

1997

Grayce Hurd, Personal Representative of the Estat of Lloyd I, Hurd, Deceased v. Lewllyn J. Sherman, Connie Sherman : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GRAYCE HURD, Personal)
Representative of the Estate)
of Lloyd I. Hurd, Deceased)
and GRAYCE HURD, Personally,)
Plaintiffs/Appellees,)

vs.)

LEWELLYN J. SHERMAN and)
CONNIE SHERMAN,)
Defendants/Appellants.)

Court of Appeals No. 970202CA

BRIEF OF THE APPELLEE

AN APPEAL FROM THE SIXTH DISTRICT COURT
KANE COUNTY, STATE OF UTAH
THE HONORABLE DAVID L. MOWER, PRESIDING

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No constitutional provisions relate to this case.

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LEWELLYN J. SHERMAN and
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Defendants/Appellants.

Court of Appeals No. 970202CA
Civil No: 940600001

BRIEF OF THE APPELLEE

I. APPELLATE JURISDICTION

Jurisdiction is properly before this Court pursuant to Utah Code Ann. §78-2-2(4) (Supp. 1996) and §78-2a-3(2)(j), and pursuant to Rule App. P. 3.

II. ISSUES PRESENTED ON APPEAL

A. Whether plaintiff, Grayce Hurd, as personal representative of the Estate of Lloyd Hurd, can bring and maintain an action against the defendants, and whether the Estate of Lloyd Hurd itself can bring and maintain an action against the defendants.

1. Standard of Review

Correction of error standard. See Bailey v. Call, 767 P.2d 138 (Utah App. 1989).

B. Whether the trial court erred when it concluded that a

constructive trust had been created for the benefit of plaintiff.

1. Standard of Review

Conclusions of law are reviewed for correctness. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

C. Whether the trial court erred when it found there was no consideration for the quitclaim deed, the checks and vehicle titles.

1. Standard of Review

The standard of review is whether the finding is clearly erroneous. Ashton v. Ashton, 733 P.2d 147 (Utah 1987).

D. Whether the trial court erred when it concluded that all of the property should be immediately returned to the plaintiff.

1. Standard of Review

Conclusions of law are reviewed for correctness. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

E. Whether the evidence presented at trial was sufficient to prove the plaintiffs' claims.

1. Standard of Review

Correction of error standard. Bailey v. Call, 767 P.2d 138 (Utah App. 1989).

III. CONSTITUTIONAL PROVISIONS

There are no constitutional provisions at issue in this case.

IV. STATEMENT OF CASE

A. NATURE OF THE CASE

Defendant's appeal from a final Judgment and Order of the Sixth Judicial District Court, Kane County, State of Utah, entered

by the Honorable David L. Mower. The Order was entered after a bench trial on April 4, 1996. The Court ordered that a constructive trust created by the parties was terminated, and that the items transferred to the defendants or either of them, as constructive trustees, shall be delivered to the plaintiff Grayce Hurd within a ten (10) day period from the date of the Court's Order. In addition, plaintiff was given judgment against the defendants for the sum of \$20,000.00 for funds taken by defendants and for costs. See Appellant's Addendum A.

B. STATEMENT OF THE FACTS

The parties to this action are Grayce Hurd hereinafter referred to as "Grayce" individually and Grayce Hurd as Personal Representative of the Estate of Lloyd I. Hurd. The deceased is hereinafter referred to as "Lloyd". The defendants are Lewellyn J. Sherman, hereinafter referred to as "Lewellyn" and Connie Sherman, hereinafter referred to as "Connie". Grayce is the mother of defendant Lewellyn and mother-in-law of defendant Connie.

References are made in this statement to admitted exhibits and the indexed record numbered by the District Clerk. In addition, references to testimony of witnesses are made to the reporter's transcript identified as "Tr." followed by the page and "L." designating the lines of the testimony.

Lloyd and Grayce commenced living together in 1964 and have held one another out as wife and husband since that time. Lloyd and Grayce did not enter into a formal marriage contract. Lloyd and Grayce filed joint Federal and State Income Tax returns

designating themselves as married and filing jointly (See Exhibits 1 and 2). Lloyd and Grayce acquired a home in Kanab, Utah on the 6th day of June, 1985, designating themselves as husband and wife and as joint tenants with full rights of survivorship (See Exhibit 4). The home was purchased for a total of \$17,000. (See Exhibit 11). Grayce contributed \$15,000 to the purchase and Lloyd contributed \$2,000 (Transcript 14). Lloyd and Grayce also accumulated: two shares of stock in the Kanab Irrigation Company issued to Lloyd or Grayce Hurd (Exhibit 7); a travel trailer, fifth-wheel type, Teton Brand 1978 model (See Exhibit 5); a travel trailer 18 feet long, Kit Companion brand; a 1977 Chevrolet pickup truck; 1980 Oldsmobile automobile; bank account at Zions First National Bank, Kanab office, Account No. 052-50552-6, with account balance of \$20,420.85 (See Exhibit 24, Finding #9, R. 144).

On May 4, 1992, Lloyd was critically ill and dying of cancer. Grayce took Lloyd to the Veterans Hospital in Salt Lake City for treatment. Grayce then stayed in the home of Lewellyn and Connie while she was in Salt Lake.

Later Lloyd left the V.A. Hospital and also stayed at the home of Lewellyn and Connie. On or about May 27 or May 28, 1992, it was apparent that "Lloyd was really getting bad." He was in a wheelchair and on oxygen (Tr. 35-L. 4 & 5).

Lloyd, Grayce, Connie and Lewellyn started discussing the need to get all of the property out of the names of Grayce and Lloyd. Grayce testified:

And all our things that was, everything, the vehicles and everything was in both names had to be transferred out of our names because if we put Lloyd in a rest-home, they would - the State would take everything. (Tr. 36-L. 9-11)

The question was asked: "who was saying there was a problem with the property, with your owning property?" (Tr. 36-L. 14) Answer by: (Grayce) "Connie and Lewellyn". Grayce testified "she (Connie) said I would also lose my Social Security and everything if everything wasn't deeded out of my name. And Lewellyn okayed it, he said, yes it would." Lewellyn also stated "that's true, Mom. We got to look in his Social Security first and then get everything out of your name." (Tr. 37-L. 13)

The four parties then discussed the method of getting the property out of the names of Lloyd and Grayce. Lewellyn called an attorney and asked if he would come over to the home "to give Lewellyn the power of attorney." (Tr. 39-L. 3) Grayce said "Lloyd, if that's what you want, why, we would trust them with that." (Tr. 39-L. 7-8)

Grayce continued: "Lloyd also talked to Lewellyn about it and said 'I want to know that Grayce will be taken care of.'" Lewellyn responded "I'll see she's taken care of" and he turned to me and asked me "Mom, do you trust me? Do you trust me?" and he said that several times and I said, "if I can't trust one of my children, who can I trust?" (Tr. 39-L. 15)

Attorney Keith Eddington came to the home with a prepared general power of attorney and had it executed by Lloyd on the 29th of May, 1992. (See Exhibit 23) Eddington testified that he

explained to Lloyd and those present that the signing of the power of attorney would permit "Lewellyn to do anything in his (Lloyd's) behalf. That he could transfer ownership to himself of all his (Lloyd's) property, he could get his cash assets." (Tr. 107-L. 8). Eddington testified "well, he (Lloyd) did want to give the power of attorney to Lewellyn because he said he trusted him." Eddington further stated: "and he trusted Lewellyn with Grayce." (Tr. 108-L. 21)

Connie brought the power of attorney form to Eddington and Eddington filled in the form in his own hand. The following testimony developed at trial:

- Q. (Olsen) Now, if he was going to give his property there was no reason for any trust was there? Lewellyn could do anything he wanted.
- A. That's true.
- Q. Now, if there was a trust relationship, did he tell you what he wanted accomplished?
- A. Not in specifics. He did make statements regarding Lewellyn's concern for his mother and I gathered from what he was saying it was more his financial position than anything else...
- Q. Now from what you tell me, did you gather that Lloyd was doing this, transferring the property to preserve it, to see that his wife Grayce was taken care of?
- A. I believe that was part of it...
- Q. But then did he tell you that he trusted Lew?
- A. Uh huh (affirmative).
- A. I think there was more concern about the State, quite honestly, than the other kids. But that would have been one of the concerns was that Grayce was taken care of.

Lloyd executed the power of attorney on the 29th of May, 1992

and died on the 3rd of June, 1992 (See death certificate - Exhibit 13).

Kenneth Lamb, a defense witness discussed the trust relationship in the following examination:

By Mr. Olsen (Tr. 126)

Q. Mr. Lamb, when you were talking with Lloyd Hurd did he ever tell you why he needed to trust Lewellyn?

A. All he told me was he couldn't trust any of the rest of his family. I don't know what his reasons were.

Q. But he said that he could trust Lewellyn?

A. Lewellyn and his wife, yes.

Q. So, apparently, he was trusting him to do something?

A. I would think.

On Monday Grayce and Lewellyn went directly to the Kanab branch of Zions Bank to make arrangements to take out the funds from Account No. 052-50552-6.

On Tuesday, June 2, 1992 Lewellyn drew checks on the account. Check 101 was made payable to himself as payee for \$10,000 and signed Lloyd I. Hurd, by Lewellyn Sherman. A second check numbered 102 was made payable to Connie Sherman for \$10,000 and signed Lloyd I. Hurd by Lewellyn Sherman. A copy of the power of attorney was presented with the checks. An account was opened at the bank in the name of Lewellyn Sherman and Connie Sherman with Lewellyn Sherman's signature authorized. Both \$10,000 checks were deposited into the newly opened account. (Tr. 168-L. 11-25)

They went from the bank to a title company. Grayce paid to have a quit-claim deed prepared. (Tr. 46-L. 10) Grayce and

Lewellyn signed the deed and offered it for recording. The grantors on the deed were Lloyd I. Hurd and Grayce Hurd, husband and wife with Lewellyn J. Sherman and Connie Sherman, husband and wife as joint tenants with full rights of survivorship as grantees. The deed was signed Lloyd I. Hurd by Lewellyn J. Sherman, his attorney in fact and by Grayce Hurd, individually. (See Exhibit 21) Grayce paid for the recording of the deed. (Tr. 47-L. 10)

Grayce and Lewellyn then went to the Tax Commission Office in Kanab where Grayce signed the titles to the 1977 Chevrolet pickup, the fifth-wheel and the 18 foot trailer. The titles were transferred. Grayce paid all of the transfer fees. (Tr. 91-L. 8-20)

The property transferred consisted of all the property owned by Grayce Hurd and Lloyd I. Hurd.

The terms of Lewellyn's trust obligation to his mother were ratified by Lewellyn in conversations between himself, his mother, his sister Iris and his brother Paul. Grayce talked to Lewellyn shortly after Lloyd's funeral.

I said, well now that Lloyd isn't in the rest home or anything, I said, let's turn everything back to me. Lewellyn said, we'd better wait and see what your Social Security is going to be. We will wait a year. ... (Tr. 52-L.9)

Grayce:

Well, we talked about it later and he said just wait a year and then he'd turn everything back to me. ... After the year was up, I said, "Well I've waited a year now. How about turning that back to me and get my name." And he said, "-- I'm not giving you anything back until you're -- while your name is on Paul's truck because he could have a wreck and you could lose everything we have." (Tr. 52-L.17)

Immediately prior to Lloyd's funeral in Kanab on the 7th of June, 1992, Paul had a conversation with Connie. Connie stated "If anything happens to Lew, or Lew doesn't turn things back in your mom's name, I'll make sure it gets back in her name." (Tr. 76-L.16) Paul also heard one discussion between Lewellyn and Grayce at the time of Lloyd's funeral:

Well Lewellyn was explaining to my mom about her Social Security, losing that, and he would say; do you trust me? Leave it in my name for a year and I will sign everything back to you and within a year everything should be out of danger of whatever he was trying to convince. (Tr. 77, L. 20)

Later towards the end of 1992 a conversation was held between Paul and Lewellyn in Richfield in June of 1992.

I told him mom's car was failing on her ... and he got hot-headed and said "Paul, don't worry, I'll get things back in mom's name" and left.

Iris Meir stated:

On June 8, her mother (Grayce) and her brother Lewellyn came to her home. (Tr. 86-L. 21) We set around the table out on the patio and this is when they let me know what had taken place with the property ... (Tr. 86-L. 23) He (Lewellyn) told me that Lloyd had given him the power of attorney so it would be sure that my mother had something to fall back on if something would happen to him. I told Lewellyn that was fine and I told my mother also, that what they had done was fine with me because at the time Lewellyn was the only one close to Salt Lake that was available to help with the matter. (Tr. 87-L. 2-6)

Iris Meir testified:

He said, Iris, I want to wait one year and make sure that

everything is settled down and okay and then this property, he said, will be back in our mother's name so that she can run her own affairs and not have to depend on anybody. (Tr. 87-L. 8-12)

Yes. Lewellyn told me, he said whenever Mom needs something, I've got this check - he said I've got her money in this special account and he had a checkbook. He said all I have to do is write out a check for whatever she needs. I didn't get a good look at the checkbook but that is what he told me. He had a special account for my mother. (Tr. 90-L. 9-12)

Defendant Connie reaffirmed the testimony of her brother-in-law Paul: (Tr. 138-L. 18-22).

Q. (Mr. Ludlow) Madam there's been some testimony about you having some conversations with relatives after the transferring of the property had occurred. First, as to Paul Sherman, did you every have a conversation with him about turning the property over?

A. I did say that. You know, I think that, I said if anything happens to Lew, I didn't want to be a part of it. I didn't.

Lewellyn has spent all of the \$20,000 cash which was taken.

He was asked: (Tr. 175-L.16-17)

Q. (Olsen) You have spent it all?

A. Well, it has been spent for one thing or another, yes.

At the conclusion of the case the Court ruled Lewellyn was a trustee of a constructive trust created for the benefit of his mother (Grayce). The Decree, Judgment and Order required the home be conveyed to the Plaintiff together with the two shares of irrigation stock and the travel trailer, house trailer, 1977 Chev pickup, and 1980 Oldsmobile automobile.

Judgment for the \$20,000 was awarded to Plaintiff since Defendants have disposed of the money.

V. SUMMARY OF ARGUMENTS

Grayce and Lloyd transferred all of the property, as well as all of the funds they owned to Lewellyn and Connie. The property was transferred without consideration because Grayce and Lloyd were told by Defendants they must get the property out of their names or the State would take it from them. Defendants also advised Grayce she could lose her Social Security if the property was held in her name. Lloyd signed a power of attorney designating Lewellyn as his attorney in fact and Lewellyn made the transfers. Grayce was able to go with Lewellyn and make such assignments, deed executions and did such other things as were necessary to transfer property interests.

The execution and use of the power of attorney created a principal-agent fiduciary relationship. The mother and son and daughter-in-law relationship created a presumption of a confidential relationship. Therefore, the burden of proof was upon the Defendants to show their actions were fair and equitable.

Defendants were obligated to hold the property for the benefit of Lloyd and Grayce during his lifetime. Upon Lloyd's death, the property was to be returned within one year to Grayce. Lloyd died on the 3rd day of June, 1992 and to this date Defendants have refused to return Plaintiff's property.

A constructive trust was found to exist because of the fiduciary relationship. Defendants have not been able to marshall evidence to impeach the Findings, Conclusions and Judgment of the District Court.

VI. ARGUMENTS

A. THE PLAINTIFF, GRAYCE HURD, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MR. HURD (LLOYD) CORRECTLY BROUGHT AND MAINTAINED AN ACTION AGAINST THE DEFENDANTS.

Appellants raise for the first time on appeal the question of whether the plaintiff as a personal representative of the estate of Lloyd is a real party in interest. The basis for the argument is that a formal marriage contract was not entered into between Grayce and Lloyd and suggests that she must be found to be the "surviving spouse" of Lloyd in order to have a real interest. Section 75-3-203(1)(d) is cited to support their argument.

The answer of Defendants filed in the matter admits the appointment of Grayce as the Personal Representative of the estate of Lloyd (See ¶ 1 of Answer - R.12). Section 75-3-203 establishes priority among persons seeking appointment as Personal Representative of an estate and has no application in these proceedings. The appointment was made upon appropriate probate petition and Letters Testamentary were issued to Grayce. There has been no objection filed in the probate proceedings. She is the appointed and qualified person to marshall the assets of the estate and to supervise the distribution of these assets to the heirs entitled to such distribution. Defendants (Lewellyn and Connie) have no standing in this separate proceedings to challenge the appointment.

A person is not disqualified to act as a Personal Representative merely because she claims property which is also claimed by the estate. (See Farnsworth v. Hatch, 47 Utah 62, 151

P.537 [1915])).

A personal representative has the obligation to "receive assets from fiduciaries" (75-3-714[2]). Therefore Grayce was obligated to seek a court determination for the recovery of assets held by Defendant and also to secure a determination as to the division of those assets between herself and the estate of Lloyd Hurd, deceased.

Since a District Court found a resulting trust wherein the trustees held the assets for the benefit of Grayce, all of the assets are required to be returned to her.

Considerable evidence was presented to the District Court concerning the relationship of Grayce and Lloyd. They were together for a period of approximately thirty (30) years. However, the purpose of the evidence was to show the relationship between the parties, their joint investment and ownership of properties, and their contributions to the resulting trust as well as demonstrating Lloyd's interest in designating Grayce as a beneficiary under the trust.

The foregoing issue is not only moot, it is also not material. Further, it is not an issue raised in the pleadings nor was it presented to the trial court. The issue cannot be raised for the first time on appeal (Park City Utah Corporation v. Ensign Company, [1978 Utah] 586 P.2d 416; Hanover Limited v. Fields 568 P.2d 75 [1977 Utah]).

B. THE TRIAL COURT CORRECTLY HELD THAT A CONSTRUCTIVE TRUST HAD BEEN CREATED FOR THE BENEFIT OF THE PLAINTIFF.

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, Ashton v. Ashton, 733 P.2D 147 (Utah 1987).

Ashton cites the following from the Restatement (Second) of Trusts §45 (1957):

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 only if,

...

(b) The transferee at the time of the transfer was in a confidential relation to the transferor.

It follows that in order to find a constructive trust existing, the lower court found a confidential relationship.

The Wyoming case of Fuller v. Fuller, 606 P.2d 306 addressed this situation and stated:

We have held that a trust is an obligation arising out of a confidence reposed in a person to apply property faithfully. (Citations omitted) We have said that a trust - in its technical sense is an obligation of a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence. A trust, is a fiduciary relationship in which one person is the holder of titled property subject to an equitable obligation to keep or use property for the benefit of another.

In Ashton the Supreme Court of Utah made similar observations, at page 151:

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.

A confidential relationship between Grayce and her son Lewellyn and daughter-in-law Connie was plead in Plaintiff's Complaint. The District Court found the parent and child relationship between the parties which shifted the burden of proof. See record 145 and 146 - Findings 1, 2 and 3.

In Baker v. Pattee, Utah Supreme Court (1984) 684 P.2d 632 it was held:

A confidential relationship is presumed between parent and child, attorney and client and trustee and cestui que trust. Blodgett v. Martsch, 590 P.2d 298 (Utah 1978)

Baker also held:

Where a confidential relationship exists, a presumption of unfairness arises which must be overcome by countervailing evidence, and the burden shifts to the Defendant to prove absence of unfairness by a preponderance of the evidence. Robertson v. Campbell, 674 P.2d 1226 (Utah 1993) ...

The District Court after hearing all of the evidence determined a trust did exist and Lewellyn agreed:

I'll keep all of the property for a year. Mom can apply for Social Security. If nobody says anything for a year, then we should be safe and I'll give all the property back to her. In the meantime, she can continue living in the house. (R. 141)

Findings of Fact 33 and 34 of the District Court (R. 138) were:

33. More than one year had passed since Lloyd's death.

34. No claims had been made by Social Security, Veteran's Administration or any other Medicare or long-term provider.

Based upon these findings the Court made the following

Conclusions of Law:

1. A constructive trust was created for the benefit of the Plaintiff. (R. 138)

Not only did Defendant have the obligation of meeting the shifted burden of proof because of the confidential relationship, the evidence as to the trust was convincing. Attention is invited to Appellee's Statement of Facts and the Findings and Conclusions of the lower court. It is impressive to observe summary statements of the witnesses.

Plaintiff's witnesses stated:

1. Grayce Hurd testified as to the discussions leading to the transfer of the property and that all of the property owned by herself and Lloyd was transferred to Lewellyn and Connie without consideration. Grayce paid all expenses in making the transfers.

She further testified concerning the representations of Lewellyn in accepting the trust that he would hold the property for her benefit and transfer it back to her after a year.

2. Iris Meir (sister of Lewellyn) stated Lewellyn said: I want to wait one year and make sure that everything is settled down and okay and then this property will be back in Mother's name so that she can run her own affairs and not have to be dependent on anybody (Tr. 87-L. 8-12).

Also, I've got her money in this special account and all I have to do is write out a check for whatever she needs.

3. Paul Sherman (Lewellyn's brother) had several conversations with Lewellyn in which Lewellyn ratified his trust responsibility. He was told "Paul don't worry, I'll get things back in Mom's name." ... And

I will sign everything back to her within a year. Everything should be out of danger ...

Statement by Connie to Paul on the day of Lloyd's funeral (7th of June, 1992): Connie said:

If anything happens to Lew, or Lew doesn't turn things back in your Mom's name, I'll make sure it gets back in her name.

Defendant's witnesses all agreed that there was a trust relationship between the parties.

1. Keith Eddington stated:

Well he (Lloyd) did want to give the power of attorney to Lewellyn because he said he trusted him.

Q. Now if it was a trust relationship, did he tell you what he wanted accomplished?

A. Not in specifics. He did make statements regarding Lewellyn's concern for his mother and I gathered from what he was saying it was more his financial position than anyone else ...

He also stated:

But that would have been one of his concerns was Grayce was taken care of.

2. Kenneth Lamb acknowledged that Lloyd trusted Lewellyn and his wife and that he was therefor trusting Lewellyn to do something (Tr. 126).

3. Defendant Lewellyn. He planned to allow his mother to continue residing in the home. (Tr. 164 - L. 11-13).

He transferred back to his mother a trailer.

4. Defendant Connie acknowledged she had told her brother-in-law Paul Sherman that, "If anything happens to Lew, or if Lew doesn't turn things back to your mom's name, I'll make sure it gets back in her name." (Tr. 76-L. 16-19) She said "I did say that." (Tr. 138-L. 21)

The evidence outlined is not only substantial but mandated a finding of a constructive trust.

C. THE TRIAL COURT CORRECTLY FOUND THERE WAS NO CONSIDERATION FOR THE QUIT-CLAIM DEED, MONEY TRANSFERS, OR VEHICLE TRANSFERS.

The trial court made Finding 25:

Neither Lewellyn nor Connie paid money for, nor transferred anything of value to Grayce in exchange (for) the quit-claim deed, the checks or the vehicles titles.

Grayce's paid for: attorney Eddington's services in preparing the power of attorney. (See Tr. 40-L. 12, Cost \$50.00); preparing the deed by the title company, cost \$10.00. (Tr. 46-L. 9); the recording of the quit-claim deed (Tr. 47-L. 10); the transfer of motor vehicle titles and new license costs (Tr. 51-L. 20).

Lewellyn and Connie paid nothing to Grayce or to Lloyd and offered no evidence of consideration. In Baker, supra the following appears at page 634:

This Court will disturb the Findings of Fact in equity cases only where the evidence clearly preponderates against them. Brown v. Loveland, Utah, 678 P.2d 292 (1984); Del Porto v. Nicolo, 27 Utah 2nd 286, 495 P.2d 811 (1972); First Security Bank of Utah NA v. Hall, 29 Utah 2nd 24, 504 P.2d 995 (1992). We are not bound to substitute our judgment for that of the trial court, and because of its advantaged position, we give considerable deference to Findings and Judgment. Gillmore v. Gillmore, Utah, 657 P.2d 736 (1982); Jensen v. Brown, Utah 639 P.2d 150 (1981); Pagano v. Walker, Utah 539 P.2d 452 (1975).

Appellant does argue consideration was either given or it was not necessary since the transfers were gifts.

A review of the evidence demonstrates that gifts were not intended. The property was to be held in trust for the benefit of Lloyd and Grayce during his lifetime. Upon the death of Lloyd, Grayce was the sole beneficiary. The self-serving notation written by Lewellyn on the checks did not change the demonstrated intent of

the parties.

The District Court was not persuaded Grayce had received adequate consideration because she was permitted to live in her own home. Her continued possession supported her testimony that she was the equitable owner of the home.

D. THE TRIAL COURT CORRECTLY CONCLUDED THAT ALL OF THE PROPERTY SHOULD BE IMMEDIATELY RETURNED.

All of the worldly possessions accumulated by Grayce and Lloyd were held in trust by Lewellyn and Connie. Grayce had been attempting to secure the needed return of the property since the year of 1993. Lewellyn had not returned the property and had exhausted all of the cash reserve transferred to him. The terms of the trust had been met and Lewellyn kept imposing unreasonable delays. Equity and justice required the immediate return of the property.

1. A Life Estate Was Not Created.

Appellants ignore the overwhelming evidence as to the terms of the trust and argue the terms were different than found by the District Court. Appellants argue Grayce had only a life estate in the assets and therefore legal title must continue to be held for Lewellyn's benefit as a remainderman.

The argument places a strained interpretation on the evidence offered in the District Court and is contrary to the Findings of the Court. The Utah Supreme Court has repeatedly held Findings of a lower Court will not be disturbed when supported by reasonable and competent evidence. See Baker v. Pattee, supra.

2. The Severance of the Joint Tenancy

Appellant argues a joint tenancy is terminated by conveyance and for that reason grantees receive unimpeachable title. We believe the argument is without merit.

While the grantees hold legal title to property in question, the equitable title is held by Grayce and she has the right to have the trust terminated.

A constructive trust was imposed because of the breach of a fiduciary relationship. The trustees refused to return the property which in equity and good conscience must be returned. Retention of the property by Lewellyn would result in his unjust enrichment.

In this case Appellants retain title to the mother's property through an abuse of confidence. The trust should be immediately distributed to the equitable owner.

E. THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH PLAINTIFF'S CLAIMS.

Plaintiff's Complaint (R-9-5) does state a cause of action which resulted because of a breach of a confidential relationship. The District Court found a constructive trust existed between the parties. The decision further ordered all of the property returned to Grayce since she is the beneficiary under the trust.

1. Evidence Supporting Plaintiff's Claim of Confidential Relationship.

The sufficiency of the evidence has been demonstrated in the Statement of Facts and argued under each of the proceeding points of argument.

Again it should be noted that constructive trusts result because of a fiduciary or confidential relationship.

Pomeroy, Equity Jurisprudence, Volume 1 §155, page 210 states:

Constructive trusts are raised by equity for the purpose of working out right and justice, where there was no intention of the parties to create such a relationship

...
If one party obtains legal title to property ... in any ... unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equity and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner ...

In Scott on Trusts 2317, §462.2 it is stated:

A constructive trust, as I have said, is imposed in order to prevent unjust enrichment. This unjust enrichment may rise out of a wrongful acquisition of the title to property ... A constructive trust may arise, however, even though the acquisition of the property was not wrongful. It arises where the retention of the property would result in the unjust enrichment of the person retaining it. So it is said that to establish such a trust it is not necessary to show intentional fraud. Tate v. Emery, 139 Or. 214, 9 P.2d 136. Teuscher v. Gragg, 136 Ok. 129, 276 P 735, 66 ALR 143; Ryan v. Plath, 18 Wa. 2d 839, 140 P.2d 968; Cook v. Elmore, 27 Wyo. 163, 192 P 824. [Emphasis added.]

In addition to the foregoing reasons for declaring a constructive trust when a fiduciary has violated a trust of confidence, this Court has made a specific determination concerning relationships where a fiduciary relationship is presumed. A confidential relationship is presumed between parent and child (See Baker v. Pattee, supra).

The fiduciary relationship existing between the parties was further demonstrated by the execution of the power of attorney and the acceptance and use of that power of attorney by Lewellyn. The

Kansas Supreme Court in Kline v. Orebaugh, 519 P.2d 691 (Kan. 1974) was confronted with facts similar to those in this case. Parents had executed a power of attorney to their son. The resulting principal and agent fiduciary relationship was considered. The Court determined a confidential relationship existing between the parties. The Court at page 695 stated:

[1-5] At the outset it would be helpful to review some of the basic rights and obligations which came into existence when W.D. and Minnie B. Orebaugh executed their powers of attorney to their son, Roy. The relation of principal and agent is a fiduciary one, and if a wrong arises because of the conduct of the agent the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*. (Wolcott & Lincoln, Inc. v Butler, 155 Kan 105, 122 P.2d 720.) In this case Roy Orebaugh having obtained a power of attorney from each of his parents was their agent. There existed a confidential relation between them. The execution of the powers of attorney was induced by that relation and Roy Orebaugh violated the confidence reposed in him by his parents.

2. Evidence Does Support Plaintiff's Claim of Constructive Fraud.

Appellant cites the elements required for a Finding of common law fraud and argues Plaintiff's burden of proof has not been met in the District Court.

The argument is without merit. A fiduciary and confidential relationship existed between the parties and a constructive trust was imposed. Plaintiff transferred to a son and daughter-in-law, without consideration, all of their assets for a specific purpose. The term of the trust (or purpose) had been met and the trustees have refused to return the property.

In addition to the general evidence creating the trust, the

District Court considered the breached confidential relationship created by the parents trust of a child, the fiduciary relationship created by execution of a power of attorney and the transfer of all of their property to the child without consideration. The trust relationship shifted the burden of proof and required the Defendants to show fairness. The Defendants were not able to show they were equitable and fair. Therefore, the District Court found a constructive trust.

As noted under other headings of this Brief, the evidence mandated the result reached by the District Court. The Appellants have not been able to marshall evidence to the contrary.

VII. CONCLUSION

Grayce and Lloyd conveyed all of their worldly possessions in trust to Lewellyn and Connie for protection against imagined problems. The "problems" were brought to their attention by Connie and by Lewellyn. Lewellyn recommended the problems would be solved by Defendants holding title to all property for a period of one year after Lloyd's death. Lloyd wanted to protect the property for himself and Grayce and for Grayce in the event of his death. No consideration was paid by Lewellyn and Connie for the transfer of the property. Grayce paid all of the costs for property transfers. Under the developed facts, the trial court correctly determined a constructive trust existed and Grayce was the beneficiary.

Equity and good conscience require the termination of the constructive trust and the return of the property to the beneficiary.

We respectfully submit the Decree, Judgment and Order of the District Court should be affirmed.

RESPECTFULLY SUBMITTED on this 1st day of July, 1997.

OLSEN & CHAMBERLAIN

By 
TEX R. OLSEN
Attorney for Plaintiffs

MAILING CERTIFICATE

I hereby certify that I caused to be mailed two true and correct copies of the foregoing **BRIEF OF APPELLEE**, by placing the same in the United States Mail, in a postage pre-paid sealed envelope, this 1st day of July, 1997 to the following:

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