

2000

Kenneth Alan Banks; Susan Banks Baker; and Bransford Michael Banks v. Means : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH ALAN BANKS;
SUSAN BANKS BAKER; AND
BRANSFORD MICHAEL BANKS;
Plaintiffs/
Appellees,

v.

NANCY A. MEANS;
Defendant/
Appellant.

NANCY A. MEANS;
Counterclaim-
Plaintiff/
Appellant,

v.

KENNETH ALAN BANKS;
SUSAN BANKS BAKER; AND
BRANSFORD MICHAEL BANKS;
Counterclaim-
Defendants/
Appellees.

REPLY BRIEF
OF THE APPELLANT

Supreme Court
Case No. 20001071-SC
Priority No. 12

APPEAL FROM THE FINAL JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE FRANK G. NOEL, PRESIDING

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FILED

SUPREME COURT
UTAH

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ARGUMENT

To simplify this Court's review of the arguments contained in this Reply, Defendant asks the Court to use the definitions for items set forth below which are comparable to the definitions as employed in the Defendant's Brief of the Appellant.

"Betty" is the decedent Betty A. Banks.

The "Trust" is a trust entitled the "Betty A. Banks Family Protection Trust" created by Betty on or about April 15, 1992, by execution of a document entitled "The Betty A. Banks Family Protection Trust" which was dated April 15, 1992. (*Brief of the Appellant*, p.6).

The "1992 Trust" is the document entitled "The Betty A. Banks Family Protection Trust" and executed by Betty on April 15, 1992 which established the Trust. ("1992 Trust") (R.156 and 211) (*Brief of the Appellant*, Exhibit 1).

The "Handwritten Note" is a note written by Mr. Platt and executed on or about August 7, 1999 by Betty, which indicated that Defendant was to be the beneficiary of the Trust with the Plaintiffs as alternate beneficiaries, and that Defendant was to be the successor trustee, executor of will and agent under P.O.A. with the Plaintiffs as back up. (R.601, 519, 496 and 498) (*Brief of the Appellant*, Exhibit 2).

The "1999 Amendment" is a document entitled "The Betty A. Banks Family Protection Trust as amended August 9, 1999" executed by Betty on or about August 9, 1999. (R.227 and 157) (*Brief of the Appellant*, Exhibit 3).

The “Two (2) Pages of the 1999 Amendment” is two (2) pages contained in the 1999 Amendment which both contain the phrase “Amended August 9, 1999” and the initials of Betty. (R.229 and 235).

A. The Handwritten Note, the 1999 Amendment and the Two (2) Pages of the 1999 Amendment complied with the requirements of Section 3.1 of the 1992 Trust to effect a modification resulting in the grant of a superior beneficial interest to the Defendant.

The Plaintiffs in their Reply [sic] Brief of Appellees cite the Court to *In re Estate of Tosh*, 920 P.2d 1230 (Wash. App. 1996) for the proposition that under Mr. Platt’s version of the facts, the two (2) pages of the 1999 Amendment could not effect a modification of the 1992 Trust by their insertion into the 1992 Trust. (*Reply [sic] Brief of Appellees*, p.35) While *Tosh* is not controlling law for this Court, it is still instructive as to the methodology to be employed to modify a trust document, mainly that any modification of a trust must comply with the procedural requirements set forth in the trust instrument. However, the Plaintiffs reliance upon *Tosh* to support their position is misplaced, as a correct application of *Tosh* to the case at bar leads to a result favorable to the Defendant.

In *Tosh*, the Court found that the trustor’s mere substitution of the pages in the document without any authentication was not in compliance with the procedural requirements set forth in the trust agreement as the trust agreement specifically mandated that an amendment be a “duly executed instrument.” *Id.* at 1232. The Court stated:

“The trust provided that it could be amended by the trustor "by a duly executed instrument filed with Trustee". The parties dispute whether "executed" means signed. Taking this word out of context, the definitions of "executed" may differ. But however "executed" is defined, we are satisfied that merely substituting a page of a trust agreement is not a "duly executed instrument". A more formal procedure is required. The substituted page was not initialed, signed, or witnessed in writing. The date at the bottom of the substituted page remained unchanged. No addendum or attachment was added to the trust instrument. Indeed, nothing on the face of the document indicated that it had been amended.”

Id.

In order to conform with *Tosh* and to modify the 1992 Trust, Betty must have complied with the procedural requirements of the 1992 Trust to effect a modification. Section 3.1 of the 1992 Trust controls the method of modification (including a revocation in part if this Court adopts the view that a revocation is required to effect a modification resulting in the grant of a superior beneficial interest to the Defendant). The only procedural requirement set forth by Section 3.1 of the 1992 Trust is that the modification must be in writing and delivered to the trustee.

The three (3) documents described by the Defendant in Brief of the Appellant, 1) the Handwritten Note, 2) the entire 1999 Amendment, or 3) Two (2) Pages of the 1999 Amendment, (“Modifying Documents”) all complied with the requirements of Section 3.1 of the 1992 Trust as each was in writing and delivered to Betty, the then acting trustee at the time of execution. In fact, each Modifying Document exceeded the requirements of Section 3.1 of the 1992 Trust by containing either execution by signature and/or initial of Betty and a date. The standard set forth in *Tosh* was met as

each of the Modifying Documents conformed to the procedural requirements of the 1992 Trust.

The effect of the modification by all three (3) of the Modifying Documents on the Trust was that: 1) the Defendant was to be granted a contingent beneficial interest in the Trust, such that if she survived Betty, the Defendant would be entitled to a distribution of the entire corpus and income of the Trust; 2) that the Defendant was to be the successor to Betty as trustee of the Trust; and 3) that the Plaintiffs' contingent beneficial interest would be divested, such that they would only be entitled to a distribution from the Trust if the Defendant did not survive Betty.

B. The Handwritten Note, the 1999 Amendment and the Two (2) Pages of the 1999 Amendment were each executed and/or initialed by Betty.

Throughout their Reply [sic] Brief of Appellees, the Plaintiffs improperly characterize the facts before the trial court as to the execution of the Handwritten Note, the 1999 Amendment and the Two (2) Pages of the 1999 Amendment.

The Defendant has placed before the trial court uncontroverted evidence that Betty initialed and/or executed all of the Modifying Documents.

Betty executed the Handwritten Note. (R.601, 519, 496 and 498) (*Brief of the Appellant*, Exhibit 2). The Plaintiffs failed to provide any evidence by affidavit or otherwise that Betty failed to execute the Handwritten Note.

Betty initialed the Two (2) Pages of the 1999 Amendment which contained the statement "Amended August 9, 1999." (R.229 and 235). The Plaintiffs failed to

provide any evidence by affidavit or otherwise the Betty did not initial the Two (2) Pages of the 1999 Amendment.

Betty initialed and executed by full signature the 1999 Amendment. (R.227 and 157) (*Brief of the Appellant*, Exhibit 3) . The Plaintiffs contention that the 1999 Amendment is comprised of the Two (2) Pages of the 1999 Amendment inserted into a blank copy of the 1992 Trust is without support by affidavit or otherwise. In fact the Defendant, has shown by affidavit that the 1999 Amendment is a complete, new document bearing the original signature of Betty on two pages near the end of the 1999 Amendment, each next to a notary clause of Mr. Platt with a notary stamp expiring on May 28, 2001, and is not merely a photocopy of the 1992 Trust. (R.227 and 157) (*Brief of the Appellant*, Exhibit 3) . The Two (2) Pages of the 1999 Amendment focused on above are included in the 1999 Amendment. Other than by implication from the testimony of Mr. Platt that he did not prepare more than three (3) pages for delivery to Betty, the Plaintiffs failed to provide any evidence to refute or to give rise to a reasonable inference contrary to one that Betty initialed and signed the 1999 Amendment in August of 1999.

The parties disagree as to the method and timing of actual creation of the Modifying Documents by Mr. Platt, but no genuine issues of material fact as to the existence of each of the Modifying Documents and the execution of each of the Modifying Documents by Betty.

Betty executed by signature and/or initialed all of the Modifying Documents, all of which included the date of such action.

Therefore, no genuine issue of material fact exists as to the existence and execution of the Modifying Documents. Contrary to the position of the Plaintiff, each of the Modifying Documents completes a modification of the 1992 Trust such that:

1) the Defendant was granted a contingent beneficial interest in the Trust, such that if she survived Betty, the Defendant would be entitled to a distribution of the entire corpus/principal and income of the Trust; 2) that the Defendant was to be the successor to Betty as trustee of the Trust; and 3) that the Plaintiffs' contingent beneficial interest would be superceded by Defendant's, such that they would only be entitled to a distribution from the Trust if the Defendant did not survive Betty.

C. This Court may review the trial court's denial of the Defendant's motion for summary judgment and as appropriate enter a finding favorable to the Defendant.

This Court may review the decision of the trial court to deny the Defendant's Motion for Summary Judgment. *Christensen v. Farmers Ins. Exch.*, 443 P.2d 385 (Utah 1968); *See also, Snow v. Rudd*, 2000 UT 20, 998 P.2d 262 (Utah 2000); *Surety Underwriters v. E & C Trucking, Inc.*, 2000 UT 71, 10 P.3d 338 (Utah 2000); *Winters v. Schulman*, 1999 UT App 119, 977 P.2d 1218 (Utah App. 1999), *cert denied* 994 P.2d 1271 (Utah 1999).

This Court in *Christensen v. Farmers Ins. Exch.*, 443 P.2d 385 (Utah 1968) held

that this Court may review a denial of a motion for summary judgment in appropriate circumstance:

“While ordinarily the denial of a motion for summary judgment is not appealable because it is not a final judgment, nevertheless when there are no issues of fact to be determined and the only dispute involves a question of law, we think this court has the duty and the power when a matter is before us to direct the lower court to enter a judgment according to the law of the case. Here the trial court ruled against the appellants and gave summary judgment to the respondent.

When a party moves for summary judgment, we think the court can give a judgment against him as well as for him when under the law such a ruling is required. See *Carpineta v. Shields*, 70 So.2d 573 (Fla.1954), and cases cited therein. While there is a division in the authorities (see 48 A.L.R.2d 1188), we think the better procedure is for the court to grant the appropriate relief when there is no unresolved issue of any material fact to be determined.”

Id. at 389.

Once Defendant’s motion for summary judgment challenged the Plaintiffs’ claims as set forth in the Amended Complaint, the Plaintiffs bore the burden of making a sufficient showing to establish the existence of the essential elements of their claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986), *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327, 339 (Utah 1997), *Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120, 124 (Utah 1994), *Schafir v. Harrigan*, 879 P.2d 1384, 1391 (Utah App. 1994).

In the situation where the facts are contested by the Plaintiffs and Defendant by affidavit or otherwise, this court reviews the evidence presented and the reasonable inferences to be drawn in the light most favorable to the Plaintiffs. *Surety Underwriters*

v. E & C Trucking, Inc., 2000 UT 71,/P35,36, 10 P.3d 338. When the evidence presented by the Defendant is uncontested by the Plaintiffs, then this court may draw reasonable inferences from such facts even though such facts and inferences are adverse to the Plaintiffs' claims. *Id.* at P/35,36.

The Defendant in her Brief of the Appellant, identified with specificity where the Plaintiffs have failed to meet their burden in response to Defendant's motion for summary judgment.

The Plaintiffs failed to meet their burdens with respect to their claim that Betty was subject to undue influence by Defendant in connection with Betty's execution of the Modifying Documents (*Brief of the Appellant*, p. 32 and 33). The Plaintiffs rely solely on evidence concerning the actions of Mr. Kevin Reeves in aiding Betty in the process of modifying the 1992 Trust (*Reply [sic] Brief of the Appellees*, p. 37 and 38). These facts do not support the Plaintiffs' claim as set forth in their Amended Complaint (R. 21) that **Defendant** unduly influenced Betty in execution of the Modifying Documents.

The Plaintiffs failed to meet their burdens with respect to their claim that Betty did not possess sufficient capacity to execute the Modifying Documents (*Brief of the Appellant*, p. 37). The Plaintiffs in their Reply [sic] Brief of the Appellees refer to evidence presented to the trial court which is insufficient to overcome the presumption of capacity as set forth in by this Court *In re Estate of Kesler*, 702 P.2d 86, 88 (Utah 1985), or by the Wyoming Supreme Court in *Hilbert v. Benson*, 917 P.2d 1152, 1157

(Wyo. 1996) (*Reply [sic] Brief of the Appellees*, p. 39 and 40)

The Plaintiffs failed to meet their burdens with respect to their claim that Betty suffered from diminished capacity such that Betty failed to act as trustee of the Trust (*Brief of the Appellant*, p. 40). The Plaintiffs in their Reply [sic] Brief of the Appellees attempt to bootstrap their diminished capacity argument as to execution of the Modifying Documents into a diminished capacity argument as to acting as trustee of the Trust (*Reply [sic] Brief of the Appellees*, p. 39 and 40). The Plaintiffs failed to present any evidence of Betty's inability to act as trustee, or sufficiency to receive the Modifying Documents (R. 367 to 374).

The Plaintiffs failed to meet their burdens with respect to their claim that portions of the 1999 Amendment are inconsistent such that the 1999 Amendment is ineffective to grant the Defendant a superior contingent beneficial interest to that of the Plaintiffs (*Brief of the Appellant*, p. 42). The initial determination of whether the 1999 Amendment is ambiguous is a question of law. *Jeffs v. Stubbs*, 970 P.2d 1234, 1251 (Utah 1998). The Defendant contends that the 1999 Amendment is not ambiguous and this Court may harmonize the entire document (*Brief of the Appellant*, p. 41). If this court finds that the 1999 Amendment is ambiguous, then the court may resort to determine the intent of Betty in interpreting the 1999 Amendment. The Plaintiffs bear the burden of supporting their claim of Betty's intent, and in opposing the evidence of the Defendant, as the Defendant placed before the trial court extensive evidence of

Betty's intent that Defendant would be entitled to a distribution of the entire corpus/principal and income of the Trust; 2) that the Defendant was to be the successor to Betty as trustee of the Trust; and 3) that the Plaintiffs' contingent beneficial interest would be superceded by Defendant's, such that they would only be entitled to a distribution from the Trust if the Defendant did not survive Betty (*Brief of the Appellant*, p.42). The Plaintiffs in their Reply [sic] Brief of the Appellees fail to identify any evidence opposing the evidence of intent brought forth by the Defendant.

The Plaintiffs' failed to meet their burden to support the elements of their claims. In the case where the Defendant presented evidence to support her motion for summary judgment, and the Plaintiffs failed to put before the trial evidence controverting the Defendant, the Defendant is entitled to judgment as a matter of law. Where the Plaintiffs did put forth some evidence, such evidence and the reasonable inference therefrom do not support the Plaintiffs' burden of proof and the Defendant is entitled to judgment as a matter of law. This Court may find that the trial court erred in its denial of the Defendant's Motion for Summary Judgment and reverse and grant Defendant's Motion for Summary Judgment.

CONCLUSION

This Court should reverse the decision of the trial court, and deny the Plaintiffs' Motion for Summary Judgment in its review of the trial court's decision for correctness.

The trial court erred in granting the Plaintiffs' motion for summary judgment on the basis that the language of the 1992 Trust required Betty as trustor, to completely revoke the Trust. The Defendant has shown that pursuant to the 1992 Trust, Betty had the power to effect her intended modification of the 1992 Trust by delivery of a written instrument to the trustee of the Trust. The Defendant presented uncontroverted evidence to the trial court that the Handwritten Note, the 1999 Amendment and/or the Two (2) Pages of the 1999 Amendment were each executed and/or initialed by Betty and then delivered to Betty as the trustee. The Handwritten Note, the 1999 Amendment and/or the Two (2) Pages of the 1999 Amendment complied with the requirements of the Section 3.1 of the 1992 Trust. The Handwritten Note, the 1999 Amendment and/or the Two (2) Pages of the 1999 Amendment effected a change in the contingent beneficiaries of the Trust such that the Defendant was to receive the principal and income of the Trust if she survived Betty, the trustor, while the Plaintiffs were to receive the principal and income of the Trust only if the Defendant failed to survive Betty.

The denial of the Defendant's Motion for Summary Judgment by the trial court is reviewable by this Court. As such, this Court should reverse the trial court and grant Defendant's Motion for Summary Judgment. The Defendant presented evidence to the trial court that the Modifying Documents effected the modification of the Trust. The Plaintiffs failed to meet their burden to support the elements of their claims after the

Defendant put forth evidence controverting the claims of Plaintiffs. The Modifying Documents were not executed under undue influence by the Defendant, Betty had sufficient capacity, the Modifying Documents or other documents were delivered to Betty as then acting trustee under the terms of the 1992 Trust, and the 1999 Amendment is not ambiguous by its terms. Therefore, Defendant is entitled to a declaratory judgment that she is solely entitled to a distribution of the entire principal and income of the Trust due to her survival of Betty.

Although not argued by Defendant in this Reply Brief of the Appellant but argued in the Brief of the Appellant, this Court should find that the attorney-client privilege applied to statements made by Defendant to Joseph L. Platt, Esquire, which were disclosed by Joseph L. Platt and thus not admissible before the trial court.

Respectfully submitted this 2nd day of July, 2001.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the "REPLY BRIEF OF APPELLANT" was mailed via first-class U.S. Postal Service mail, postage pre-paid, on July 2, 2001 to:

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