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Donald Rawlings and Jeanette Rawlings v. Arnold Dwayne Rawlings and Paulette Rawlings v. Arnold Dwayne Rawlings and Paulette Rawlings, as Trustees of the Arnold Dwayne Rawlings Family Trust, Theron LaRell Rawlings, Bryce C. Rawlings, and Carol Lynn R. Masterson : Reply Brief

Utah Court of Appeals

M. David Eckersley; Prince, Yeates & Geldzahler; Attorneys for Appellants.
Thomas W. Seiler; Robinson, Seiler & Anderson, L.C.; M. Dayle Jeffs; Jeffs & Jeffs; Attorneys for Appellees.

IN THE UTAH COURT OF APPEALS

DONALD RAWLINGS and JEANETTE RAWLINGS, Plaintiffs and Appellants, v. ARNOLD DWAYNE RAWLINGS and PAULETTE RAWLINGS, Defendants and Appellees,	**REPLY BRIEF OF APPELLANTS**
ARNOLD DWAYNE RAWLINGS and PAULETTE RAWLINGS, as Trustees of the Arnold Dwayne Rawlings Family Trust, THERON LaRELL RAWLINGS, BRYCE C. RAWLINGS AND CAROL LYNN R. MASTERSON, Third-Party Plaintiffs and Appellees.	Case No. **20070797-CA**

REPLY BRIEF OF APPELLANTS

APPEAL FROM A JUDGMENT CERTIFIED AS FINAL BY THE FOURTH DISTRICT COURT, HONORABLE FRED D. HOWARD

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INTRODUCTION

In their briefs, the third party plaintiffs make factual representations which are either wholly inaccurate or very misleading. For example, they assert that Donald Rawlings did not refute the testimony of Dwayne Rawlings and LaRell Rawlings that their father said, in Donald's presence, that the property was being conveyed to Donald to hold for the family. In reality, Donald testified as follows:

> Q. Mr. Rawlings, at any time between the time when you learned that your father had cancer and the date of the deed on March 24, 1967, did your father indicate to you that he was deeding the property to you to hold for anyone else?
>
> A. He did not.

(R. 1451 Trans. Vol. IV at p. 653.)

With regard to the alleged conversation between LaRell, Arnold and Donald in a Salt Lake restaurant, he testified as follows:

> Q. While you were in there, in the café, what was said by your father or LaRell in your presence?
> A. We were just eating and talking.
>
> Q. Do you recall what he said about the transfer of the property?
> A. He didn't mention that while I was there.

(R. 1451 Trans. Vol. III at p. 482.)

Third party plaintiffs indicate that in 1971 Cleo Rawlings paid taxes on the farm. They fail to point out that such payment was for taxes assessed in 1966, prior to appellants' ownership of the property. (Exhibit 59.)

They also assert that Donald distributed proceeds from the resolution of the boundary dispute "thereby acknowledging his role of holding the farm for the benefit of the family." (Brief of third party plaintiffs LaRell and Bryce Rawlings and Carol Masterson at p. 5.) They fail to acknowledge that what was offered to the four siblings was $2,100.00, in total, from a recovery of $52,000.00.

While these factual inaccuracies are not crucial to the appropriate disposition of this appeal, they do highlight the unwillingness of third party plaintiffs to address the issues in light of the evidence as it was actually presented.

POINT I APPELLANTS HAVE NO BURDEN TO MARSHAL EVIDENCE IN SUPPORT OF FACTUAL FINDINGS THE TRIAL COURT DID NOT MAKE.

Each of the third party plaintiffs assail the appellants for the asserted failure to marshal the evidence in support of the trial court's finding of the existence of a confidential relationship between Arnold Rawlings and the appellants. This is a puzzling assertion because the trial court made no such finding. While appellants have argued that such a finding is a mandatory predicate to the validity of the court's determination to impose a constructive trust, there is no such finding for which appellants would be required to marshal the evidence. "[T]he marshaling requirement applies only to

challenges of factual findings, not to conclusions of law." Eggert v. Wasatch Energy Corp., 2004 UT 28 ¶ 37, 94 P.3d 193, 203 (Utah 2004).

It is also significant that the trial court made no finding that Arnold Rawlings intended the deed to Donald and Jeanette Rawlings to be a conveyance in trust for the family. Such a finding is also a predicate to the imposition of a constructive trust. See Ashton v. Ashton, 733 P.2d 151 (Utah 1987), wherein the Court noted what was required for the imposition of a constructive trust to conform with the intent of the grantor.

> A constructive trust is an equitable remedy which arises by operation of law to prevent unjust enrichment. Accordingly, parol evidence may be introduced to establish a constructive trust. If the evidence is of a clear and convincing nature such that the remedy should be granted, the trial court may alter a deed which is regular in form and presumed to convey clear title.

Restatement (Second) of Trusts § 45 (1957) provides, in pertinent part:

> Effect of Failure of Oral Trust for a Third Person
> (1) Where the owner of an interest in land transfers it inter vivos to another in trust for a third person, but no memorandum properly evidencing the intention to create a trust is signed, as required by the Statute of Frauds, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the third person, if, but on if,
>
> . . .
>
> (b) The Transferee at the time of the transfer was in a confidential relation to the transferor.
>
> In Parks v. Zions First National Bank, the Court construed Section 44, Restatement (Second) of Trusts, as being

> applicable only to those cases arising out of express trusts. The reasoning stated therein is without doubt applicable to section 45, and dictum in that opinion so states.
>
> In Parks, we described an express trust as a fiduciary relationship with respect to property, arising as a result of a manifestation of intent to create it and subjecting the person in whom title is vested to equitable duties to deal with it for the benefit of others.

733 P.2d at 150-51(emphasis added). See, also, Haws v. Jensen, 209 P.2d 229 (Utah 1949); Nielson v. Rasmussen, 558 P.2d 511 (Utah 1976).

In the instant case, the Court did not find that Arnold intended a trust to arise in favor of the family, which failure is fatal to the decision to impose a constructive trust.

Appellants detailed the evidence below not as a challenge to findings made by the court but rather to demonstrate that on the basis of the evidence presented the court could not have made the requisite findings necessary for the imposition of a constructive trust. Accordingly, the conclusion of law that a constructive trust was warranted can be reviewed by this Court and reversed, and not merely vacated, if unsupported by the evidence offered at trial. Bailey v. Call, 767 P.2d 138 (Utah App. 1989).

The trial court's finding (62) that Arnold Rawlings did not consider the conveyance in 1967 to be a transfer of his ownership in the property is of no legal significance. Utah law is clear that

> if valid on its face, the presumption is that the deed conveys fee title. Absent fraud, duress, mistake or the like attributable

> to the grantee, a competent grantor will not be permitted to attack or impeach his own deed.

Barlow, Inc. v. Commercial Sec. Bank, 723 P.2d 398, 401 (Utah 1986) See also, Mattes v. Olearin, 759 P.2d 1177 (Utah App. 1988) (holding that wife and husband were not in a confidential relationship and wife could not, therefore, question the validity of her deed to her husband). Even during his own lifetime Arnold would not have been able to question the validity of the 1967 deed and he never sought to do so.

While third party plaintiffs have asserted (and the trial court found) that the reason the conveyance was made to Donald and Jeanette was to get the property out of Arnold's name, this assertion is meaningless. If the conveyance was valid the motivation for the conveyance is of no significance. Indeed, in Mattes, supra, the plaintiff testified that the reason she conveyed her home to her husband was to avoid claims of her former husband's creditors. Id. at 1179. That motivation had no affect on the validity of her conveyance.

Third party plaintiffs submitted, and the court below adopted, a hodgepodge of factual findings which is no way speak to the legal issue presented; namely, whether the third party plaintiffs presented clear and convincing evidence that Arnold Rawlings intended his 1967 warranty deed to be a conveyance in trust and did so at a time when he was in a confidential relationship with the grantees. The court below found neither of these facts and the evidence offered at trial was not susceptible to making such findings.

In point of fact, the court's finding that Arnold did not consider the 1967 deed to be any form of transfer of his ownership interest, which finding has not been challenged by third party plaintiffs, expressly negates their contention that the deed was intended by Arnold to be a conveyance in trust and is fatal to any such claim.

POINT II IN THE ABSENCE OF EVIDENCE TO SUPPORT A FINDING OF AN ORAL EXPRESS TRUST THERE IS NO BASIS FOR THE IMPOSITION OF A CONSTRUCTIVE TRUST.

Both in the court below and in this Court, the third party plaintiffs have suggested that a constructive trust could be imposed to prevent the "unjust enrichment" of Donald and Jeanette Rawlings under an unspecified "more general form of pure equity." (Brief of LaRell Rawlings, Bryce Rawlings and Carol Masterson at p. 20.) The flaw in this argument is that the third party plaintiffs don't identify any reason why the conveyance from Arnold Rawlings to Donald and Jeanette was in any way wrongful. As previously noted by appellants, under Utah law the

> [o]wner of property has a right to dispose of it during his lifetime as he sees fit, even though his act may, in itself, seem to be unfair and unreasonable with reference to the interest of other children than the one to whom the conveyance is made.

Froyd v. Barnhurst, 28 P.2d 135, 136 (Utah 1934).

Third party plaintiffs have offered no explanation of how a conveyance to one child and not another could be said to constitute an unjust enrichment of the child receiving the conveyance. Invoking something referred to as "pure equity" is not a

substitute for demonstrating facts recognized by the law as a basis for imposition of a constructive trust.

The contention that third party plaintiffs were misled into executing quit claim deeds in 1974 is of no moment. The third party plaintiffs had no interest in the property they quit claimed in 1974 and, therefore, lost nothing as a result of the alleged fraud. If the 1967 deed from Arnold to Donald and Jeanette wasn't intended as a conveyance in trust for the family, then the third party plaintiffs had no colorable interest of any nature in the property they refer to as "the farm" and could not have suffered any loss by renouncing any such nonexistent interest.

POINT III THIRD PARTY PLAINTIFFS' CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS

In 1980, Donald and Jeanette Rawlings conveyed a portion of the property allegedly held in trust and kept approximately $40,000.00 of the $52,000.00 they received as consideration. The third party plaintiffs were clearly put on notice by this conduct that appellants were not treating the property as trust property held for their benefit. The statute of limitations begins to run against a party who has knowledge or through reasonable investigation could have acquired knowledge that a purported trustee was not acting for the benefit of an alleged beneficiaries of a trust. Snow v. Rudd, 2000 UT 20 ¶ 11. Third party plaintiffs had knowledge in 1980 that put them on notice to determine if Donald's actions were consistent with the existence of a trust. Instead, they waited an

additional seventeen years before commencing the present action without so much as even asking Donald about the distribution of the proceeds of the sale of part of the property.

To the extent third party plaintiffs are now asserting that a constructive trust is an appropriate remedy not for a failed oral express trust but rather for some unspecified "unjust enrichment" in the acquisition of the property, this cause of action is subject to a four year statute of limitations. See Russell/Packard Development, Inc. v. Carson, 2003 UT App. 316. In the absence of an express trust, the statute began to run on the date the deed was delivered. See Baker v. Pattee, 684 P.2d 631 (Utah 1984) (holding that a claim that a deed wasn't intended as a conveyance must be brought within 4 years of delivery of deed). Accordingly, any claim for unjust enrichment was barred 26 years before the present action was filed.

POINT IV THE COURT BELOW ERRED IN AWARDING SANCTIONS

While the third party plaintiffs assert that Utah Code Ann. § 78-31b-5(3)(p) authorizes sanctions for failure to participate in mediation in good faith, such is not the case. The statute merely authorizes the Judicial Council to promulgate rules. The actual rules only authorize the imposition of sanctions against absent parties. See Rule 101(h) of the Utah Rules of Alternative Dispute Resolution. Appellants appeared at the mediation. Accordingly, it was an abuse of discretion for the Court to impose sanctions.

There is an additional reason why sanctions should not have been awarded on the basis of counsel's affidavits about what transpired in the mediation. As the Utah Supreme Court recently held in Reese v. Tingey Const., 2008 UT 7, 177 P.3d 605 (Utah 2008), mediation proceedings are confidential and counsel is not permitted to disclose to "any court, in argument, briefs, or otherwise, statements or comments made during the [ ] mediation." Id. at ¶ 11.

Appellants admit that this issue was not raised below but assert that the Court's consideration of affidavits which violate the statute, Utah Code Ann. § 78-31b-8(4) (Rep.Vol. 9 2002), and this Court's prior holding in Lyons v. Booker, 982 P.2d 1142 (Utah App. 1999) (quoted in Reese, supra), constitutes plain error warranting reversal.

CONCLUSION

Under Utah law, the only way a deed, absolute on its fact, can be held to be a conveyance in trust is if it is established by evidence leaving no doubt that such was the grantor's intent and that the grantor was in a confidential relationship with the grantee. No such evidence was presented in this case and the judgment entered below should be reversed.

DATED this 21st day of April, 2008.

PRINCE, YEATES & GELDZAHLER

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MAILING CERTIFICATE

I hereby certify that on the 22 day of April, 2008, I caused two true and correct copies of the foregoing **Reply Brief of Appellants** to be mailed, first-class postage prepaid thereon, to the following:

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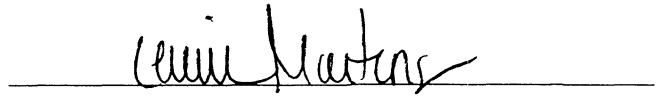

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