

2001

Matthew Pagano, Carman pagano and Milleo Pagano v. Mary P. Walker : Petition for Rehearing

Utah Supreme Court

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

MATTHEW PAGANO, CARMAN :
PAGANO and MILLEO PAGANO, :
 :
Plaintiffs and Respondents, :
 :
vs. :
 :
MARY P. WALKER, :
 :
Defendant and Appellant.

Case No.
13864

PETITION FOR REHEARING

APPEAL FROM A JUDGMENT OF THE 2nd
JUDICIAL DISTRICT COURT, IN AND FOR
WEBER COUNTY, STATE OF UTAH,
HONORABLE CALVIN GOULD, JUDGE PRESIDING

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Clerk, Supreme Court, Utah

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TEXTS

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A.L.I. Restatement of the Law of Trusts, Sections 1 & 2 and Sections 404-460	7
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the judgment of the trial court in favor of the Plaintiffs should be reversed and judgment entered in favor of the Defendant for the following reasons:

1. That Plaintiff is required to prove that it was the intention of the settlor to create a trust at the time of the opening of the joint accounts.

2. That the terms of the trust created by the settlor must be set forth with certainty.

ARGUMENT

If the theory upon which the Plaintiffs sought relief and the trial court granted relief was that Mary was the Trustee and the Plaintiffs were the beneficiaries of an express trust then a reversal would be in order. But the case before the court is not one to enforce an express trust, and it should not be judged on the standards required to establish or to enforce an express trust. The Plaintiffs seek relief in equity to establish a constructive trust -- to call into play the equitable powers of the court to prevent an unjust enrichment.

The opinion recites that the trial court found, on the basis of clear and convincing evidence, that Mary Walker had made the following statement regarding the bank accounts in issue:

"Mother told me to pay her bills, keep a little out for my arthritis and divide up the rest."

The court's opinion states that:

"Even if the statement had been in writing, signed by the mother, Lucy, there is doubt that it should properly be regarded as sufficiently specific to meet the requirements for the establishment of a trust for Plaintiff's benefit."

This statement shows that in reviewing this case the court examined the evidence in the light of requiring the Plaintiffs to produce evidence that would support the establishment of an express trust rather than evidence that would support a constructive trust, which was the standard applied by the trial court. The remedial character of the constructive trust is defined by Chief Judge Cardozo in cases decided by the Court of Appeals of New York:

"A constructive trust is the formula which the conscience of equity finds expression. Where property has been acquired under circumstances that the holder of legal title may not in good conscience retain the beneficial interest equity converts him into a trustee."

Beaty v. Guggenheim Exploration
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"A constructive trust is then the remedial device through which preference of self is made subordinate to loyalty to others."

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467 NE 545, 62 ALR 1 (1928)

The claim of vagueness in Lucy's instruction to Mary regarding her savings account must be considered in the light of all the circumstances rather than in the light of how would Lucy have said it had she been a lawyer. The statement was made by Mary

at a time when she and her brothers were discussing the specific bank accounts in issue. The only persons concerned with these accounts were Mary and her brothers Matthew, Carmen and Milleo. All persons present knew that when she spoke directly to them and said divide, that she meant divide the funds with them not some stranger or collateral relative. They were all of Lucy's children. What was to be divided by Mary in accordance with Lucy's instruction? It was what was left after Lucy's debts were paid and Mary had kept a little out for her arthritis.

When Mary repudiated her Mother's instructions and determined to keep all of the funds for herself, she puts her brothers in a position where the only remedy available to them was the power of the equity court. The real issue is: Is the court powerless to prevent Mary from unjustly enriching herself by her own wrongdoing?

The general rule concerning the acquisition of property by a fiduciary is set forth in Sec. 190 of the American Law Institute of the Restatement of Restitution:

"Where a person in a fiduciary relation to another acquires property, and the acquisition or retention of the property is in violation of his duty as fiduciary, he holds it upon a constructive trust for the other."

The evidence in this case was clear and without dispute that Mary was in a confidential relationship to her mother, Lucy. There is no evidence that Mary abused this confidential relationship during the lifetime of her mother; therefore, it is not unreasonable to assume that Lucy would believe that the simple

and most inexpensive way to distribute the bulk of her estate would be to rely on Mary to carry out her instruction to divide the funds accumulated by her and her husband in a lifetime of work with her children.

In an effort to clarify the Plaintiffs' position, which was apparently not made clear to the court, let us take the position that Mary and Lucy were in a fiduciary relationship, and further assume that in this fiduciary relationship Lucy told Mary at a time when Lucy and Mary were discussing the funds in the joint accounts:

"(Mary when I am gone) I want you to pay my bills, keep a little out for your arthritis, and divide the rest (with your brothers)."

And let us further assume that the above conversation has been admitted - rather than as in this case, found by the court upon clear and convincing evidence. Then let us further assume that Mary admitted this conversation at a time when she and her brothers met to discuss their mother's estate and to agree upon an administrator with the will annexed. Assume further that after Mary had admitted she made such a statement that she then said,

"I will divide the money up if there isn't any trouble." (Tr. 124).

And assume further that at a later time she said:

"And furthermore I have decided not to divide the money and I won't have a guilty conscience about it--it's mine." (Tr 15)

Under such fact circumstances would this court have any difficulty coming to the conclusion that when Mary said she was not going to divide the money (in this case over \$74,000.00) and

was going to keep the entire amount for herself that she would be unjustly enriched if the court permitted her to retain the entire sum?

The illustrative fact situation set forth above is a reasonable interpretation of the legal result of the finding of the trial court based on the standard of clear and convincing evidence.

The law applicable to such a fact situation is not the law applicable to an express trust but is the law applicable to a constructive trust as defined in Sec. 160 of the American Law Institute Restatement of the Law of Restitution:

Sec. 160. Constructive Trust.

Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.

Comment:

a. Constructive trust and express trust. The term "Constructive trust" is not altogether a felicitous one. It might be thought to suggest the idea that it is a fiduciary relation similar to an express trust, whereas it is in fact something quite different from an express trust. An express trust and a constructive trust are not divisions of the same fundamental concept. They are not species of the same genus. They are distinct concepts. A constructive trust does not, like an express trust, arise because of a manifestation of an intention to create it but it is imposed as a remedy to reprevent unjust enrichment. A constructive trust, unlike an express trust, is not a fiduciary relation, although the circumstances which give rise to a constructive trust may or may not involve a fiduciary relation.

It is true that both in the case of an express trust and in that of a constructive trust one person holds the title to property subject to an equitable duty to hold the property for or to convey it to another and the latter has in each case some kind of an equitable interest in the property. In other respects, however, there is little resemblance between the two relationships. An attempt to define a trust in such a way as to include constructive trusts as well as express trusts is futile, since a single definition which would include such distinct ideas would be so general as to be useless. A constructive trust differs from an express trust in much the same way a quasi-contractual obligation differs from a contractual obligation. On the other hand, a quasi-contractual obligation and a constructive trust closely resemble each other, the chief difference being that the Plaintiff in bringing an action to enforce a quasi-contractual obligation seeks to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money, whereas the Plaintiff in bringing a suit to enforce a constructive trust seeks to recover specific property. For these reasons Constructive Trusts are dealt with together with Quasi Contracts in the Restatement of this Subject. Constructive trusts are not dealt with in the Restatement of Trusts, except in so far as they arise out of express trusts or attempts to create express trusts.

The term "trust", when not modified by an adjective, is in the Restatement of this Subject confined to express trusts (see Restatement of Trusts, Sec. 1, 2).

b. Constructive trust and resulting trust. A constructive trust is also to be distinguished from a resulting trust. A resulting trust arises where a transfer of property is made under circumstances which raise an inference that the person making the transfer or causing it to be made did not intend the transferee to have the beneficial interest in the property transferred. A constructive trust is imposed not because of the intention of the parties but because the person would be unjustly enriched if he were permitted to keep the property. The Trustee of a resulting trust, like the Trustee of an express trust, is in a fiduciary relation to the beneficiary of the trust. (See Restatement of Trusts, Secs. 404-460).

c. Unjust enrichment. A constructive trust is imposed upon a person in order to prevent his unjust enrichment. To prevent such unjust enrichment an equitable duty to convey the property to another is imposed upon him. There are many situations in which a person holding title to property is subject to an equitable duty to convey it to another. * * *

d. Unjust enrichment and unjust deprivation. In most cases where a constructive trust is imposed the result is to restore to the plaintiff property of which he has been deprived and to take from the defendant property the retention of which by him would result in a corresponding unjust enrichment of the defendant; in other words, the effect is to prevent a loss to the Plaintiff and a corresponding gain to the defendant, and to put each of them in the position in which he was before the defendant acquired the property.

The Utah cases of Hawkins v. Perry, 123, Utah 16, 253 P₂ 372, and Haws v. Jensen, 110 Utah 212, 209 P₂ 229, and the California case of Jovkieh v. Badaglicco, 170 P₂ 984, set forth in detail on pages 21, 22, 23 and 24 of Respondent's brief, are all cases which recognize and apply the equity principles herein set forth in a manner consistent with Respondent's position.

A constructive trust also differs from an express trust in the fact that since the constructive trust is a remedial feature of the law of equity, it can be imposed at any time the court is satisfied that the equitable requirements have been met. Vol. 76 Am. Jur 2d Trusts states the rule as follows:

"Sec. 236. Where confidential relationship is present.

A constructive trust arises where a conveyance is induced on the agreement of a fiduciary or confidant to hold in trust for a reconveyance or other purpose, where the fiduciary or confidential relationship is one upon which the grantor justifiably can and does rely and where the agreement is breached, since the breach of the agreement is an abuse of the confidence, and to establish such a trust it is not necessary to

show fraud or intent not to perform the agreement when it was made. The tendency of the courts is to construe the term "confidence" or "confidential relationship" liberally in favor of the confider and against the confidant, for the purpose of raising a constructive trust on a violation or betrayal thereof. A parent and child, grandparent and child, or brother and sister relationship is not intrinsically one of confidence, but under certain circumstances involves a confidence and abuse of which gives rise to a constructive trust in accordance with the terms of an agreement or promise of a grantee to hold in trust or to reconvey."

In the case of Sacre v. Sacre, 55 A₂ 592, 173 ALR 1261, 1271, the court held:

"Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction would not have been impeached if no such confidential relation had existed."

CONCLUSION

The court's opinion totally emasculates the equitable principal of unjust enrichment and constructive trust in respect to a joint account. The opinion opens the door to use the joint account as a vehicle of fraud and unjust enrichment.

The court adopts a rule that sets the following precedent: Even if the claimant proves by clear and convincing evidence that the surviving joint tenant agreed with the person who supplied all the funds to the joint account to distribute the proceeds in accordance with directions given by the person who supplied the funds then, because the claimant has not proved all the elements to

establish an express trust, the surviving party to the joint account may disregard his agreement and retain the funds by virtue of the fact he is holder of the legal title.

The court's opinion refuses to recognize the historical powers of the chancery or equity court to hold the surviving member of the joint account to his equitable duty, and further permits such survivor to enrich himself by his own breach of duty.

It is respectfully submitted that the foregoing errors justify the court in granting a re-hearing and re-examining this case in the light of the equitable principles of unjust enrichment and constructive trust.

Respectfully submitted,

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Attorney for Respondents

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OF THE

STATE OF UTAH

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Defendant and Appellant.

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The trial court based its decision upon the remedial and equitable principles of constructive trust and recognized the following principles set forth in the introductory note to Chapter 12 of the American Law Institute Restatement of Trusts

Page

"A constructive trust is imposed, not because of the intention of the parties, but because the person holding title would profit by a wrong and would be unjustly enriched if permitted to keep the property. A constructive trust, unlike an express trust or resulting trust, is remedial in character." (See Restatement of Restitution, 160.)

The majority of the Supreme Court erred in that it did not recognize the foregoing fundamental difference between a constructive trust and an express trust. The opinion held that

the judgment of the trial court in favor of the Plaintiffs should be reversed and judgment entered in favor of the Defendant for the following reasons:

1. That Plaintiff is required to prove that it was the intention of the settlor to create a trust at the time of the opening of the joint accounts.

2. That the terms of the trust created by the settlor must be set forth with certainty.

ARGUMENT

If the theory upon which the Plaintiffs sought relief and the trial court granted relief was that Mary was the Trustee and the Plaintiffs were the beneficiaries of an express trust then a reversal would be in order. But the case before the court is not one to enforce an express trust, and it should not be judged on the standards required to establish or to enforce an express trust. The Plaintiffs seek relief in equity to establish a constructive trust -- to call into play the equitable powers of the court to prevent an unjust enrichment.

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The court's opinion states that:

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This statement shows that in reviewing this case the court examined the evidence in the light of requiring the Plaintiffs to produce evidence that would support the establishment of an express trust rather than evidence that would support a constructive trust, which was the standard applied by the trial court. The remedial character of the constructive trust is defined by Chief Judge Cardozo in cases decided by the Court of Appeals of New York:

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and most inexpensive way to distribute the bulk of her estate would be to rely on Mary to carry out her instruction to divide the funds accumulated by her and her husband in a lifetime of work with her children.

In an effort to clarify the Plaintiffs' position, which was apparently not made clear to the court, let us take the position that Mary and Lucy were in a fiduciary relationship, and further assume that in this fiduciary relationship Lucy told Mary at a time when Lucy and Mary were discussing the funds in the joint accounts:

"(Mary when I am gone) I want you to pay my bills, keep a little out for your arthritis, and divide the rest (with your brothers)."

And let us further assume that the above conversation has been admitted - rather than as in this case, found by the court upon clear and convincing evidence. Then let us further assume that Mary admitted this conversation at a time when she and her brothers met to discuss their mother's estate and to agree upon an administrator with the will annexed. Assume further that after Mary had admitted she made such a statement that she then said,

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The illustrative fact situation set forth above is a reasonable interpretation of the legal result of the finding of the trial court based on the standard of clear and convincing evidence.

The law applicable to such a fact situation is not the law applicable to an express trust but is the law applicable to a constructive trust as defined in Sec. 160 of the American Law Institute Restatement of the Law of Restitution:

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CONCLUSION

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The court adopts a rule that sets the following precedent: Even if the claimant proves by clear and convincing evidence that the surviving joint tenant agreed with the person who supplied all the funds to the joint account to distribute the proceeds in accordance with directions given by the person who supplied the funds then, because the claimant has not proved all the elements to

establish an express trust, the surviving party to the joint account may disregard his agreement and retain the funds by virtue of the fact he is holder of the legal title.

The court's opinion refuses to recognize the historical powers of the chancery or equity court to hold the surviving member of the joint account to his equitable duty, and further permits such survivor to enrich himself by his own breach of duty.

It is respectfully submitted that the foregoing errors justify the court in granting a re-hearing and re-examining this case in the light of the equitable principles of unjust enrichment and constructive trust.

Respectfully submitted,

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