section 683.2, subdivision (c).

With respect to the second issue, Munoz asserted the deed had been timely recorded under section 683.2, subdivision (c), because it had been deposited in the mail by an employee in Darling's office on March 27, 2007 and, thus, was "deemed recorded" on that date, even though it was not formally stamped and processed by the County Recorder until June 21, 2007. (See § 1170.)[3] The only evidence produced to support the contention Darling's office had mailed the deed on March 27, 2007 was a document found in Darling's file entitled "Real Estate Check List." In his testimony Darling identified the document as one used by his office staff to track case activity. Although he had not personally seen the envelope transmitting the deed, Darling recognized a handwritten notation by one of his employees on the checklist that the deed had been mailed to the County Recorder's office on March 27, 2007. The document indicated to

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[3] Section 1170 provides, "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record."

Darling that, in the ordinary course of business, the deed had been deposited in the mail as noted. Over Ward's objection, the trial court admitted the checklist into evidence under the business records exception to the hearsay rule. (See Evid. Code, § 1271.)

On August 27, 2008 the court entered a judgment denying any relief to Ward, finding the Trust and deed were not the product of undue influence and concluding Munoz had complied with the requirements of section 683.2, subdivisions (a) and (c). Accordingly, the deed had severed the joint tenancy, the Trust was valid and the Trust (and ultimately Munoz) was now the owner of Luna's half-interest in the house.

## CONTENTIONS

Ward contends Munoz failed to comply with the provisions of section 683.2, subdivision (c), and the trial court erred in concluding the quitclaim deed should be deemed recorded when it was mailed from Darling's office. She also contends the trial court abused its discretion in admitting the checklist into evidence under the business records exception to the hearsay rule. Munoz contends the deposit of the deed in the mail was sufficient to comply with the requirements of section 683.2, subdivision (c). Alternatively, she contends the joint tenancy was effectively severed by execution of the Trust and compliance with section 683.2, subdivision (c), was not required.

## DISCUSSION

1. *Overview of Joint Tenancy Principles*

A joint tenancy consists of an estate owned jointly in undivided equal shares by two or more persons. (§ 683, subd. (a).) "The principal characteristic of joint tenancy property ownership is the right of survivorship which accrues to a surviving joint tenant; the surviving joint tenant succeeds to the interest of the deceased joint tenant by operation of law. A termination of the joint tenancy, prior to the death of one joint tenant, by converting title to another form such as tenancy in common, destroys this right of survivorship." (*Estate of Gebert* (1979) 95 Cal.App.3d 370, 376; see *Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 630 ["The right of survivorship is the distinguishing feature of a joint tenancy. [Citation.] In all other respects, the rights of tenants in common and joint tenants with respect to property are the same."]; *Grothe v.*

*Cortlandt Corp.* (1992) 11 Cal.App.4th 1313, 1317 [when one joint tenant dies, entire estate belongs automatically to the other tenant]; *Tenhet v. Boswell* (1976) 18 Cal.3d 150, 155 [upon severance of joint tenancy, cotenants become tenants in common].)

At common law, "a joint tenant in California could sever a joint tenancy without giving notice to the other joint tenants. 'An indisputable right of each joint tenant is the power to convey his or her separate estate by way of gift or otherwise without the knowledge or consent of the other joint tenant and to thereby terminate the joint tenancy.'" (*Estate of England* (1991) 233 Cal.App.3d 1, 4 (*England*), quoting *Riddle v. Harmon* (1980) 102 Cal.App.3d 524, 527 (*Riddle*); accord, *Estate of Propst* (1990) 50 Cal.3d 448, 456.) Severance of the joint tenancy interest, however, required the use of a "strawman" as the intermediary; in other words, a joint tenant could not transfer his or her interest directly to a trust in order to sever the joint tenancy. (See, e.g., *Clark v. Carter* (1968) 265 Cal.App.2d 291, 294-296 (*Clark*).) The *Riddle* court dispensed with this formality, reasoning the rationale for the common law rule had "vanished about the time that grant deeds and title companies replaced colorful dirt clod ceremonies as the way to transfer title to real property." (*Riddle*, at p. 531; see *Estate of Grigsby* (1982) 134 Cal.App.3d 611, 617 [the "ritualistic requirement of a fictional reciprocal transfer was abandoned by a more pragmatic court" in *Riddle*].) Accordingly, in circumstances not unlike the case at bar, the *Riddle* court concluded a wife had effectively severed the joint tenancy she held with her husband by transferring her interest by grant deed to herself as a tenant in common and ruled in favor of the devisee of that interest. (*Riddle*, at p. 531.)

*Riddle* did not go unnoticed. In 1984, in response to a recommendation of the Law Revision Commission, the Legislature enacted section 683.2, which codified the holding in *Riddle*. (See *England, supra*, 233 Cal.App.3d at p. 6.) The Legislature originally rejected the Commission's additional recommendation the severance be recorded in order to be effective. (See Stats. 1984, ch. 519, § 1, pp. 2064-2065.) A year later, however, the Legislature added the recording requirement as subdivision (c) of section 683.2. (See Stats 1985, ch. 157, § 1, at pp. 1051-1052; *England*, at p. 6; see

generally 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, §§ 58, 60, 62, pp. 107-112.)

"The purpose of section 683.2, subdivision (c), is to avoid potentially fraudulent behavior by the party who executes a document severing the joint tenancy." (*England, supra,* 233 Cal.App.3d at p. 6.) "The Law Revision Commission recommendation regarding the 1985 amendment states that, '[s]ince a severance may be made secretly, there is an opportunity for fraud: A joint tenant may execute an undisclosed severance, deposit the severing instrument with a third person, and instruct the third person to produce the instrument if the severing joint tenant dies first so the severed half may pass to his or her heirs or devisees. However, if the other joint tenant dies first, the secret severing instrument may be destroyed so that the surviving joint tenant will take the other half of the property by survivorship, thereby becoming owner of the entire property. [¶] . . . This new requirement [i.e., subdivision (c)] will prevent the severing joint tenant from suppressing the severing instrument if the other joint tenant dies first.'" (*Ibid.*) Further, by requiring recordation, subdivision (c) provides other joint tenants with constructive notice of the severance of the joint tenancy and the extinction of their right of survivorship. (See *ibid*.)

In sum, in its current form section 683.2, subdivision (a), permits a joint tenant to sever the tenancy without the consent of other joint tenants through execution of a deed transferring the joint tenant's interest to a third person or other written instrument that evidences the intent to sever the joint tenancy. However, to be effective, section 683.2, subdivision (c), requires a written instrument purporting to sever a joint tenancy be recorded before the death of the joint tenant or notarized within three days before the joint tenant's death and recorded within seven days after the death.[4]

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[4] Section 683.2, subdivision (c), provides in full: "Severance of a joint tenancy of record by deed, written declaration, or other written instrument pursuant to subdivision (a) is not effective to terminate the right of survivorship of the other joint tenants as to the severing joint tenant's interest unless one of the following requirements is satisfied: [¶] (1) Before the death of the severing joint tenant, the deed, written declaration, or other written instrument effecting the severance is recorded in the county where the real

2. *Luna's Transfer Was Subject to the Recording Requirements of Section 683.2, Subdivision (c)*

Munoz first argues Luna's transfer of her joint tenancy interest to the Trust extinguished Ward's right of survivorship whether or not it was timely recorded because subdivision (a) of section 683.2 expressly acknowledges the existence of "other means by which a joint tenancy may be severed": "(a) Subject to the limitations and requirements of this section, in addition to any *other means by which a joint tenancy may be severed*, a joint tenant may sever a joint tenancy in real property as to the joint tenant's interest without the joinder or consent of the other joint tenants by any of the following means: (1) Execution and delivery of a deed that conveys legal title to the joint tenant's interest to a third person, whether or not pursuant to an agreement that requires the third person to reconvey legal title to the joint tenant; (2) Execution of a written instrument that evidences the intent to sever the joint tenancy, including a deed that names the joint tenant as transferee, or of a written declaration that, as to the interest of the joint tenant, the joint tenancy is severed." (§ 683.2, subd. (a), italics added.)

As Munoz asserts, the appellate court in *England*, *supra*, 233 Cal.App.3d 1 suggested, pursuant to the savings clause in section 683.2, subdivision (a), documents other than deeds conveying legal title may effectively sever a joint tenancy. In *England* a joint tenant had executed a holographic will conveying her joint tenancy interest to a third party. The will was not recorded. The court held the attempted severance was ineffective because it was neither notarized nor recorded as required by section 683.2, subdivision (c). (*England,* at p. 7; see also *Dorn v. Solomon* (1997) 57 Cal.App.4th 650, 653 [deed not recorded until month after joint tenant died was ineffective to sever joint tenancy].) In a footnote, however, the *England* court left open the possibility a will, "if

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property is located. [¶] (2) The deed, written declaration, or other written instrument effecting the severance is executed and acknowledged before a notary public by the severing joint tenant not earlier than three days before the death of that joint tenant and is recorded in the county where the real property is located not later than seven days after the death of the severing joint tenant."

notarized and recorded," could be sufficient to sever a joint tenancy under section 683.2, subdivision (c)(2). (*England*, at p. 7, fn. 7.)

From this unremarkable starting point—a will notarized and recorded in accordance with the requirements of section 683.2, subdivision (c)(2), may be sufficient to sever a joint tenancy—Munoz leaps to the truly remarkable conclusion that Luna's transfer of her interest to the Trust constituted severance by "other means" under section 683.2, subdivision (a), and the transfer was sufficient in and of itself to sever the joint tenancy, even though the deed was not recorded in compliance with subdivision (c). To support this argument, Munoz relies solely on cases decided before the enactment of section 683.2. For example, Munoz points to language in *Clark*, *supra*, 265 Cal.App.2d 291 that a "joint tenancy is . . . severed when one joint tenant transfers his entire interest in the estate to a trustee for the use and benefit of the grantor." (*Id*. at p. 294.) According to Munoz (and apparently the trial court, as well), because the purpose of section 683.2 is to prevent fraud and no fraud was found here, there was no need to comply with subdivision (c).

Munoz's reasoning is fundamentally flawed. The first words of subdivision (a) are "[s]ubject to the limitations and requirements of this section . . . ." Thus, even assuming a transfer of a joint tenancy interest to a trust constitutes "other means" of severing a trust (and we see no reason why it should not), it remains subject to the recording limitations set forth in subdivision (c)(1) or (c)(2). (See Legis. Com. com., 6A West's Ann. Civ. Code (2007 ed.) foll. § 683.2, p. 275 ["If the instrument effecting the severance is not recorded as required by subdivision (c), that subdivision provides that the severance of the joint tenancy is not effective to terminate the survivorship right of the nonsevering joint tenant. Thus, if a conveyance by a joint tenant is not recorded as required, the transferee holds the interest conveyed as a tenant in common, subject to a right of survivorship in the nonsevering joint tenant"]; see also *England*, *supra*, 233 Cal.App.3d at pp. 5-6 ["While appellant is correct in asserting that a part of a 'will'—for example the contract portion—can be effective immediately upon execution, his cases are clearly distinguishable because they deal with *joint* wills in which *all* joint tenants are

parties to the severance. They do not stand for the proposition that one joint tenant may *unilaterally* sever a joint tenancy without the other party receiving notice."].)

Accordingly, to the extent the trial court's judgment purported to hold the joint tenancy was effectively severed upon the transfer of Luna's interest to her Trust, that conclusion is wrong.

3. *Munoz and the Trust Failed To Comply with the Recording Limitations of Section 683.2, Subdivision (c)*

As discussed, to unilaterally effect a severance of a joint tenancy of real property (that is, without the joinder or consent of the other joint tenants), the deed or other document must be recorded prior to the death of the severing joint tenant (§ 683.2, subd. (c)(1)) or the deed or other instrument must have been notarized not earlier than three days before the death of the severing joint tenant and recorded not later than seven days after his or her death (§ 683.2, subd. (c)(2)). In this case the quitclaim deed and Trust were notarized eight days prior to Luna's death—five days outside the period allowed by subdivision (c)(2). Accordingly, to be effective the quitclaim deed had to have been "recorded in the county where the real property is located" prior to Luna's death on March 29, 2007. (See § 683.2, subd. (c)(1).)

According to the evidence admitted at trial, the deed transferring Luna's interest to the Trust was deposited in the mail by an employee in the drafting attorney's office on March 27, 2007. Although the deed was not stamped as recorded by the Los Angeles County Recorder until June 21, 2007, Munoz argues—and the trial court ruled—the deed is properly "deemed" recorded on the date of mailing under section 1170 and thus satisfied the requirements of section 683.2, subdivision (c)(1).

Section 1170, which provides a properly acknowledged or certified instrument may be "deemed to be recorded" when "it is deposited in the Recorder's office, with the proper officer, for record," simply does not include the constructive deposit or "mailbox rule" articulated by the trial court. This provision was originally enacted in 1872. At that time, recording a document required an official in the office of the county recorder to copy or transcribe the relevant information into the proper book maintained by the

recorder. (See *Cady v. Purser* (1901) 131 Cal. 552, 557 ["[t]he word 'recorded' in ordinary usage signifies copied or transcribed into some permanent book"]; accord, *Dougery v. Bettencourt* (1931) 214 Cal. 455, 464.) Ordinarily, that function could not be completed at the time the document was initially presented. Section 1170 ensured that instruments required to be recorded before they became effective could be "deemed recorded" once they were turned over to the proper official in the recorder's office. (See *Dougery*, at p. 463.)[5] In other words, handing a properly certified document to the correct official confirmed the intended transfer (or other purpose of the instrument) had been conclusively elected by the recording party, who should not be penalized by any delay caused by the recorder's failure to promptly transcribe the entry into the correct book. Even then, if the purpose of the instrument was to provide constructive notice of the recorded action to others, section 1170 did not apply; and the instrument did not become effective until it was actually transcribed into the correct book. (See *Dougery*, at pp. 463-464.)

As the legislative history of section 683.2, subdivision (c), demonstrates, one of its significant purposes is to provide constructive notice of the severance of the joint tenancy to the remaining joint tenants. (See *England, supra,* 233 Cal.App.3d at p. 6.) Courts have repeatedly declined to allow reliance on section 1170 when a recording requirement bears such a purpose. (See, e.g., *Cady v. Purser, supra,* 131 Cal. at pp. 557-558; *Dougery v. Bettencourt, supra,* 214 Cal. at p. 465 ["deposit" is a sufficient recording when the purpose of the recording requirement is not to provide constructive notice, but is to make the recorded act "public and irrevocable"]; *Eckhardt v. Morley* (1934) 220 Cal. 229, 231 ["wherever the purpose of recordation is to give constructive notice of the contents of the instrument, the mere deposit of it with the recorder is not the equivalent of

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[5] As explained by the Supreme Court, "the depositing of the instrument in the recorder's office is sufficient" "[f]or the purpose of complying with a statutory requirement, as in the case of official bonds or certificates of marriage, where the evident purpose of the statute is to make the instrument a matter of public record, or when the recording of an instrument is an essential step in perfecting some right or completing some act of the party . . . ." (*Dougery v. Bettencourt, supra,* 214 Cal. at p. 463.)

recordation"]; *Dyer v. Martinez* (2007) 147 Cal.App.4th 1240, 1244 [*Cady* "applied the general principle that to rely on the fiction of constructive notice, and abrogate the requirement for actual notice, the party seeking recordation must ensure all of the statutory requirements are met"].) We see no reason to vary that result here.[6]

Even if section 1170 were applicable to the recording of deeds and other instruments severing a joint tenancy under section 683.2, however, there is neither authority nor policy justification for expanding that section's doctrine of "constructive recording" through depositing the document with the recorder's office to include the further fiction of a "constructive deposit" simply by placing the document in the mail. As Ward points out, Munoz has failed to identify even one decision to that effect; and we have found none. The absence of authority for Munoz's position is not surprising. To begin with, section 1170 states "deposited in the recorder's office, with the proper officer," not "deposited in the mail addressed to the Recorder's office." Munoz's argument, moreover, necessarily presumes the applicability of Evidence Code section 641, which creates a rebuttable presumption that a "letter correctly addressed and properly mailed" has been "received in the ordinary course of mail." But this provision does not have universal application; for instance, it does not apply to the filing of a notice of appeal (*Nu-Way Associates, Inc. v. Keefe* (1971) 15 Cal.App.3d 926, 928) or to the filing of a pleading in court (*Thompson, Curtis, Lawson & Parrish v. Thorne* (1971) 21 Cal.App.3d 797, 801; see also Cal. Rules of Court, rule 8.25(b)(1) ["[a] document is deemed filed on the date the clerk receives it"]).[7]

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[6] In arguing for a different result Munoz cites an opinion from Division Two of the Fourth Appellate District that was vacated as the result of an order granting a petition for rehearing. (See Cal. Rules of Court, rule 8.268(d).) As we expect appellate counsel to know, reliance on such an opinion is entirely improper. (Cal. Rules of Court, rule 8.1115(a); see *Townsend v. Townsend* (2009) 171 Cal.App.4th 389, 405-406, fn. 11 ["[a]lthough we deny Cynthia's request to impose a monetary sanction on James II's attorney for his violation of our rules of court, we note our disapproval of the violation"].)

[7] Moreover, a rebuttable presumption a document has been received in the ordinary course of mail is far different from a conclusive presumption deeming it received as of

Likewise, Evidence Code section 641 does not automatically apply to recordable instruments placed in the mail addressed to the county recorder. While county recorders have long accepted filing of documents by mail, the date of recording assigned to the document, once it has been received by the recorder, is the date the instrument is processed, not the date of deposit into the mail. (See *Ricketts v. McCormack* (2009) 177 Cal.App.4th 1324 [describing current practices in recording mortgage loan reconveyances].) Though there have been reports of delays in the processing of deeds or other instruments received in the mail by county recorders, courts have placed the burden on the party seeking to file the instrument if the time of recording is critical. For instance, section 2941 requires lenders and trustees to record reconveyances within a specified number of days or suffer penalties for failing to comply with the statutory deadlines. Facing class action challenges from customers who claimed their reconveyances were not timely filed (see, e.g., *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816), these institutional parties persuaded the Legislature to add current subdivision (c) to section 2941, which allows lenders and trustees to invoke the protection of Evidence Code section 641 with respect to their statutory obligation to cause reconveyances to be recorded in a timely fashion. (See *Ricketts*, at pp. 1334-1335 [discussing legislative history of section 2941].) Simply placing a properly stamped envelope containing the deed and applicable fees in the mail, however, is not sufficient. To obtain the benefit of this provision, lenders and trustees must send the reconveyances "by certified mail with the United States Postal Service or by an independent courier service using its tracking service that provides documentation of receipt and delivery, including the signature of the recipient, the full reconveyance or certificate of discharge in a recordable form, together with payment for all required fees, in an envelope addressed to the county recorder's office of the county in which the deed of trust or mortgage is recorded." Then, and only then, may the lender or trustee invoke the

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the date of mailing. If the "ordinary course of mail" is delivery within three business days, for example, the quitclaim deed mailed by the law office employee was not delivered to the recorder's office until after Luna's death.

protection of Evidence Code 641. (See § 2941, subd. (c) ["[c]ompliance with this subdivision shall entitle the trustee to the benefit of the presumption found in Section 641 of the Evidence Code"].)

This procedural fastidiousness serves a remarkably pragmatic purpose: It is difficult to imagine the number of disputes that might arise were the assertion on a proof of service or a cancellation mark on a stamp accepted as proof of the date of recording. This case poses a perfect example. Munoz asserted, and the trial court concurred, the lawyer's secondhand assertion of typical office procedures, corroborated by one handwritten entry on an internal checklist, constituted adequate proof of timely recording within the meaning of section 683.2, subdivision (c)(1). We have no hesitation concluding the quitclaim deed may not be "deemed recorded" in compliance with section 1170 based on this meager showing. Having no other proof of recording in compliance with section 683.2, subdivision (c)(1), the deed was ineffective to sever the joint tenancy. Accordingly, Ward's right of survivorship was never extinguished.

**DISPOSITION**

The judgment is reversed and the matter remanded for further proceedings not inconsistent with this opinion. Ward is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.