1965

Bernice Culley v. Garfield Smeltermen's Credit Union et al : Brief of Respondent

Utah Supreme Court

Roy F. Tygesen; Attorney for Plaintiff and Appellant;
Mark S. Miner; Attorney for Plaintiff and Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

BERNICE CULLEY, Executrix of the Estate of VIRGIL J. CULLEY, deceased,

Plaintiff and Respondent,

vs.

GARFIELD SMELTERMEN'S CREDIT UNION, and S. L. LESTER President; GLEN M. JONES, Vice-President; and AL ROBINSON, Treasurer,

Defendants.

Case No. 10247

vs.

DOUGLAS K. CULLEY,

Interpleading Plaintiff and Appellant

RESPONDENT'S BRIEF

A. H. ELLETT, Judge

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The Appellant's statement of the disposition in the Lower Court is correct.

STATEMENT OF FACT

The appellant's statements of the facts are so slanted in his favor, and in many instances, so incorrect, that

the respondent feels compelled to restate the facts as they were interpreted by respondent and the Lower Court.

On March 10, 1960, Virgil J. Culley, who was a roaster operator at the Garfield Smelter and who had very little education, and who, at the time had been married to the respondent for more than two years, opened an account at the Garfield Smeltermen's Credit Union and at the time he opened this account he signed a joint share agreement card. Contra to what the appellant has stated in his facts there was only one account opened and the joint share agreement was not the type of agreement which is uniformly used by banks and savings and loan companies but was strictly a joint share agreement card as was used by the Garfield Smeltermen's Credit Union. We feel that the distinction is so important that we are setting out the joint share agreement card as was introduced in evidence and as is set forth on page 8-A of the transcript:

> The ..... Credit Union is hereby authorized to recognize any of the signatures subscribed hereto in the payment of funds or the transaction of any business for this account. The joint owners of this account, hereby agree with each other and with said Credit Union that all sums now paid in on shares, or heretofore or hereafter paid thereon, are and shall be owned by them jointly, with right of survivorship and be subject to the withdrawal or receipt of any of

them, and payment to any of them or the survivor or survivors shall be valid and discharge said Credit Union from any liability for such payment.

Any or all of said joint owners may pledge all or any part of the shares in this account as collateral security to a loan or loans.

The right or authority of the credit union under this agreement shall not be changed or terminated by said owners, or any of them except by written notice to said credit union which shall not affect transactions theretofore made.

Contra to what the appellant has stated in his facts the account was not carried in the name of the deceased, Virgil J. Culley, and Douglas Culley, the appellant, but was carried strictly in the name of Virgil J. Culley. The only connection which the appellant has or ever had with this account or intended to have was having his name placed on the joint share agreement card solely and wholly for testamentary reasons. These important facts were completely left out of the appellant's statement of facts and respondent feels that they are so important that, with the Court's indulgence, we would like to set forth, briefly, the appellant's sworn testimony. In this regard, said testimony starting and being set forth on page 105 of the transcript:

Question: Now this particular account which is subject to this action, did you make any deposits or withdrawals on this account?

Answer: I did not.

The Court: He admitted he did not.

The Court: It is also admitted that the deceased was not indebted to him.

Question: I understand you discussed this account with him.

Answer: That's true.

Question: Did you ever have any discussions with him about whether or not you could put money in or take it out of this account?

Answer: No, sir, I didn't.

Question: And you never intended to take any money out of this account, did you?

Answer: That's absolutely right.

Question: And you never intended to deposit any money in this account, did you?

Answer: That's true.

Question: And you never intended to have any access to this account, did you?

Answer: After dad's death, yes.

Question: While he lived you never intended to have any access to it at all?

Answer: No sir, I didn't, no sir.

Question: And you never co-signed with him on any loans or deposits, and I am asking about this account.

Answer: No.

Question: Well, didn't you stipulate in this court that at the time that your dad — Your dad wasn't indebted to you at any time at the time this card was signed?

Answer: That's true.

Question: And he didn't owe you any money?

Answer: That's right.

Question: And you never claimed any part of this account during his life time, did you?

Answer: Not while he was living.

Question: And you never had any right to withdraw any portion of it?

Answer: I stated that.

Question: And at the time you signed the card which is Plaintiff's Exhibit One, you never obtained any interest in the $500.00 that was in there at that time, did you?

Answer: No sir.

Question: What did your father tell you when you signed this card?

Answer: He told me point-blank I was to see that the boys was provided and taken care of.

Question: That was back in 1960?

Answer: That's right.

Question: He was in good health at that time?

Answer: He certainly was.

Question: And he had $500.00 in the credit union?

Answer: That's true.

Question: And he owed some $2,302.42, isn't that correct?

Answer: That's correct.

Question: And at the time he had in the credit union $565.93?

Answer: That's true.

Question: And he owed, actually, if you deduct this, $1,728.05. Isn't that correct?

Answer: Yes, sir, that's true.

Question: Do you know from your conversation with him that you never intended and he never intended to give you any interest whatever in this money, did he? In this $500.00?

Answer: I have already told you that in the event of his death I was supposed. . .

Question: You never claimed any interest in the money which was in the bank at the time, did you?

Answer: No, I didn't.

Question: And you don't claim that you had any right to put money in or take money out of this account during your father's life do you?

Answer: No.

Virgil J. Culley died on the 17th day of October, 1963, and at the time of his death he left $770.00 in this account at the Garfield Smeltermen's Credit Union. He also had a Pontiac automobile and a trailer which were in his own name, both of which were heavily encumbered and all of which was paid off by reason of insurance which was carried on the accounts which paid off the Pontiac car, the trailer, and doubled the $770.00 which is the subject of this action. On the 21st day of September, 1963, Virgil J. Culley, deceased, did draw a will and in the will he specifically stated, "I make no provision in this, my last will and testament, for my children, Buddy Lee Culley, Laurie Jo Culley, Rodney Brent Culley, Douglas Kent Culley and Chad Culley, and I have purposely excluded them and each of them from participation in this, my last will and testament, and it is my desire that none of my children taken any

part of my estate." He then provided that should anyone contest the will they should receive One Dollar. The respondent testified that it was the desire of Virgil J. Culley that this $770.00 in the credit union be used for his funeral expenses. The will did not disown his children. It is obvious that the decedent knew that he had only sufficient money to bury himself.

ARGUMENT

POINT I

DOUGLAS K. CULLEY, THE APPELLANT HEREIN, TESTIFIED IN THE LOWER COURT THAT THE JOINT SHARE ARGEEMENT WAS CREATED BY VIRGIL J. CULLEY AND THE APPELLANT, DOUGLAS CULLEY, WITH AND FOR THE SOLE INTENTION THAT DOUGLAS K. CULLEY, THE APPELLANT, AS SURVIVOR, IF ENTITLED TO ANY MONEY AT ALL, SHOULD HAVE THE REMAINING FUNDS AT THE TIME OF DEPOSITER'S DEATH AND THAT THE SHARE AGREEMENT WAS PURELY AN ATTEMPTED TESTAMENTARY TRANSFER AND AS SUCH, SAID AGREEMENT IS VOID FOR FAILURE TO COMPLY WITH SECTION 74-1-5 OF THE UTAH CODE ANNOTATED, 1953.

The appellant relies on, and has cited for his position, *Braegger vs. Loveland,* 12 Utah 2d 384-367, P.2d, 177; and *Tangren vs. Ingalls*, 12 Utah 2d 388-367 P.2d 179. The foregoing cases have no application to the present case, either in facts or in law. The Court will recall that in *Tangren vs. Ingalls,* the case came up via a summary judgment and this Court sent it back for a new trial with instructions that the lower court was to determine whether or not the appellant could meet the requirement of presenting a clear and convincing evidence with which to attack the recital of the deposit cards. There was also some evidence of gift to the extent of $4,000.00 and up to the time of notice there was no question that Adeline M. Ingalls could withdraw and place money in the account. None of these facts are present in the subject case. In *Braegger vs. Loveland,* 12 Utah 2d 384-367, P.2d, 177, the testimony was that either party could withdraw money and that up to a month before her brother's death Emma withdrew money and deposited it in an account of her own name. The Court further held that there was strong evidence of an intent to make a gift.

The foregoing cases are both distinguishable from this case in that in the instant case the sworn testimony of the appellant himself established the fact that V. S. Culley, deceased, never surrendered dominion and control of this account and that there was no intention of a gift of any type or nature. The Court's attention is again

called to the fact that this share agreement which is the subject of this action is entirely different from the usual agreements which are now used by savings and loan associations. The ones which are presently used by the banks and savings and loan associations set forth an agreement such as follows: "The placing of the funds in the account shall be conclusively intended to be a gift and a delivery of the funds to the joint tenants to the extent of the prorated interest in the account." This, of course, is placed in the joint share agreement for the protection of the banks and the savings and loan associations. It is also completely lacking in the credit union agreement which is set forth herein. An analysis of the credit union agreement shows that it was obviously drawn for the sole protection of the credit union. The Court's attention is further drawn to the fact that in order to make out a gift the law requires a donative intent, the relinquishment of domination by the donor, and an acceptance by the donee, (See Brown, Personal Property, Section 37, Second Edition, 1936). It is obvious from the facts of this case that there was no present proprietary interest given and the depositor, V. J. Culley, deceased, retained full and complete interest and dominion over the account. The appellant admittedly did not deposit into said account, could not take funds from the account and had no interest in the account of any type or nature except upon the death of the depositor.

It has long been the established law that in order to make out a gift there must be an intervivos interest and there must exist an intention that each party shall have the present and equal right to withdraw the funds, (see *Haggerty vs. Haggerty,* Flo. 1951, 52 S.2d, 432; *Spark vs. Canney*, 88 S.2d, 307; and *Murray vs. Gadsden,* 91 U.S. App. D.C., 38, 197 F.2d, 194, 33 A.L.R. 2d 554). The courts are quite uniform in applying the test of a gift intervivos, for such there is required a clear intention of the donor to transfer a present interest, delivery by surrender of dominion and control to the donee, and acceptance of the gift by the donee. The rules have been modified by the nature of a joint fund but the basic elements are the same: donative intent, delivery. Not the money, in specie, in the joint fund, but a gift of an undivided interest in the funds and a surender of an equal right to withdraw the funds and the acceptance by the donee, (see *McKinnon vs. First National Bank of Pensacola,* 77 Flo. 777, 82 S. 748, 6 A.L.R. 111; *King vs. King,* Flo., 1951, 55 S.2d 181; *Webster vs. St. Petersburg Federal Savings and Loan Association,* 155 Fla., 412 20 S.2d, 400; *Chase Federal Savings and Loan Association vs. Sullivan,* 1961, Flo. 127 S.2d, 112).

The appellant completely failed to prove a joint tenancy in that there was no concurrence of the four unities of time, title, interest and possession. In this regard, the appellant had no right to put money in the account and had no right to take it out and the original

$500.00 had been disposed of numerous times prior to the death of the depositor. The appellant admitted that he had no right of possession whatsoever and the evidence shows that the only purpose in putting Douglas Culley's name on the share agreement card was either to make him V. J. Culley's agent or to create in him a right of survivorship without any present right to any part of the account.

The appellant obtained no interest whatsoever in the joint account by reason of a contract. In this regard the evidence shows that the account card was provided by the credit union for the sole protection of the credit union. The evidence further reveals that it was never intended by the parties that the contract should determine the rights of the parties. The appellant readily admitting that there was no consideration and that the depositor had full and complete dominion over the account and that appellant had none. Thus all of the elements of the contract are lacking.

CONCLUSION

The Court's attention is respectfully called to the fact that the lower court determined this case on the sworn testimony of the appellant. The court properly found that this joint fund was created by V. J. Culley with the sole intention that Douglas Culley, as survivor, would only inherit at the time of the death of V. J. Culley. The plaintiff clearly rebutted the presumption that V. J. Culley ever surrendered or intended to sur-

render equal right to withdraw the money or any part thereof to Douglas Culley or that Douglas Culley ever accepted any interest in the funds during the life time of V. J. Culley. It is obvious that the requirements of a gift intervivos have never been met. In view of this, this instrument certainly violates the statute of wills and fails to comply with any parts thereof and a contrary ruling would operate to deceive the claims of those entitled to priority over testamentary beneficiaries, including creditors and rights of widows to have their dower set apart.

Respectfully submitted,

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Attorney for Plaintiff and Respondent