

2008

Hal LeFevre, Julia Richmond, Jeffrey LeFevre, Kelly LeFevre, Daniel LeFevre, Bryce LeFevre, and Cynthia C. L. Giles v. Leland E. Stout : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF HAROLD ALMA LEFEVRE & EDITH K. LEFEVRE, Deceased.	Case No. 20080234
HAL LeFEVRE, JULIA RICHMOND, JEFFREY LeFEVRE, KELLY LeFEVRE, DANIEL LeFEVRE, BRYCE LeFEVRE, and CYNTHIA C. L. GILES, Petitioners/Appellees/Cross-Appellants, vs. LELAND E. STOUT, Respondent/Appellant/Cross-Appellee.	

REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE

APPEAL FROM THE FINAL JUDGMENT OF
THE FOURTH DISTRICT COURT OF UTAH COUNTY
THE HONORABLE GARY D. STOTT

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UTAH APPELLATE COURTS

MAR 25 2009

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26, 2008

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF

HAROLD ALMA LEFEVRE &
EDITH K. LEFEVRE,

Deceased.

HAL LeFEVRE, JULIA RICHMOND,
JEFFREY LeFEVRE, KELLY LeFEVRE,
DANIEL LeFEVRE, BRYCE LeFEVRE, and
CYNTHIA C. L. GILES,

Petitioners/Appellees/Cross-Appellants,

vs.

LELAND E. STOUT,

Respondent/Appellant/Cross-Appellee.

Case No. 20080234

REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE

JURISDICTIONAL STATEMENT ON CROSS-APPEAL

The amended judgment was entered March 4, 2008. Stout filed his notice of appeal on March 5, 2008, and the LeFevre children timely filed their notice of cross-appeal on the attorney fee issue on March 20, 2008.

The Order Granting Motion for Stay and Other Relief Upon Appeal was entered March 26, 2008. The LeFevre children timely filed their notice of appeal on April 1, 2008.

ISSUES PRESENTED ON CROSS-APPEAL

1. Did the trial court abuse its discretion in denying requested attorney fees?

Standard of review. Upon review, an appellate court will review for correctness the issue of whether the case is a type for which attorney fees may be granted.¹ The related issue of the amount of fees, or whether to deny fees altogether, is reviewed for abuse of discretion.²

2. Did the trial court abuse its discretion in granting a stay to preserve the status quo pending appeal?

Standard of review. Although the LeFevre children are correct that a court's interpretation of a rule is reviewed for correctness, the ultimate decision whether to grant a stay is vested in the discretion of the court and is reviewed for abuse of discretion.³

SUMMARY OF ARGUMENT ON CROSS-APPEAL

The LeFevre children cross-appealed on two issues: the failure to award attorney fees, and the grant of a stay pending appeal. The denial of attorney fees was within the discretion

¹*Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998).

²*Bailey-Allen Co. v. Kurzet*, 876 P.2d 421, 428 (Utah Ct. App. 1994) (“Bailey-Allen is apparently correct, then, that [a code section] endows the trial court with discretion in awarding attorney fees. We must therefore determine whether the trial court's denial of those fees constituted an abuse of discretion.”); *Equitable Life & Casualty Ins. Co. v. Ross*, 849 P.2d 1187, 1194 (Utah Ct. App. 1993) (“Determination of such fees is within the sound discretion of the trial court, and will not be overturned unless there is a showing of a clear abuse of discretion.”).

³Utah R. App. P. 62(a); *In re Johnson*, 2001 UT 110, ¶ 16, 48 P.3d 881.

of the trial court. In addition, the statutes relied on by the LeFevre children do not support an award of attorney fees in this case.

The stay pending appeal just preserved the status quo pending appeal. Although the judgment was self-executing, the stay did not counteract the judgment, but only prevented transfers of title or changes in possession during the appeal. This was well within the discretion of the trial court.

ARGUMENT

I: THE LeFEVRE CHILDREN DID NOT ALLEGE NOR ESTABLISH THE REQUIREMENTS OF A CONSTRUCTIVE TRUST; THE COURT ERRED IN GRANTING THEM TITLE TO THE HOME.

In *Rawlings v. Rawlings*,⁴ which was decided after Stout's initial brief but prior to the LeFevre children's brief, this Court clarified the law regarding constructive trusts and explained the critical distinction of express constructive trusts and equitable constructive trusts. The trial court awarded the house to the LeFevre children using broad equitable constructive trust language, but the facts do not support that award. The facts here are more consistent with an express equitable trust, but again the facts do not support such an award. The LeFevre children failed to address the distinction between express constructive trusts and equitable constructive trusts. Also, the LeFevre children dismiss in only footnotes the issues of: (1) even if the constructive trust theory was proper, did the trial court err by awarding the home to the LeFevre children without requiring an adjustment for the increased equity of

⁴2008 UT App 478, 200 P.3d 662.

home caused by the title-holder discharging the mortgage against the house; and (2) in a probate matter, did the trial court err by awarding the house directly to the LeFevre children instead of treating it as an asset of the probate estate.

As articulated in Stout's initial brief, the trial court erroneously awarded the property to the the LeFevre children through a constructive trust theory. In support of the trial court's decision, the LeFevre children contend that the trial court properly held a constructive trust arose as a matter of law in order to remedy an inequity. Under this theory of an equitable constructive trust, the LeFevre children contend Ellen Stout LeFevre committed a fraudulent act against them, she also violated her duties under a confidential relationship, and, as a consequence, she and Stout were unjustly enriched. Even if the trial court was correct in using the constructive trust theory, the LeFevre children fail to address the proper constructive trust theory at issue in our case, an express constructive trust. Furthermore, although the LeFevre children cite to several types of confidential or fiduciary relationships, they fail to address the missing evidence of superior influence necessary in a finding of a confidential relationship.

A. *The LeFevre Children's Failure to Properly Plead a Constructive Trust Should Have Barred the Trial Court's Award to Them Under that Theory.*

The LeFevre children acknowledge they did not plead a constructive trust, but argue they alleged the facts on which the constructive trust was based.⁵ But, neither their petition nor their brief allege the necessary elements of either type of constructive trust. And, at

⁵Appellees' brief at 15.

times, the LeFevre children's brief cites case law based on the completely different legal theory of equitable estoppel.⁶ Stout does not dispute the trial court's inherent power to create constructive trusts when pled by a petitioner. However, the LeFevre children fail to cite any case law that supports the trial court's imposition of a constructive trust when a petitioner never pled a constructive trust theory.

The LeFevre children did not plead constructive trust as a cause of action. Instead, the LeFevre children filed a petition to "set aside" the personal representative actions of Ellen as they concerned the transfer of the home from the probate estate of Harold LeFevre to Ellen's trust. In fact, on the morning of the trial, the trial court judge denied the LeFevre children's motion to amend their pleadings to add a claim of constructive trust to their causes of action. Based on the trial court's denial, there was no argument and no evidence presented at trial for the purpose of proving or disproving the validity of a constructive trust theory in this matter.

Accordingly, it was error for the trial court to award a judgment based on the constructive trust theory that was never pled by the LeFevre children.

B. *Even if the Trial Court's Consideration of the Constructive Trust Theory was Proper, the Trial Court Should Have Used the Express Constructive Trust Analysis, Not the Equitable Constructive Trust Analysis.*

In its conclusions of law, the trial court held the home belongs solely to the LeFevre children "pursuant to equity, fairness and to effect the intent of Harold and Ellen at the time

⁶Appellee's brief at 13; *Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671, 678 (Utah Ct. App. 1990).

of Harold's death.”⁷ The trial court's conclusion blurs the distinction between two separate theories of constructive trusts, express and equitable. The LeFevre children's failure to plead a constructive trust, as explained above, has created a record void of any argument articulating the proper constructive trust analysis.

As explained by this Court in *Rawlings*, “an express trust is 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.”⁸ In other words, this type of constructive trust allows the enforcement of an express trust that would not otherwise be enforceable. This Court further explained that “when no written instrument evidences a trust involving real property, the trust is enforceable only in limited circumstances.”⁹ The critical elements of an express trust require evidence that (1) a confidential relationship existed between the grantor and the grantee at the time the grantor transferred the property to the grantee, and (2) the grantor intended to transfer ownership of the property to the grantee in trust for the benefit of a third-party.¹⁰

In contrast, an equitable constructive trust “creates and imposes a trust in equity to avoid the unjust enrichment of one who has committed some wrongful act.”¹¹ The Utah

⁷Record 1175 ¶ 4.

⁸*Rawlings*, 2008 UT App 478, ¶ 14 (quoting *Ashton v. Ashton*, 733 P.2d 147, 151 (Utah 1987) (emphasis added)).

⁹*Id.* at ¶ 15 (citations omitted).

¹⁰*See id.* at ¶ 12; *see also Ashton*, 733 P.2d at 151.

¹¹*Rawlings*, 2008 UT App 478 at ¶ 13.

Supreme Court further explained that an equitable constructive trust arises “as a matter of equity where there has been (1) a wrongful act, (2) unjust enrichment, and (3) specific property that can be traced to the wrongful behavior.”¹²

In *Rawlings*, a father conveyed property to one of his sons and the son’s wife (the Grantees). The siblings claimed the father’s intent was that the Grantees were to hold the property in trust for the benefit of all the siblings; the Grantees claimed their title was absolute. The trial court sided with the siblings, using, as in the instant case, general equitable principles. This Court reversed, holding the dispute should have been analyzed under the express constructive trust theory because the siblings’ argument was that the father expressly intended the property to be shared by all his children. Furthermore, this Court held as a matter of law that there was no express trust because there was no evidence the father intended to transfer the property into a trust.

Although there is evidence here that Ellen intended to (and did) transfer the property into a trust, establishing an express constructive trust also requires proof of a confidential relationship.¹³ The discussion in the following subpoint shows there was no confidential relationship between Ellen and her adult, nonresident step-children.

Where the element of an express constructive trust were not satisfied, general equitable principles cannot fill the void. “The law governing the enforcement of express trusts is clear and must be applied even when it produces results that, under a pure fairness

¹²*Wilcox v. Anchor Wate Co.*, 2007 UT 39, ¶ 34, 164 P.3d 353.

¹³*Rawlings*, ¶ 15.

standard, might arguably be deemed inequitable.”¹⁴ The trial court’s grant of a constructive trust must be reversed.

C. *There Are No Facts Establishing a Confidential Relationship.*

As one of the requirements to show an express constructive trust, the facts must establish that Ellen was in a confidential relationship with the the LeFevre children. Although the trial court concluded there was a confidential relationship, there is no evidence justifying such a conclusion. At best, the findings below show that Ellen and the LeFevre children had a “good relationship.”¹⁵

As articulated in Stout’s initial brief, a kinship or relationship is not in itself sufficient to show a confidential relationship. Rather, “there must be a showing, in addition to the kinship, a reposal of confidence by one party and the resulting superiority and influence on the other party.”¹⁶ The LeFevre children’s brief fails to address this critical element of showing a confidential relationship. Instead, the LeFevre children’s brief merely restates types of legally recognized confidential relationships without providing any of the necessary legal tests and analysis to support the trial court’s finding of a confidential relationship in this case.

The cases and relationships argued by the LeFevre children do not apply. Stout does not dispute that there may be fiduciary duties between a personal representative and the

¹⁴*Id.* at ¶ 18 (citations omitted).

¹⁵Record 1175 ¶ 37.

¹⁶*In re Estate of Jones*, 759 P.2d 345, 347-48 (Utah Ct. App. 1988) (citation omitted).

creditors and heirs, or between a trustee and beneficiary, but none of those relationships existed at the time of the alleged agreement in this case. At the time of the meeting after Harold's death, the only relationship between Ellen and the LeFevre children was that of step-mother and adult, non-resident, step-children. The LeFevre children claim the terms of the trust later created were different than agreed at that meeting, but in creating or modifying the terms of the trust, Ellen was the trustor of the trust. The LeFevre children have cited to no law establishing a confidential relationship as a matter of law between a trustor and prospective beneficiaries. They make no claim of violation of her duties as trustee – the evidence was that she conveyed the property in accordance with the terms of the trust. The LeFevre children's complaint was that Ellen wrongfully amended the trust, which was an act as trustor, not trustee.

Once again, the fact a constructive trust theory was never pled or argued by the LeFevre children makes it impossible for the trial court to have concluded there was in fact an express constructive trust. In our case, the LeFevre children's argument in support of a constructive trust rests on the legal conclusion that Ellen had a confidential relationship with the LeFevre children. As stated in Stout's initial brief, the findings in this case do not support such a conclusion. There simply is no proof that Ellen held superior influence over the the LeFevre children, and this Court should reverse the conclusion that a confidential relationship existed.

II: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE LeFEVRE CHILDREN AN AWARD OF ATTORNEY FEES.

The trial court's conclusion that "each party shall pay their own attorney fees"¹⁷ is within the discretion of the trial court. Under Utah law, attorney fees "are awarded only as a matter of right under a contract or statute."¹⁸ Section 75-1-310 of the Utah Code does not provide for any award of attorney fees. Rather, the statute clearly states, "the court . . . may, in its discretion, order *costs* to be paid by any party to the proceedings or out of the assets of the estate as justice may require."¹⁹ The LeFevre children were already awarded their *costs* by the trial court.²⁰

The LeFevre children cite to no authority supporting their argument that this statute mandates an award of attorney fees in addition to costs. In the one Utah²¹ case to address this statute, *Grindstaff v. Sheville (In re Sheville)*,²² the party claiming attorney fees apparently relied on this statute only to support an award of costs.²³ The court did not allow costs under

¹⁷Record 1173 ¶ 15.

¹⁸*Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, ¶ 71, 201 P.3d 966 (citation omitted).

¹⁹Utah Code Ann. § 75-1-310 (2009) (emphasis added).

²⁰Record 1173 ¶ 14.

²¹This statute is not part of the Uniform Probate Code, so it is unlikely other courts would have opined on this statute.

²²2003 UT App 141, 71 P.3d 179.

²³*Id.* ¶ 3.

the statute because the claim was raised for the first time on appeal.²⁴ The award of attorney fees discussed in that case was based on a separate statute relating to bad faith litigation.²⁵

Similarly, the LeFevre children's claim under Utah Code § 75-3-719 is belied by the express terms of the statute. The statute is explicitly limited to a "personal representative" or a "person nominated as personal representative." As the LeFevre children state, no successor personal representative has been appointed to oversee Harold's estate. Furthermore, the implied "nomination" of Hal LeFevre to be the personal representative of Harold's estate has never been formally recognized. And, the LeFevre children's action does not come on behalf of Harold's estate; rather, the LeFevre children complaint was brought by the individually named children of Harold, not his estate.

Even if Hal LeFevre had been appointed personal representative, the statute would only authorize an award of attorney fees "from the estate," not from Stout.

Accordingly, the LeFevre children's claim to have their attorney fees paid by Harold's estate under Utah Code Ann. § 75-3-719 must be denied.

III: THE TRIAL COURT DID NOT ERR IN GRANTING STOUT A STAY PENDING APPEAL.

As the LeFevre children acknowledge, the issue of the stay pending appeal is now moot. Due to the trial court's order granting Stout's motion for a stay of execution on the

²⁴*Id.*

²⁵*Id.* ¶ 4.

judgment, determining the appropriateness of the stay pending appeal at this appellate stage is effectively moot.

Even if this Court decides to address this issue under the theory of “capable of repetition yet evading review,” the Utah Rules of Civil Procedure provides clear guidelines supporting the trial court’s granting of the stay in this case. Rule 62(d) authorizes a stay, “unless such a stay is otherwise prohibited by law or these rules.”²⁶ The LeFevre children claim that a stay is prohibited, basing their arguments on *In re Grant*,²⁷ a 1914 decision issued before the current rules of appellate procedure were adopted. The case does not represent current Utah law on a stay pending appeal.

Grant held that a stay would not lie from a “self-executing” judgment. In reaching that conclusion, the court relied on an Indiana attorney disbarment case, *Walls v. Palmer*.²⁸ The Utah court noted that an appeal from an order of disbarment would not reinstate the attorney pending the appeal.²⁹ Although that may have been the law in Utah in 1914, it is not the current law. In *In re Discipline of Johnson*,³⁰ the Utah Supreme Court held that a

²⁶ Utah R. Civ. P. 62(d).

²⁷44 Utah 386, 140 P. 226 (1914).

²⁸64 Ind. 493 (1878).

²⁹*Grant*, 140 P. at 228.

³⁰2001 UT 110, 48 P.3d 881.

disbarred lawyer “should be entitled to a stay of judgment pending appeal” unless there is “a substantial threat of irreparable harm to the public.”³¹

Rule 62(d) of the Utah Rules of Civil Procedure states: “When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules.” Leland Stout posted a bond and is therefore entitled to a stay. Nothing in the rules prohibits a stay, and the 1914 case relief upon by the LeFevre children is no longer the law in Utah.

In addition, the stay does not invalidate the judgment. If title has already transferred, as argued by the the LeFevre children, then the effect of the stay is to prohibit the LeFevre children from making a further transfer. This is necessary to preserve the status quo pending appeal. Thus, if Stout prevails on appeal, there will be no intervening third-party rights to prevent returning the parties to their original positions.

The LeFevre children fail to cite any case law prohibiting a stay pending appeal after a trial court’s judgment gives title to an opposing party. Instead, Utah case law encourages an appellant to obtain the protection of a stay when seeking to overturn a trial court’s judgment awarding title to an appellee.³² As articulated by the Utah Supreme Court, if an appellant fails to obtain a stay and the appellee subsequently sells the property to a third-party, “an appeal is moot if possession or ownership of specific property which is

³¹*Id.* ¶ 17.

³²*See Richards v. Baum*, 914 P.2d 719 (Utah 1996); *see also Taylor v. Rosillo*, 2002 UT App 199 (memorandum decision).

inextricably involved in the relief being sought on appeal has been conveyed to third parties.”³³ In other words, an appellant must necessarily obtain a stay pending appeal in order to protect his rights to possession and ownership of a piece of property.

Here, the trial court wisely granted Stout’s motion to stay the LeFevre children’s possession of the property until the resolution of this appeal. Stout’s defense and appeal in this matter is directly tied to determining the rightful possession and ownership of the home. If, as Stout anticipates, this Court rules in his favor and reverses the trial court’s decision, allowing Stout to keep the home, Stout would have been irreconcilably harmed if the LeFevre children had been able to sell the home in the interim and force Stout’s family to leave the home. The LeFevre children have not been wrongfully deprived of their ability to protect their interest in the home because the laws necessarily protect the Stout’s right to appeal the trial court’s judgment below.

CONCLUSION

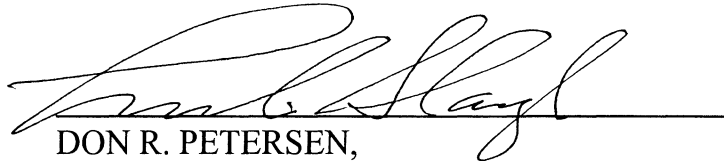
This Court should reverse the trial court’s finding that the LeFevre children are the rightful owners of the home under a constructive trust. Furthermore, the undisputed facts provide sufficient grounds to award judgment in favor of Stout. Alternatively, this case should be remanded for additional findings and reconsideration in light of those findings.

This Court should affirm the trial court’s decision that each party pay their own

³³*Richards*, 914 P.2d at 721 (citation and quotation omitted).

attorney fees. This Court should also affirm the trial court's decision to grant a stay pending appeal.

DATED this 25th day of March, 2009.

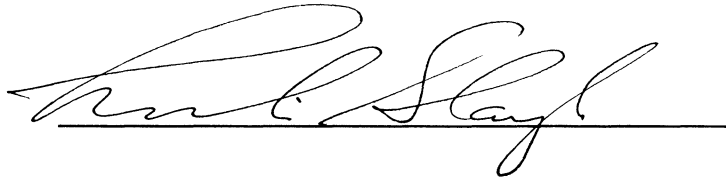
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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 25th day of March, 2009.

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A handwritten signature in black ink, appearing to read "Don R. Petersen", written over a horizontal line.

ADDENDUM

Order Granting Motion for Stay and Other Relief Upon Appeal, entered March 26, 2008

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

IN THE MATTER OF THE
ESTATE OF,

HAROLD ALMA LEFEVRE and
EDITH K. LEFEVRE,

Deceased.

**ORDER GRANTING MOTION
FOR STAY AND OTHER
RELIEF UPON APPEAL**

Case No. 933400210

Judge Gary D. Stott

Division #4

Respondent Leland E. Stout's Motion for Stay and Other Relief Upon Appeal is hereby granted, and the Court now enters the following order:

1. The Court hereby orders a stay of the execution of the judgment entered in this matter.
2. All parties in this matter are hereby ordered to refrain from doing anything or causing any action which may affect, encumber or otherwise diminish the value of the property located on Canyon Road, Provo, Utah.

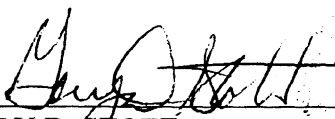
3. It is hereby ordered that the parties shall maintain the status quo during the pendency of the appeal. The LeFevres are hereby ordered to maintain the property in the same or similar condition of its current state, and shall cause no diminution in value of the property because of a failure to maintain said property.

4. The Stouts shall also file with this Court a bond in the amount of \$20,000.00 which shall be submitted to this Court on or before March 14, 2008, at 5:00 p.m. The bond may be a cash, corporate or surety bond at the choosing of the Stouts.

5. The Stouts shall also be required to maintain homeowners and fire insurance on the property at a value set of \$200,000.00.

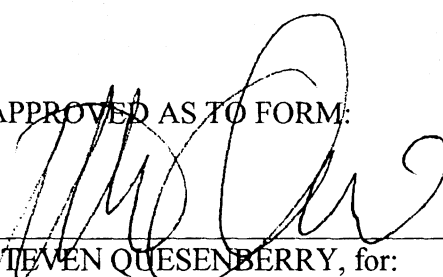
DATED this 14 day of March, 2008.

BY THE COURT:



GARY D. STOTT
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

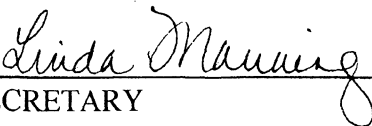


STEVEN QUESENBERRY, for:
HILL, JOHNSON & SCHMUTZ
Attorneys for LeFevres

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following,
postage prepaid, this 17th day of March, 2008.

Stephen Quesenberry, Esq.
Kirsti H. Hansen, Esq.
Hill, Johnson & Schmutz
4844 North 300 West, Suite 300
Provo, UT 84604



SECRETARY

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