

1986

Gorrell v. Gorrell : Brief of Respondent

Utah Supreme Court

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Pete N. Vlahos; Vlahos & Sharp; Attorney for Appellant.

Michael J. Glasmann; Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Respondent.

Recommended Citation

Brief of Respondent, *Gorrell v. Gorrell*, No. 860113.00 (Utah Supreme Court, 1986).
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DOCK No. 860113 IN THE SUPREME COURT OF THE
STATE OF UTAH

THE MATTER OF THE ESTATE)
OF)
BERINE WENTLAND GORRELL,)
Deceased.)
T E. GORRELL,)
Appellant.)

860113-CA

Case No. 20603

RESPONDENT'S BRIEF

Appeal from the Judgment of the District Court
in and for the County of Weber, State of Utah
THE HONORABLE DAVID E. ROTH
DISTRICT JUDGE

MICHAEL J. GLASMANN, ESQ.
VAN COTT, BAGLEY, CORNWALL &
McCARTHY
1000 First Security Bank Building
Ogden, UT 84401
(Attorney for Respondent)

M. VLAHOS, ESQ.
J. S. & SHARP
Forum Building
Kiesel Avenue
UT 84401
(Attorney for Appellant)

FILED
JUL 9 1985

Clerk, Supreme Court, Utah

LIST OF PARTIES

Appellant . . . Robert E. Gorrell

Respondent . . . First Security Bank of Utah, N. A., as
Personal Representative of the Estate
of Katherine Wentland Gorrell*

*Although the First Security Bank as Personal Representative of the decedent's estate has never been listed in the case heading, the First Security Bank as Personal Representative is probably the appropriate respondent on this appeal, inasmuch as the Personal Representative is representing the interests of the Estate of Katherine Wentland Gorrell.

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IN THE SUPREME COURT OF THE
STATE OF UTAH

IN THE MATTER OF THE ESTATE)	
)	
OF)	
)	
KATHERINE WENTLAND GORRELL,)	Case No. <u>20603</u>
)	
Deceased.)	
)	
vs.)	
)	
ROBERT E. GORRELL,)	
)	
Appellant.)	
)	

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The Estate of Katherine Wentland Gorrell, through its Personal representative, the First Security Bank of Utah, N. A., petitioned the District Court of Weber County in the Second Judicial District, for an order requiring Robert E. Gorrell, the appellant, to turn over approximately Forty-Seven Thousand Dollars (\$47,000.00) cash alleged to have been found by Mr. Gorrell in the decedent's home subsequent to her death.

A hearing on the First Security Bank's petition was held before the Honorable Judge Wahlquist on August 9, 1984. During said hearing, the parties stipulated that the amount of cash discovered by Mr. Gorrell in the decedent's home was Forty-Three Thousand Seven Hundred

Forty-Eight Dollars (\$43,748.00). A dispute, however, arose between Mr. Gorrell and First Security Bank as to the proper ownership of the cash found in the decedent's home.

Judge Wahlquist ordered the matter set for trial to determine the ownership of the Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00).

The matter was set for trial on February 5, 1985. On the day of trial, both counsel for Mr. Gorrell and counsel for the First Security Bank stipulated that the sole purpose for the trial was for the court to determine whether the Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) cash found by Mr. Gorrell in the decedent's home, subsequent to the decedent's death, belonged in whole or in part to the estate or whether said cash belonged in whole or in part to Mr. Gorrell.

After reviewing the stipulation of counsel and hearing the testimony in the case, the Honorable Judge David E. Roth ruled that the Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) cash was solely the property of the decedent's estate. It is from that judgment of the District Court that Mr. Gorrell now appeals.

STATEMENT OF FACTS

Respondent's Statement of Facts is taken from the trial transcript, which will be designated (TR), the District Court's record which will be designated (CR) and a supplemental transcript designated (Supp.TR).

The decedent, Mrs. Katherine Wentland Gorrell, died testate on May 4, 1984, at the age of eighty (80) years (CR-1). A copy of the decedent's will is found on pages 4 and 5 of the court record.

The decedent was survived by three children and her husband, Robert E. Gorrell, the Appellant. The three children's names are Normandy Wentland Johnson, Billie Wentland and Gene Wentland.

Robert E. Gorrell and the decedent were married on November 17, 1961, and had been married approximately $22\frac{1}{2}$ years at the time of the decedent's death (TR-6).

Prior to the decedent's last illness, decedent and Robert Gorrell were living in the decedent's home located at 3272 Adams Avenue, Ogden, Utah (TR-6). This home was the sole and separate property of the decedent (TR-12).

At the commencement of the trial in this matter, it was stipulated by the parties before Judge David E. Roth, as a statement of fact, that Mr. Gorrell had found Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) cash in the decedent's home shortly after her death (Supp. TR-114). Mr. Gorrell

testified that he found the money in question on the day Mrs. Gorrell died which was May 4, 1984 (TR-46).

Furthermore, at the trial in this matter Mr. Gorrell testified in response to questions from Respondent's counsel, that he assumed the Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) cash had been saved from the decedent's Social Security and Mr. Gorrell's money. Mr. Gorrell admitted that no one other than the decedent knew for sure where the money came from (TR-36).

During the trial of this case, testimony was presented by both parties concerning the earning capacity and financial background of both Robert Gorrell, and the decedent.

Normandy Johnson, the decedent's daughter, testified that to the best of her recollection her mother had worked in her beauty shop until 1971 (TR-94). Mr. Gorrell testified that the decedent retired from work in her beauty shop at age 62 (TR-75). The court found from the evidence that the decedent had worked at least four or five years after her marriage to Appellant (TR-111).

Mr. Gorrell testified that he had worked various odd jobs from the time of the parties' marriage in 1961 until he became employed at K-Mart in 1967 (TR-8-9). Mr. Gorrell testified further that he worked three months at

K-Mart and thereafter became employed at the Defense Depot Ogden (TR-10). Mr. Gorrell testified that he worked for 12 years at the DDO and then retired in 1979 or 1980 (TR-23).

From the evidence at the trial concerning Mr. Gorrell's and decedent's work histories during their marriage, Mr. Gorrell argues that those facts lead to the inescapable conclusion that the Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) found by Mr. Gorrell in the decedent's home was at least partly contributed to by him. Both Respondent and the court disagreed.

At the time of Mr. Gorrell's marriage to the decedent, the decedent was 57 years old and Mr. Gorrell was roughly 53 years old (TR-69). Mr. Gorrell testified at the trial in this matter that he did not own a home or a car at the time of the marriage and did not bring any assets into the marriage (TR-13). The decedent on the other hand, at the time of her marriage to Mr. Gorrell, owned a home, a car and other assets (TR-12).

Evidence presented at the trial in this matter would indicate that at the time of the decedent's marriage to Mr. Gorrell the decedent's home was completely paid for (TR-12, TR-190). The decedent's daughter, Normandy Johnson, testified that in 1963 her mother paid approximately \$1,200 cash for a hospital bill on behalf of her daughter as a wedding present (TR-108).

Normandy Johnson also testified that approximately

six years after her mother's marriage to Mr. Gorrell, her mother was in a position to pay approximately \$2,700 cash for a 1967 Chevvie II (TR-107).

Decedent was able to purchase a home and a car and pay cash for the items referred to above, prior to Mr. Gorrell's obtaining steady employment at the Defense Depot Ogden in 1967.

Testimony was also given by Mr. Gorrell that at the time of trial his Social Security and retirement incomes (approximately \$700 per month) were inadequate to meet his monthly expenses (TR-82-83). Mr. Gorrell also testified that he needed approximately \$1,000 per month to feed himself and pay his bills (TR-83).

Mr. Gorrell also testified that of the Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) cash found in the home shortly after Mrs. Gorrell's death, Five Thousand Dollars (\$5,000.00) remained as of the date the First Security bank froze the assets (TR-45-46).

The bank had frozen the assets of Mr. Gorrell's bank account prior to Mr. Gorell's hearing before Judge Wahlquist on August 9, 1984, as evidenced by paragraph 2 of Judge Wahlquist's order dated August 29, 1984 (CR-28). Mr. Gorrell admitted during the trial, spending approximately Thirty-Eight Thousand Dollars (\$38,000.00) of the cash he found in the decedent's home (TR-46). Mr. Gorrell testified further that he didn't know whether Twelve Thousand Dollars (\$12,000.00) of the Thirty-Eight Thousand

Dollars (\$38,000.00) spent by Mr. Gorrell had been spent on miscellaneous expenses (TR-50).

The court after hearing all of the testimony and evidence presented at the trial in this matter, concluded that three possibilities existed as to the origin of the Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) cash found in the decedent's home. First, that all the money was saved from money given to the decedent by Mr. Gorrell. Second, that all of the money was saved by the decedent prior to the marriage. Third, that all of the money was saved jointly by the decedent and Mr. Gorrell during the marriage (TR-110). The court concluded that all three of these possibilities were equally possible (TR-111).

SUMMARY OF ARGUMENTS

The Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) cash found by Mr. Gorrell in the decedent's home was owned by the decedent at the time of her death and therefore would be presumed to be included within the decedent's estate. That Mr. Gorrell could only overcome that presumption by establishing by a preponderance of the evidence that said cash asset was contributed to in whole or in part by Mr. Gorrell. That Mr. Gorrell failed to meet that burden.

ARGUMENT

POINT ONE

THE FORTY-THREE THOUSAND SEVEN HUNDRED FORTY-EIGHT DOLLARS (\$43,748.00) FOUND BY APPELLANT IN THE DECEDENT'S HOME WAS IN THE SOLE POSSESSION AND CONTROL OF THE DECEDENT UNTIL THE TIME OF HER DEATH

No direct evidence that the decedent was the owner of the Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$443,748.00) found in her home was presented at the trial of this case. Such evidence was made virtually impossible by Mrs. Gorrell's death.

The money, according to Mr. Gorrell, was found in a heart-shaped beauty box in a blue agate roaster pan in the kitchen of the decedent's home (TR-35). Mr. Gorrell also testified that he had never done any cooking as long as he was married to Mrs. Gorrell (TR-35). Mr. Gorrell testified further that Mrs. Gorrell was "one of the best cooks going, German descent." (TR-87)

Evidence was presented during the trial showing that the decedent had large sums of cash on hand. For example, Mrs. Gorrell's purchase of a new car for \$2,700 cash, (TR-107) her cash payment of her daughter's \$1,200 hospital bill, (TR-108) and the discovery of \$1,800 cash in Normandy Johnson's ten-year-old son's pockets (TR-98), which money the daughter returned to her mother, the decedent (TR-100).

Respondent contends that at the time of the decedent's death, the only two people that could have had an

ownership interest in the money, were Mr. Gorrell and the decedent, because they were the only ones living in the house after decedent's daughter moved away in 1963 (TR-91).

Respondent contends that the fact the decedent was the owner of the discovered cash and that Mr. Gorrell had no ownership interest in the cash is established by the facts surrounding discovery of the cash and Mr. Gorrell's own statements about the money.

Mr. Gorrell testified that he found the money and at no point did Mr. Gorrell testify that he had any knowledge whatsoever of the money's existence or its whereabouts prior to the find.

Appellant argues at page 11 of his appeal brief that the money was in the possession of Robert Gorrell and that Respondent therefore should bear the burden of proof in this case. Respondent believes Appellant is referring to the fact that he possessed the money after he found it.

It seems logical to Respondent that in order to determine what assets belonged to the estate of the decedent one should look at the assets owned at the time of the decedent's death and not after the decedent's death. The critical point in time is the moment of the decedent's death.

Respondent contends that it was impossible for Mr. Gorrell, at the time of the decedent's death, to have possessed or owned the subject cash, which he did

not realize existed until finding it after the decedent's death.

Respondent responds further that the trial court correctly found that

"This money up until the time of the death of the deceased was in her possession and control and normally would be part of the estate."

(TR-162)

POINT TWO

IN ORDER TO EXCLUDE ALL OR A PORTION OF THE FORTY-THREE THOUSAND SEVEN HUNDRED FORTY-EIGHT DOLLARS (\$43,748.00) FROM THE DECEDENT'S ESTATE, APPELLANT HAD THE BURDEN OF PROVING BY AT LEAST A PREPONDERANCE OF THE EVIDENCE THAT THE CASH DISCOVERED WAS COMPRISED IN WHOLE OR IN PART OF MONEYS CONTRIBUTED BY APPELLANT

Respondent contends that First Security Bank of Utah, N. A., vs Lucille Buckley Hall and Harold E. Hall, 504 P 2d 995 (Utah 1972), is the controlling authority on the issue of whether Robert Gorrell had the burden of proof in this case.

In that case, the personal representative of the Estate of George Hatton Buckley and his wife, Pearl Murdock Buckley, sued Lucille Buckley Hall and her husband to recover stock certificates or the proceeds from the sale of said stock certificates.

The stock certificates in question were in the name of George Hatton Buckley. The defendant effected

a transfer of the stocks on the books of the corporation into her own name and then sold the shares.

Defendant in that case contended that she had a right to the stock because it had been given to her by her mother during her mother's lifetime.

The Trial court held that the defendant had the burden of proving her ownership of the shares of stock by way of gift by clear and convincing evidence. This court affirmed the trial court's ruling. In so holding, this court also cited the case of Jones vs Cook, 223 P 2d 423 (Utah 1950).

Appellant seems to recognize First Security Bank vs Hall, supra, as the authority on the issue of who had the burden of proof. Appellant argues, however, that in the instant case there is "no proof of original ownership" and that "a preponderance of the evidence would suggest that the funds were those of Appellant" (Appellant's Brief, Page 10).

The trial court's findings are in direct contradiction to Appellant's argument in that the court found that the money, up until decedent's death, was in the possession and control of the decedent and the evidence did not preponderate in favor of the Appellant (TR-111).

Appellant also quotes from Vol. 63A AM JUR 2D, Property, §51, Page 282 (1984), which reads:

"There is rebuttable presumption of ownership of property from possession thereof, which is applied to real pro-

perty and personal property alike... And possession of personal property may be sufficient evidence of ownership in a given case to protect one dealing with the property as that of the possessor. A person claiming ownership of property which is in the possession of another, bears the burden of proving facts essential to the claim of ownership."

It appears from the standards set forth in First Security Bank vs Hall and in the above-quoted section of AM JUR, that Mr. Gorrell in order to challenge the ownership of the decedent's estate, was required to prove his interest in the cash by a preponderance of the evidence. This he failed to do.

POINT THREE

THAT THE LOWER COURT DID NOT ABUSE ITS DISCRETION OF THE FACTS IN FINDING THAT APPELLANT HAD FAILED TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THE FORTY-THREE THOUSAND SEVEN HUNDRED FORTY-EIGHT DOLLARS (\$43,748.00) WAS COMPRISED IN WHOLE OR IN PART OF MONEYS CONTRIBUTED BY APPELLANT

In the case of Garcia vs Schwendiman, 645 P 2d 651 (Utah 1982), this court held as follows:

"The standard for appellate review of factual findings affords great difference to the trial court's view of the evidence unless the trial court has misapplied the law or its findings are clearly against the weight of the evidence."

In First Security Bank of Utah, N. A., vs Hall, supra, this court stated:

"As this court has stated in numerous prior decisions, we will not disturb the findings of the trial court unless the court has misapplied proven facts or made findings clearly against the weight of evidence."

Respondent contends that there were ample facts available within the court records to support the court finding by a preponderance of the evidence that the cash asset had been created wholly out of the decedent's separate money. Specifically, Respondent relies on the fact that Mr. Gorrell at 53 years of age had absolutely nothing by way of assets to show for his years of work. That the decedent had accumulated a home that was fully paid for and apparently had enough money to pay cash for the items referred in Respondent's Statement of Facts. That Mr. Gorrell after he obtained possession of the Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) cash found in the decedent's home spent approximately Thirty-Eight Thousand Dollars (\$38,000.00) of that money in less than four months.

This court in the case of K. J. Scharf vs BMG Corporation, No. 18963, filed April 16, 1985, ruled on an appellant's challenge to the lower court's factual findings as follows:

"With respect to these matters, we take as our starting point the trial court's findings and not Erickson's recitation of the facts. To mount a successful attack on the trial court's findings of fact, an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings."

Appellant has asked this court to view the facts of this case in the light most favorable to the Appellant. The

all of the evidence in

this trial, concluded that of the three possibilities which would explain the existence of the cash asset in the decedent's home, all three were equally possible (TR-111). In so ruling, the lower court held that Mr. Gorrell had failed to prove by a preponderance of the evidence that the cash asset had been created wholly or in part by his contributions.

CONCLUSION

Respondent requests that this court affirm the decision of the lower court.

Respectfully submitted this 2nd day of July, 1985.

VAN COTT, BAGLEY, CORNWALL
& MCCARTHY

By Michael J. Glasmann
Michael J. Glasmann
1000 First Security Bank Building
Ogden, UT 84401

CERTIFICATE OF SERVICE

Comes now counsel for the Respondent and certifies to the Court that ten (10) copies of Brief of Respondent were posted or delivered to the Clerk of the Supreme Court of the State of Utah, 332 State Capitol Building, Salt Lake City, Utah 84114, and that four (4) copies were mailed to Appellant, by posting same in the United States mail, postage prepaid and addressed to Pete N. Vlahos, of Vlahos & Sharp, 2447 Kiesel Avenue, Ogden, Utah 84401, on this 3rd day of July, 1985.

VAN COTT, BAGLEY, CORNWALL
& MCCARTHY

BY Michael J. Glasmann
MICHAEL J. GLASMANN
Attorney for Respondent