

1986

Katherine Wentland Gorrell v. Robert E. Gorrell : Brief of Appellant

Utah Supreme Court

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENTS	4
ARGUMENT	
POINT ONE	5
THE JUDGMENT OF THE LOWER COURT IN FINDING THAT THE CASH FOUND WAS AN ASSET ONLY OF THE DECEASED WAS A FINDING MADE AGAINST THE WEIGHT OF THE EVIDENCE	
POINT TWO	9
THE JUDGMENT OF THE LOWER COURT CONSTITUTED AN ABUSE OF DISCRETION IN PLACING THE BURDEN OF PROOF UPON THE APPELLANT	
CONCLUSION	12
ADDENDUM	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

CASES

<u>First Security Bank of Utah, N. A. vs. Hall,</u> <u>29 Utah 2d 24, 504 P.2d 995 (1972)</u>	8, 9
--	------

PERIODICALS

29 Am. Jur. 2d § 235 (1967)	11
63A Am Jur. 2d § 51 (1984)	10

IN THE SUPREME COURT OF THE
STATE OF UTAH

IN THE MATTER OF THE ESTATE)

OF)

KATHERINE WENTLAND GORRELL,)

Deceased.)

vs.)

ROBERT E. GORRELL,)

Appellant.)

Case No. 20603

BRIEF OF APPELLANT

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issues presented by this Appeal are as follows:

1. Where the Appellant and his wife, the Decedent, whose estate is the Respondent in the above entitled action, have resided together in the same premises for more than twenty-two and a half (22½) years, and the Appellant was the primary income producer for the family, has the District Court made a finding clearly against the weight of the evidence in finding that the cash found in the home subsequent to the demise of the Appellant's spouse is an asset only of the non-producing spouse?

2. Where the Appellant and his wife, the decedent, whose estate is the Respondent in the above entitled action, have resided together in the same premises for more than twenty-two and a half ($22\frac{1}{2}$) years, wherein the primary income producer for the family was the Appellant, has the District Court abused its discretion in requiring that the burden of proof that the cash funds found in the home rested upon the Appellant by a preponderance of the evidence, or did, in fact, the burden of proof fall upon the estate to prove that the funds were solely the assets of the estate?

STATEMENT OF THE CASE

This is an action wherein the Respondent, the estate of Katherine Wentland Gorrell, Deceased, who was the wife of the Appellant, petitioned the Lower Court to recover property of Decedent, which was filed against Appellant herein. The petition to recover property of Decedent was filed by Respondent with the aid and assistance of counsel, Michael J. Glasmann, Esq., and the Appellant appeared by and through counsel, Pete N. Vlahos, Esq. The Court granted a Judgment in favor of the estate of Katherine Wentland Gorrell, and found the cash asset to be solely an asset of the estate.

STATEMENT OF FACTS

The Appellant, Robert Gorrell, and his now deceased wife, Katherine Gorrell, were intermarried on the 17th day of November, 1961, and ever since said time, until the demise of Katherine Gorrell, on the 4th of May, 1984, at the age of eighty (80) years, Appellant and Katherine Gorrell lived together as husband and wife, constituting the marriage of twenty-two (22) years and six (6) months. (TR 58)

The Appellant, Robert Gorrell, testified at the trial that Appellant had worked practically the whole time of his marriage to the deceased, Katherine Wentland Gorrell, (TR 60, 62, 66, 70-73, 75-76, 90-91, 107-108)

A few days following the demise of Katherine Gorrell, the Appellant, Robert E. Gorrell, was rearranging the cupboards in the kitchen so that he could work around the range and around the counter sink due to his being confined to a wheelchair, having lost both his legs, Appellant discovered in a small blue agate roasting pan, a heart shaped beauty box that contained approximately \$43,000.00, the money in question. (TR 86-87)

Upon discovering the money in question, Appellant contacted an employee of First Security Bank on Washington Boulevard, a Dennis Johnston, and informed Mr. Johnston that

he had discovered some cash in the home in which he and Decedent resided. (TR 86) The money or property discovered by Appellant is the property which Respondent has petitioned the Lower Court to recover as solely an asset of the estate of Katherine Wentland Gorrell.

On March 18, 1985, Judgment was rendered against Appellant, in that Appellant allegedly did not sustain a burden of proof in establishing that the cash asset was created either in whole or in part from assets contributed by Appellant, therefore the Court awarded the entire sum of \$43,748.00 as an asset of the estate of Decedent and required Appellant to immediately turn over to Decedent's estate the unused portion of the \$43,748.00 in Appellant's control, and further ordered Appellant not to dispose of, in any way, any assets purchased in whole or in part from the \$43,748.00 discovered in Decedent's home. (R 42, 43)

SUMMARY OF ARGUMENTS

1. The Appellant was the primary income producer for the family, as evidenced by the trial record and resided with his now deceased wife in the same premises for more than twenty-two and a half ($22\frac{1}{2}$) years, contributing all of his income to the Decedent, who controlled the money during the twenty-two and a half ($22\frac{1}{2}$) year period, such that the

District Court has misapplied proven facts or made findings clearly against the weight of the evidence in holding that the cash found in the home subsequent to the demise of Appellant's spouse is an asset only of the Decedent's estate.

2. The District Court abused its discretion by requiring that the Appellant, by a preponderance of the evidence, prove that the cash funds were his when, in fact, the burden of proof should fall upon the estate to prove that the funds were solely the assets of the estate.

ARGUMENT

POINT ONE

THE JUDGMENT OF THE LOWER COURT IN FINDING THAT THE CASH ASSET FOUND WAS AN ASSET ONLY OF THE DECEASED WAS A FINDING MADE AGAINST THE WEIGHT OF THE EVIDENCE

In the trial record, Appellant testified, as well as the daughter of the deceased, as to the income which both Appellant and the deceased earned during the twenty-two and a half (22½) years of their marriage.

The Appellant testified that between 1961 to 1967, Appellant worked at odd jobs, including driving a truck for the City for six (6) months. (TR 60,62) The daughter of the deceased, testified that the Appellant worked continuously during this 1961 to 1967 period. Then Appellant

worked during 1967 for three (3) months at K-Mart, (TR62) following which he became employed full time with the DDO in 1967 working in the packing line as a Grade 2 and started at \$2.22 an hour, at which job he worked five (5) or six (6) days a week. (TR 66) Appellant testified that he missed approximately eight (8) months of work without pay in 1967, (TR 70)but that he returned to work full time in 1968 and that from 1968 until approximately twelve (12) years later in 1979 or 1980, Appellant worked steadily, and that any work that he missed due to medical problems were covered by annual leave or sick leave after that first operation. (TR 71)

Appellant further testified that while working at DDO, he attained Grade 4 and eventually Grade 5, Step 5 while working at DDO and then retired roughly around 1979 or 1980. (TR 75) Appellant further testified that during the 1970s, he earned approximately between \$7.00 and \$8.00 an hour with his income increasing during the twelve (12) year period at DDO from \$2.22 an hour to a final hourly wage of \$8.10 an hour when he retired in 1979 or 1980. (TR 76)

Appellant further testified that upon his retirement in 1979 or 1980, he was receiving a constant \$335.00 a month as a retirement payment, and that the retirement, along with

social security in 1979 was between \$500.00 and \$700.00 a month, and that his social security combined with the retirement as of the time of trial was \$706.00 a month. (TR 90, 91)

Appellant further testified that he worked as a clown in several parades each year, including the 4th of July and the 24th of July selling balloons and earned approximately \$500.00 a year at this job. (TR 107, 108)

The Appellant, as well as the daughter of the Decedent, an adverse party, testified that the Decedent, Katherine Wentland Gorrell, received approximately \$225.00 a month from social security benefits when Decedent retired at the age of sixty-two (62), and that Decedent, after retirement, no longer worked on people's hair and received no income therefrom. Further testimony was given by the Appellant that Decedent retired roughly one (1) year after the Appellant's marriage with the Decedent. (TR 91, 94, 104)

The Appellant also testified on many occasions that he left the business interest up to his wife and upon receiving any cash or pay checks, he would endorse them directly to his wife and she would handle the funds from thereon out. (TR 105)

A critical part of the testimony is that Appellant found the money in denominations of two (2) \$100.00 bills and the rest of the cash asset consisted of \$50.00s, \$10.00s, \$20.00s and \$5.00s and that the money was found in a large pile. (TR 102) This would tend to show that the money was not accumulated over a short period of time, but rather little or small amounts of money were occasionally taken from a pay check or such and deposited within the box which was put into the blue agate roasting pan of which Appellant had no knowledge. This would show an accumulation of the money over a long period of time and that it was at least drawn from a combination of the income of the Decedent and the Appellant and not solely from the income of the Decedent.

The Utah Supreme Court held in First Security Bank of Utah, N. A. vs. Hall, 29 Utah 2d 24, 504 P.2d 995 (1972), as follows:

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

It is the Appellant's contention that the District Court has clearly made a finding against the weight of the evidence presented by the testimony of both the Appellant and the daughter of the deceased in finding that the cash

asset consisting of over \$43,000.00 comprised of two (2) bills, \$100.00 bills, and the remainder in \$50.00s, \$20.00s, \$10.00s and \$5.00s was solely an asset of the estate when the money was apparently accumulated over a long period of time and the Appellant was the primary income earner for the family over the twenty-two and a half (22½) year period.

POINT TWO

THE JUDGMENT OF THE LOWER COURT
CONSTITUTED AN ABUSE OF DISCRETION IN
PLACING THE BURDEN OF PROOF UPON THE
APPELLANT

Respondent herein was the petitioner in the Lower Court seeking recovery of the property from Appellant because the cash asset was currently in the possession of Appellant.

Respondent alleges that the case of the Utah Supreme Court, First Security Bank of Utah, N. A. vs. Hall, 29 Utah 2d24, 504 P.2d 995 (1972), places the burden of proof by a preponderance of the evidence or clear and convincing evidence upon Appellant. In that particular case, the Defendant contended that the Trial Court erred in imposing upon the Defendant the burden of proving her ownership of the shares of stock in question by way of a gift by clear and convincing evidence. The Court held as follows:

It would appear to us that the Defendant having acquired possession of the stock certificates which were carried on the books of the Corporation in the name of the Decedent, George H. Buckley, and George H. Buckley not having executed the stock transfer endorsements which were a part of each certificate, that Defendant did, in fact, have the burden of establishing her ownership by gift by clear and convincing evidence.

In the instant case, there is no proof or evidence of original ownership, such as a stock certificate with the name of the Decedent on it, but rather this case involves cash, which did not necessitate any signature for transfer, and a preponderance of evidence would suggest that the funds were those of Appellant, the primary income producer of the family.

Volume 63A Am. Jur. 2d, Property § 51 (1984) entitled Burden of Proof; Presumptions, states as follows:

There is rebuttable presumption of ownership of property from possession thereof, which is applied to real property 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.

The Appellant upon discovering the secreted contents of

the roasting pan, not knowing its origin, immediately contacted the Personal Representative of his deceased wife's estate for deposit of the discovered secreted funds.

In the instant case, the Respondent or estate of Katherine Wentland Gorrell claims ownership of the property which was in the possession of the Appellant, Robert Gorrell, and therefore bears the burden of proving facts essential to the claim of ownership.

29 Am. Jur. 2d, Evidence § 235 (1967) entitled Personal Property, states as follows:

As a general rule, proof of the possession of personal property is prima facia evidence of title or is said to raise the presumption of ownership which may be rebutted or overcome by evidence of ownership of another or by evidence of the circumstances surrounding the possession... Inasmuch as possession is a fact continuous in nature, it is, when its existence is once shown, presumed to continue until the contrary is proved.

Accordingly it is Appellant's argument that the Lower Court abused its discretion in requiring Appellant to bear the burden of proof in showing that the cash asset was an asset of Appellant when Appellant was in possession of same, but that, in fact, the burden of proof rested upon the party, the Respondent or estate of Katherine Wentland Gorrell in this case, which claimed ownership of property

which was in the possession of another, namely the Appellant.

CONCLUSION


It is submitted to this Honorable Court that the District Court has clearly made a finding against the weight of the evidence presented by the testimony of both the Appellant and the daughter of the deceased in finding that the cash asset consisting of over \$43,000.00 comprised of two (2) large bills, \$100.00 bills, and the remainder in \$50.00s, \$20.00s, \$10.00s and \$5.00s was solely an asset of the estate when the money or cash asset was apparently accumulated over a long period of time, and the Appellant was the primary income earner for the family over the twenty-two and a half (22½) year period, and further that the Lower Court abused its discretion in requiring Appellant to bear the burden of proof in showing that the cash asset was an asset of Appellant, when Appellant was in possession of same, and therefore had a presumption of ownership thereby placing the burden of proof upon the Respondent or estate

of Katherine Wentland Gorrell to show ownership of the cash asset.

Respectfully submitted this 3rd day of June, 1985.

VLAHOS & SHARP

BY



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ADDENDUM

Findings of Fact and Conclusions of Law

Attached

Judgment

Attached

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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

----- oOo -----
)
IN THE MATTER OF THE ESTATE
)
OF) FINDINGS OF FACT
) AND
) CONCLUSIONS OF LAW
KATHERINE WENTLAND GORRELL,
)
Deceased.) Probate No. 15727
----- oOo -----

The petition of First Security Bank of Utah, N. A., as personal representative of the above-entitled estate, for a determination of the ownership and identity of the sum of Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) cash discovered by Robert E. Gorrell in the decedent's home subsequent to the decedent's death, and for an order from this court requiring said Robert E. Gorrell to turn over the unspent portion of said cash asset to the personal representative, having come on regularly for trial on the 5th day of February, 1985, before the Honorable David E. Roth, judge of the above-entitled court, after notice of the trial having been given to all interested parties and the First Security Bank of Utah, N. A., hereinafter referred to as plaintiff, having been represented by its attorney, Michael J. Glasmann, and Robert E. Gorrell, hereinafter referred to as defendant, having been present and represented by his attorney, Pete N. Vlahos, and also present in the court room were two of decedent's heirs who were also heirs of the decedent's estate, Billy Z. Wentland and Normandy Johnson, formerly known as Normandy Wentland, and the

THATCHER - GLASMANN

court having heard testimony from defendant, Robert E. Gorrell, and from Normandy Johnson, and the court having heard the argument of counsel and the court being fully advised in the premises, now enters its

FINDINGS OF FACT

1. Plaintiff, First Security Bank of Utah, N. A., is the duly appointed personal representative of the estate of Katherine W. Gorrell.

2. At the time of the decedent's death, she was married to defendant, Robert E. Gorrell, and that decedent and defendant resided in a home located at 3272 Adams Avenue, Ogden, Utah, which home was owned solely by the decedent at the time of her death.

3. Decedent in addition to being survived by her husband, Robert E. Gorrell, was survived by three children, to-wit, Gene Wentland, Billy Z. Wentland and Normandy Johnson, formerly Normandy Wentland.

4. Plaintiff and defendant at the commencement of the trial in this matter stipulated that the defendant subsequent to the decedent's death, discovered Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,738.00) in the decedent's home. It was further stipulated that the defendant, Robert E. Gorrell, had no knowledge whatsoever of the money's existence or whereabouts prior to his discovery of the money.

5. Based upon the above stated stipulation, the court finds that unless the defendant, Robert E. Gorrell, proved by a preponderance of the evidence that the cash asset of Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) was com-

prised in whole or in part of moneys contributed by defendant, the cash asset must be considered property of the estate of the decedent.

6. The court finds further from the evidence and testimony presented at trial that three equally plausible possibilities existed regarding the origin of the cash asset found in the decedent's home, namely, that the cash asset could have been created wholly out of the assets of the decedent, the cash asset could have been created in part by the decedent's assets and in part by the defendant's assets or the cash asset could have been created wholly by the defendant's assets.

7. The court finds further that the defendant did not sustain his burden of proof in establishing that the cash asset was created either in whole or in part from assets contributed by the defendant and therefore, it is the order of this court that the entire sum of Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) shall be considered an asset of the estate of the decedent.

CONCLUSIONS OF LAW

1. The Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) cash discovered by the defendant, Robert E. Gorrell, in the decedent's home subsequent to the decedent's death, the existence of which was unknown to the defendant prior to his discovery, shall be deemed property of the decedent's estate.

2. In order for the defendant to establish that the ownership of the discovered cash was in whole or in part his, defendant must prove by a preponderance of the evidence that the cash asset was comprised in whole or in part of moneys contributed by

the defendant.

3. The defendant failed to sustain his burden of proof and therefore, it is the order of this court that the entire sum of Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) shall be deemed an asset of the decedent's estate.

4. That the defendant shall be required to immediately turn over to decedent's estate the unused portion of the said Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) which is in the defendant's control and is further ordered not to dispose of in any way any assets purchased in whole or in part from the Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,738.00) discovered in decedent's home.

DATED and Signed this _____ day of February, 1985.

BY THE COURT:

DAVID E. ROTH, DISTRICT JUDGE

APPROVED AS TO FORM:

PETE N. VLAHOS,
Attorney for Robert E. Gorrell

MICHAEL J. GLASMANN OF
THATCHER & GLASMANN
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Telephone: 394-5783

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

----- oOo -----
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IN THE MATTER OF THE ESTATE
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OF) J U D G M E N T
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KATHERINE WENTLAND GORRELL,) Probate No. 15727
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The petition of First Security Bank of Utah, N. A., as personal representative of the above-entitled estate for a determination of the ownership and identity of the sum of Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) cash discovered by Robert E. Gorrell in the decedent's home subsequent to the decedent's death and for an order from this court requiring said Robert E. Gorrell to turn over the unspent portion of said cash asset to the personal representative, having come on regularly for trial on the 5th day of February, 1985, before the Honorable David E. Roth, judge of the above-entitled court, after notice of the trial having been given to all interested parties, and the First Security Bank of Utah, N. A., hereinafter referred to as plaintiff, having been represented by its attorney, Michael J. Glasmann, and Robert E. Gorrell, hereinafter referred to as defendant, having been present and represented by his attorney, Pete N. Vlahos, and also present in the court room were heirs of the decedent's estate, Billy Z. Wentland and Normandy Johnson, formerly known as Normandy Wentland, and the court having heard testimony

THATCHER - GLASMANN

from the defendant, Robert E. Gorrell, and from Normandy Johnson, and the court having heard the argument of counsel and having entered Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED AND DECREED:

1. That the Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) cash discovered by the defendant, Robert E. Gorrell, in the decedent's home subsequent to the decedent's death, the existence of which was unknown to the defendant prior to his discovery, is hereby deemed property of the decedent's estate.

2. That the defendant is hereby ordered to immediately turn over to decedent's estate the unused portion of the said Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) which is in the defendant's control and is further ordered not to dispose of in any way any assets purchased in whole or in part from the Forty-Three Thousand Seven Hundred Forty-Eight Dollars (\$43,748.00) discovered in decedent's home.

DATED and Signed this ____ day of February, 1985.

BY THE COURT:

DAVID E. ROTH, DISTRICT JUDGE


APPROVED AS TO FORM:

PETE N. VLAHOS,
Attorney for Robert E. Gorrell

CERTIFICATE OF SERVICE

Comes now counsel for the Appellant and certifies to the Court that ten (10) copies of Appellant's Brief was 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 Respondent, by posting same in the United States mail, postage prepaid and addressed to Michael J. Glasmann, of Thatcher & Glasmann, 1000 First Security Bank Building, Ogden, Utah 84401 on this 4th day of June, 1985.

VLAHOS & SHARP

BY 

PETE N. VLAHOS,
Attorney for Appellant