

1986

Katherine Wentland Gorrell v. Robert E. Gorrell : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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JUDGMENT
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DOCKET NO. 860113-CA

IN THE UTAH COURT OF APPEALS

In the Matter of the Estate)
of Katherine Wentland Gorrell,)
)
 Deceased.)
v.)
)
Robert E. Gorrell,)
)
 Appellant.)

Case No. 860113-CA

PETITION FOR REHEARING BY RESPONDENT FIRST SECURITY
BANK OF UTAH, N.A., PERSONAL REPRESENTATIVE

Appeal from the decision of the Second Judicial District
Court of Weber County, Hon. David E. Roth, Judge

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PETITION FOR REHEARING	1
ARGUMENT	1
I. The Findings of Fact of the Lower Court Should Not Be Set Aside by The Appellate Court	3
II. No Joint Tenancy Ownership Existed in the \$43,700.00	4
CONCLUSION	6
CERTIFICATE OF COUNSEL	9

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>First Security Bank of Utah, N. A., v. Lucille Buckley</u> <u>Hall and Harold E. Hall</u> , 594 P.2d 995 (Utah 1972)	3
<u>Garcia v. Schwendiman</u> , 645 P.2d 651 (Utah 1982)	3
<u>Neill v. Royce</u> , 120 P.2d 327 (1942)	7
<u>Statutes</u>	
Utah Code Annotated 57-1-5 (1953 as amended)	8
<u>General Reference</u>	
20 AM JUR 2d 96, Cotenancy and Joint Ownership §4	8
54 AM JUR 2d 554, Money §6	10

In the Matter of the Estate
of Katherine Wentland Gorrell,

v.

Appellant.

PETITION FOR REHEARING

ARGUMENT

The parties stipulated at the commencement of the

hearing and appellant testified that prior to finding the \$43,700.00, appellant had no knowledge of the money's existence.

Appellant testified that on the same day that decedent died, he went in to rearrange the cupboards in the kitchen and found approximately \$43,700.00 in a heart shaped beauty box in a blue agate roasting pan (Tr - 35 and 46). Appellant also testified that he had never done any cooking as long as he was married to Katherine Gorrell (Tr - 35).

During the trial, appellant testified that Katherine Gorrell was the only one that knew where the money came from (Tr - 36). Appellant, respondent and the trial court all agreed that the \$43,700.00 found in Mrs. Gorrell's home had been in her sole possession and control at the time of her death.

Respondent acknowledges that a finding that the money was in Mrs. Gorrell's exclusive possession does not establish where the money came from. On the issue of where the money came from, the trial judge found three equally plausible alternatives:

1. Mrs. Gorrell saved the money from Mr. Gorrell's earnings.
2. Mrs. Gorrell saved the money prior to the marriage.
3. The savings consisted of moneys from both Mr. and Mrs. Gorrell (Tr - 111).

No matter which scenario this Court or any court accepts, it is important to note that Mrs. Gorrell did the saving and that Mrs. Gorrell had an interest in the money saved.

During the Gorrell's marriage, Mrs. Gorrell was the business manager and handled all of the money (Tr -37-40). She did the cooking and she took care of Mr. Gorrell through all of his medical problems which, as Mr. Gorrell testified, was no easy job for a woman her age (Tr -27).

Respondent was at an enormous disadvantage during the trial of this case in that respondent's key witness, the witness that knew the source of the \$43,700.00, was dead and unable to testify. The trial court heard the full side of Mr. Gorrell's story and only fragments of Mrs. Gorrell's story. In spite of that fact, the trial judge found from the evidence that he did not know the source of the money. By reversing the trial court, respondent contends that this Court has made a factual finding that the money belonged to appellant.

POINT I. THE FINDINGS OF FACT OF THE LOWER COURT
SHOULD NOT BE SET ASIDE BY THIS APPELLATE COURT.

In the case of Garcia v. Schwendiman, 645 P.2d 651
(Utah 1982), the Utah Supreme Court:

The standard for appellate review of factual findings affords great difference to the trial court's view of the evidence unless the trial court has misapplied the law or its findings are clearly against the weight of the evidence.

And in First Security Bank of Utah, N. A., vs. Hall,
supra, that court stated:

As this court has stated in numerous prior decisions, we will not disturb the findings of the trial court unless the court has misapplied proven facts or made findings clearly against the weight of evidence.

The trial court did not make a finding in this case that the \$43,700.00 belonged to Mr. Gorrell. This Court has ruled that the lower court improperly placed the burden of proof in this case on Mr. Gorrell. Respondent contends that once the court has made that finding the case should either be remanded for further findings by the lower court or the Appeals Court should apply the law within the factual finding already made by the trial court.

In the instant case, respondent fails to understand how appellant could be deemed to be the sole owner of the discovered money under the facts presented to the lower court.

POINT II. NO JOINT TENANCY OWNERSHIP EXISTED IN THE
\$43,700.00

The Utah Supreme Court in the case of Neill v. Royce, 120 P2d 327 (1942) held that absent the designation of joint tenancy the law favored a finding of tenancy in common. The court stated:

The historical background of a joint tenancy has an interesting and fluctuating record. In the early English common law the general rule was that in the absence of an express provision severing the interests, a transfer of estates was deemed by law a joint tenancy at this early time for the reason that a tenancy in common tended to split the feudal tenures, thus rendering it difficult to collect these feudal military services. . . .

When the military tenures were abolished and converted into free and common socage by the statute 12 Chas. II, (1660) C. 24, Sec. 1, the reason for such presumption of joint tenancy ceased to exist. . . . Hence, in the absence of express words to the contrary, the presumption of the law reversed itself from presuming a joint tenancy to favoring and presuming a tenancy in common.

Utah Code Annotated 57-1-5 (1953 as amended) states:

Every interest in real estate granted to two or more persons in their own right shall be a tenancy in common, unless expressly declared in the grant to be otherwise. Use of words "joint tenancy" or "with rights of survivorship" or "and to the survivor of them" or words of similar import shall declare a joint tenancy. A sole owner of real property shall create a joint tenancy in himself and another or others by making a transfer to himself and such other or others as joint tenants by use of such words as herein provided or by conveying to another person or persons an interest in land in which an interest is retained by the grantor and by declaring the creation of a joint tenancy by use of such words as herein provided. In all cases the interest of joint tenants must be equal and undivided.

Although this statute covers only real property, the legislature, consistent with Neill v. Royce, supra, has expressed a preference for tenancy in common, unless the ownership is expressly declared to be otherwise.

In order for a joint tenancy to exist, it has long been recognized that a unity of time, title, possession and interest must exist. 20 Am Jur 2d P. 96, Cotenancy and Joint Ownership §4

In the case before this court, whether there was a unity of time is unknown because we do not know the source of the money. However, the unities of title, possession and interest do not exist where appellant does not know where the money came from (Tr - 35-36), and agrees that the decedent did know. Appellant could have no unity of title, possession or interest in property, the very existence of which he knew nothing about, where the decedent possessed and controlled the

money during her lifetime.

A joint tenancy ownership of the \$43,700.00 cannot be found in this case absent a written expression to that effect or facts sufficient to support a joint tenancy. If this court finds that a joint tenancy ownership of the \$43,700.00 did not exist at the time of the decedent's death, then it seems only logical to respondent that the court would find that the money was owned by the Gorrells as tenants in common. If the money was owned by the Gorrells as tenants in common, then one-half of the money belonged to Mr. Gorrell and the other half belonged to the estate.

CONCLUSION

The First Security Bank, as personal representative of the Gorrell estate, had no choice in this case but to argue that the \$43,700.00 should have been included in the decedent's estate. The decedent was survived by not only a husband but by three children of a prior marriage. Those three children together with First Security Bank believed earnestly that the \$43,700.00 or some portion thereof should have been included in the estate because Mr. Gorrell had no knowledge of the existence of the money prior to Mrs. Gorrell's death. All parties to this action have respected Mr. Gorrell's honesty in coming forward with the fact that he had discovered the money and knew nothing about its existence prior to that discovery. Absent such a declaration by Mr. Gorrell, this case would not be pending before this Court.

In this case, in order for this Court or the trial court to award all of the money to Mr. Gorrell, it must find that Mr. Gorrell owned the money at the time of Mrs. Gorrell's death.

Ownership of money could be established by possession. 54 Am Jur 2d 554, Money §6. If possession is the test of ownership in this case, the estate should prevail, where the lower court specifically found that Mrs. Gorrell was in control and possession of the money at the time of her death.

If possession alone is insufficient to establish ownership, then respondent can only assume that this Court is attempting to determine ownership by looking to the source of the money. The trial court, after considering all of the evidence in the case and the demeanor of the witnesses, found that although several possibilities existed as to the source of the money, it was unable to determine the money's source. Unless this Court first determines that the trial court misapplied proven facts or made findings clearly against the weight of evidence, then it must also so find.

The money that was possessed and controlled by Mrs. Gorrell was not in joint tenancy. Respondent contends that if it was not joint tenancy property and was not proven to be Mr. Gorrell's money, then it should not be awarded to him.


Respondent contends further that the money should either be divided equally as cotenancy property or at the very

least this case should be remanded to the trial court for a further factual finding as to the ownership of the money.

DATED this 10th day of August, 1987.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By


Michael J. Glasmann
Attorneys for Respondent, First
Security Bank of Utah, N. A.

CERTIFICATE OF COUNSEL

Pursuant to the terms of Rule 35 (a) of the Rules of the Utah Court of Appeals, Michael J. Glasmann, as counsel for respondent petitioner, First Security Bank of Utah, N. A., hereby certifies that the foregoing Petition For Rehearing is presented in good faith and not for delay.

DATED this 10th day of August, 1987.



MICHAEL J. GLASMANN

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that four copies of the foregoing
PETITION FOR REHEARING BY RESPONDENT FIRST SECURITY BANK OF
UTAH, N. A., PERSONAL REPRESENTATIVE, were mailed, postage
prepaid, this 10th day of August, 1987, to:

Pete N. Vlahos, Esq.
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A. B. Humphreys

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