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The Continental Bank and Trust Company, Administrator, D/B/N With Will Annexed of the Estate of Walter D. Thomas v. Clisbee Kimball, Administrator of the Estate of Fern K. Thomas; Zions Savings & Loan Association; American Savings & Loan Association; Utah Savings & Loan Association; Deseret Federal Savings & Loan Association; Prudential Federal Savings & Loan Association; and State Savings & Loan Association : Brief of Respondent

Utah Supreme Court

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Arthur H. Nielsen; Attorney for RespondentsDale E. Anderson; Attorney for Appellant

In the Supreme Court of the State of Utah

THE CONTINENTAL BANK AND TRUST COMPANY, Administrator, d/b/n With Will Annexed of the Estate of Walter D. Thomas,

Plaintiff and Appellant,

vs.

CLISBEE KIMBALL, Administrator of the Estate of Fern K. Thomas; ZIONS SAVINGS & LOAN ASSOCIATION; AMERICAN SAVINGS & LOAN ASSOCIATION; UTAH SAVINGS & LOAN ASSOCIATION; DESERET FEDERAL SAVINGS & LOAN ASSOCIATION; PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION; and STATE SAVINGS & LOAN ASSOCIATION,

Defendants and Respondents.

Case No. 11125

BRIEF OF RESPONDENT

Appeal from the District Court of Salt Lake County, State of Utah
Marcellus K. Snow, District Judge

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In the Supreme Court of the State of Utah

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Case No. 11125

BRIEF OF RESPONDENT

Plaintiff, as the Administrator with the Will Annexed of the Estate of Walter D. Thomas, brought an action seeking to recover and bring into the estate, the pass book accounts which decedent held in joint tenancy with his wife Fern K. Thomas in various savings and loan institutions. (R. 1-6)

DISPOSITION IN THE LOWER COURT

At the pretrial the Court dismissed the Complaint because the Court determined that as a matter of law Section 7-13-39, U.C.A. 1953 (Chapter 17, Sec. 38, Laws of Utah 1961) precluded Plaintiff from introducing any evidence to rebut "the intention of all of the parties to the account to vest title to such account and the additions thereto in such survivor or survivors." (R. 63, 64)

STATEMENT OF FACTS

At the time of his death on September 27, 1965 Walter D. Thomas left surviving him, his widow Fern K. Thomas (who died during the course of probate of her husband's will), three children, and several grandchildren.

Appellant has set out in its Statement of Facts that decedent Walter D. Thomas opened several accounts in various savings and loan institutions in the joint names of himself and his wife Fern K. Thomas. Assuming, without conceding, that this is the fact, the trial court held nevertheless that under the provisions of the statute (Section 7-13-39, U.C.A. 1953) no evidence is admissible, in the absence of alleged fraud or undue influence, to alter or change the contractual relationship created by written contract between or among the parties. Since Appellant does not contend that the relationship created by the joint tenancy contract was induced by fraud or undue influence, (R. 1-6) the lower court dismissed the complaint. (R. 63, 64)

STATEMENT OF ISSUES

The sole issue to be determined on appeal is whether Appellant is precluded from introducing evidence to alter the contractual relationship otherwise appearing in connection with the joint accounts of decedent and his wife in the various savings and loan institutions.

ARGUMENT

POINT I

THE LOWER COURT PROPERLY CONCLUDED THAT APPELLANT COULD NOT INTRODUCE EVIDENCE TO ALTER OR CHANGE THE CONTRACTUAL RELATIONSHIP APPEARING TO EXIST UNDER THE JOINT TENANCY CONTRACT BETWEEN AND AMONG THE VARIOUS SAVINGS AND LOAN INSTITUTIONS AND DECEDENT AND HIS WIFE.

Appellant first points to the several Utah cases in which this Court has held that savings accounts with banking institutions in joint tenancy between the account holders are subject to attack by "clear and convincing" evidence that the intent of the creator of the account was not to create a joint tenancy between himself and the other party to the account.

In the case of *Tangren v. Ingalls,* (1961) 12 U2d 388, 367 P2d 179, the court speaks of what it calls the "rebuttable presumption rule." Although the Tangren Case involved an account in a savings and loan institution, it arose and was decided before the effective date of Section 7- 13-39 (The Savings & Loan Act, Chapter 17, Laws of Utah 1961 became effective January 1, 1962).

Nor did the Court in the Tangren Case consider the effect of Section 7-7-12, U.C.A. 1953 which was still in existence and which governed the withdrawal of funds from building and loan associations (the predecessors to savings and loan companies). This statute provides in part as follows:

> "Shares or investment certificates may be issued to or in the name of two persons or the survivor, and in the event of the death of either the association shall be liable thereon only to the survivor, and while both are living, payment to either shall discharge the liability to both."

The rule announced by this Court in the Tangren Case is contrary to the general rule regarding the admissibility of parol evidence to vary the terms of a written instrument. As stated in *Starley v. Deseret Foods Corp.*, 93 Utah 577, 74 P2d 1221, 1223:

> "In the absence of fraud, duress, or oppression, parol evidence will not be received to explain or modify an instrument, unless there is something on the face thereof or in the manner of the signature to create an imbiguity or uncertainty as to the liability of the party signing, or unless there was a mutual mistake of fact as to the signing of the instrument."

This statement of the law merely follows the general rule, which, as stated in 30*Am. Jur. 2d, EVIDENCE,* Section 1016, is as follows:

> "The well-established general rule is that where the parties to a contract have deliberately put their engagement in writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties, and the extent and manner of their undertaking, have been reduced to writing, and all parol evidence of prior or contemporaneous conversations or declarations tending to substitute a new and different contract for the one evidenced by the writing is incompetent. Stated otherwise, the intention of the parties as evidenced by the legal import of the language of a valid written contract cannot ordinarily be varied by parol proof of a different intention."

Under the most recent pronouncement by this Court in a case involving a joint tenancy account (*Hanks v. Hales*, (1966) 17 U2d 344, 411 P2d 836), this Court said:

> "This is an agreement between the bank and parties, fixing the condition upon which the money is deposited; upon which it may be withdrawn; and the rights of the parties between themselves. Such a deposit card when duly signed is entited to the same sanctity as any other duly executed written contract."

By the adoption of Section 7-13-39 in 1961, the legislature merely adopted for contracts with savings and loan institutions the irrebuttable presumption rule, which

in the absence of fraud or undue influence precludes the introduction of parol evidence to vary the terms of the contract between and among the parties creating a joint tenancy relationship. The law states:

> "The opening of the account in such form shall, in the absence of fraud, or undue influence, be conclusive evidence in any action or proceedings to which either the association or the surviving party or parties is a party, of the intention of all of the parties to the account to vest title to such account and the additions thereto in such survivor or survivors."

That the legislature may do this, is clear. In fact, this Court in the Tangren Case alluded to such legislative fiat in quoting from the earlier case of *Greener v. Greener,* 116 Utah 571, 212 P2d 199 where the Court voiced its doubts as to the "conclusive presumption" doctrine followed in *Holt v. Bayles,* 85 Utah 364, 39 P2d 715 after death of one of the parties had occurred. The Court stated at page 392 of 12 U2d:

> " 'The reason for the conclusive presumption, *in the absence of statute,* may not be clear for seemingly *death would have no effect on the intent with which the joint deposit was created.*' (Emphasis added.)"

Appellant, however, argues simply that the statute should not be applied in this case because of the provisions of Section 66 of the Savings and Loan Act (Sec. 7-13-66, U.C.A. 1953) which, insofar as applicable here, states:

"1. The name, rights, powers, privileges, and immunities of every building and loan or savings and loan association heretofore incorporated under the laws of this state, repealed and revised by this act, shall be governed, controlled, construed, extended, limited and determined by the provisions of this act to the same extent and effect as if such association had been incorporated pursuant hereto, and the articles of association, certificate of incorporation or charter, however entitled, bylaws and constitution, or other rules of every such association heretofore made or existing are hereby modified, altered and amended to conform to the provisions of this act; except that the *obligations of any such existing association, whether between such association and its members, or any of them, or any other person or persons, or any valid contract between the members of any such association, or between such association and any other person or persons, existing at the time this act takes effect, shall not be in any way impaired by the provisions of this act,* and, with such exceptions, every such association shall possess the rights, powers, privileges and immunities and shall be subject to the duties, liabilities, disabilities and restrictions conferred and imposed by this act notwithstanding anything to the contrary in its certificate of incorporation, bylaws, constitution or rules." (Emphasis added.)

At the outset it is apparent that this section of the statute was enacted to avoid the contention that the Act may be unconstitutional under Article 1, Section 10 of the United States Constitution which prohibits a state from adopting a law "impairing the Obligation of Contracts."

Insofar as this case is concerned, however, what obligation or contract with its members (Walter D. Thomas or Fern K. Thomas) would be in any way impaired by the provisions of Section 7-13-39 hereinbefore quoted? The answer is, "Obviously none."

Under the provisions of the joint tenancy contract executed by both Dr. and Mrs. Thomas with each savings and loan association (a copy of which is attached to the Answer of some of the Defendant Associations) the association was obligated to pay the amount of the share account to either Dr. or Mrs. Thomas during the lifetime of both and upon the death of either, it was obligated to pay such share account to the survivor. In the instance of the American Savings and Loan, the contract provides:

> "*As Joint Tenants with right of survivorship* and not as tenants by the entirety, the undersigned .....hereby apply for a membership and a ..... withdrawable account in the AMERICAN SAVINGS & LOAN ASSOCIATION, same to be issued subject to the provisions of the Laws under which the Association is organized and operating and the Articles of Incorporation and By-laws of the Association.
>
> "We hereby appoint the secretary of the Association with power of substitution and revocation as our proxy to vote for us in our stead at any special or annual meeting of the Association at which we may not be present.

> "You are directed to act pursuant to any one or more of the joint tenants' signatures, shown below, in any manner in connection with this account and to pay, without any liability for such payment, to any one or the survivor or survivors at any time. It is agreed by the signatory parties with each other and by the parties with you that any funds placed in or added to the account by any one of the parties is and shall be conclusively intended to be a gift at that time of such funds to the other signatory party or parties to the extent of his or their pro rata interest in the account. Any other person named below is authorized to withdraw funds from this account." (Emphasis added.) (R. 32)

The contract is then signed by both Walter D. Thomas and his wife Fern K. Thomas. Such contract with American Savings and Loan Association and the obligation imposed thereby (as well as every contract with the other savings and loan institutions) are in no way impaired but are strictly enforced by the statute which prevents the relationship created by the contract, and the obligations arising thereunder, from being challenged in Court except for fraud or undue influence.

Although the foregoing should adequately answer the argument of Appellant, as contained in its brief or otherwise, we wish to point out further to the Court that there is a basic sound reason for applying a different rule of evidence to accounts with savings and loan associations than is applied to regular savings accounts in banks.

An account was a savings and loan association does not create the usual debtor-creditor relationship between the institution and the "account holder" as is created between a bank and a depositor. The account holders in a savings and loan association are actually shareholders, owning redeemable shares in the association, which shares they are entitled to vote just as ordinary shareholders are entitled to vote in a regular corporation. This explains the provision of the contract quoted above giving the Secretary of the American Savings and Loan a proxy to vote the shares held by the investor.

Certainly this Court would not wish to lay down a rule that permitted every stock certificate held in joint tenancy in a regular corporation to be questioned as to the intention of the person who had purchased the stock. Nor will this Court allow the joint tenancy relationship created in a deed on real property to be questioned except upon the grounds stated above for fraud, mistake or undue influence.

Appellant argues that the "legislature may not constitutionally enact a law which results in attributing a conclusive presumption of a person's intention, because of some action taken by such person *where there is no connection or probability in experience to connect the act with the presumption.*" (Emphasis Added.)

The simple answer to this argument is that the contract speaks for itself. The parties have entered into a binding legal contract creating rights in each other

as well as obligations one to the other. The mere fact that the form of the contract is printed and furnished by the institution is of no consequence. People are also able to obtain printed forms or leases, deeds, notes, and other valid contract documents from stationery stores everywhere. The joint tenancy contract is not executed unless the parties involved ask the institution for such form and voluntarily sign it. If it were otherwise (where fraud or undue influence is involved), such facts may be established as in the case of other written contracts induced by fraud or undue influence.

SUMMARY

As we view the matter there is no reason why a joint tenancy created in a savings and loan share account should be questioned except upon the grounds set forth in the statute; namely: fraud or undue influence. Since no attempt is made here to challenge the joint tenancy on either of such bases, the statute (Section 7-13-39) should be applied and the contract should be conclusive evidence of the intention of the parties to create a joint tenancy.

Respectfully submitted,

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