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Lanneita Godfrey and Beth Godfrey v. Flo Monson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LANNEITA GODFREY and
BETH GODFREY

)

Plaintiffs and
Respondents

)

vs.

)

Case No. 16094

FLO MUNSON, Administratrix
of the Estate of ELIZA M.
PACK GODFREY

)

)

Defendant and
Appellant.

)

BRIEF OF APPELLANT

Appeal from Judgment of the First Judicial District Court
for Cache County, Utah
HONORABLE VENOY CHRISTOFFERSEN, JUDGE

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Respondents

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Case No. 16094

STATEMENT AND FACTS

George Godfrey acquired the south half of lot 7 block 4 plat "B" Clarkston Town Site Survey hereinafter called "disputed land", together with other land under a townsite deed dated 1880 (see Exhibit 5). He and his second wife, Elizabeth Z. Godfrey conveyed the disputed land to Eliza M. Pack Godfrey under a Warranty Deed dated 1910 (see Exhibit 4). George Godfrey was a polygamist and shortly after this conveyance left his second wife, Elizabeth Z. Godfrey and their children in Clarkston, Utah, Cache County, and moved to Fielding, Utah, Box Elder County, where he resided with Eliza M. Pack Godfrey, his third wife (p. 72). Possession of the disputed land was given at the time of the move to George J. Godfrey who was the son of George Godfrey and Elizabeth Z. Godfrey. He lived in Clarkston and continued to operate the disputed land as a dry farm. George Godfrey died in 1926 while a resident of Fielding, Utah. (See page 3 of Flo Munson's deposition) The disputed land was operated by George J. Godfrey until 1945 when he died. Following that time, it was operated by George J. Godfrey's son, Dale Godfrey, (p. 49). George Godfrey continued to pay the property taxes on the disputed land after 1910 for a short period of time (p. 73), but at some unknown date the family in Clarkston, besides operating the land and keeping the profits, began paying the property tax. In 1965, a deed dated 1964 was recorded from Annie T. Godfrey, surviving

widow of George J. Godfrey to the Plaintiffs under which deed the Plaintiffs claim title to the property (see Exhibit 9). Nothing else appears of record to divest title from Eliza M. Pack Godfrey except this Deed. The Deed itself does not contain a complete legal description of the disputed land.

In 1961 Eliza M. Pack Godfrey died and her son Hyrum Godfrey, acting as administrator of her estate, probated the real property located in Fielding, Utah. In that probate, all the children of Eliza M. Pack Godfrey conveyed their interest in the Fielding property to Hyrum. Hyrum had remained unmarried and lived with his mother Eliza M. Pack Godfrey all of his life. There is no mention of the Clarkston property in that probate.

In 1973 the estate of George J. Godfrey was probated, although his death occurred in 1945. This probate did not mention the disputed land, but did include several pieces of property that were included in the deed by Annie T. Godfrey marked as Exhibit 9, including the piece just south of the disputed land and enclosed within the same fence (see Exhibit 2).

In 1974 representatives of Eliza M. Pack Godfrey's family met with Annie T. Godfrey, at her request, wherein Annie T. Godfrey asked them to give her a deed to the disputed land. Shortly thereafter, a letter and deed prepared by Mrs. Annie T. Godfrey's attorney was sent to Hyrum requesting

that all the heirs of Eliza M. Pack Godfrey deed their interest to Annie T. Godfrey (see Exhibit 1). When Defendant discovered the tax notices for the disputed land were listed in Beth Godfrey's name, she had it immediately corrected into the name of the estate (see Exhibit 13).

There was no written or verbal notice of the Plaintiff or their agents that they were claiming ownership of the property against Eliza M. Pack Godfrey or her heirs (p. 29) other than the Warranty Deed with a defective legal description until Plaintiffs commenced this lawsuit. Further, no requests were made by Eliza M. Pack Godfrey or her heirs upon the Plaintiffs or their agent or representatives to surrender possession of the property or to account for its use.

ARGUMENT

I. THAT THE PLAINTIFFS HAVE FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THEY ESTABLISHED TITLE TO THE LAND IN QUESTION BY ADVERSE POSSESSION.

Utah Law governing adverse possession is well defined and of long standing. §78-12-7, UCA 1953, states as follows:

"In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law; and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action." (emphasis added)

The Utah Supreme Court further clarified this in the case of Cooper v. Carter Oil Co., 7 Utah 2d 9, 316 P2d 320 (1957) wherein the Court stated:

"It is recognized that in order for a claimant to initiate and establish a new title by adverse possession, he must maintain open, notorious, continuous, exclusive and adverse possession of the property for a period of seven years. The purpose underlying this rule is that the 'possession be of such character as to plainly manifest that the claimant is asserting ownership of the property against the owner and the world and to prevent one who may occupy land in an equivocal or surreptitious manner from using such possession as a basis to claim title by adverse possession.'" (emphasis added)

As the Defendant does not contest Plaintiff's possession, the real factual issue before the court is whether the Plaintiffs as Claimant under adverse possession have proven that their possession was exclusive and adverse as required. The trial court in its memorandum decision dated July 13, 1978 listed the facts upon which it made its decision namely:

- (1) Plaintiffs have been in possession and farmed the land for over 30 years;
- (2) the Plaintiffs Beth Godfrey and her mother lived on the property adjacent to the subject property.
- (3) Beth Godfrey's brother Dale farmed all the property for Plaintiffs including the subject property which was enclosed by a fence with other property with no separation from Plaintiffs other property.
- (4) They farmed and took the crops for over thirty years and paid the taxes for over twenty years;
- (5) The defendant as Administratrix of the estate of Eliza M. Pack Godfrey and anyone claiming through the estate were aware of the use and possession by the Plaintiffs and made no effort to either remove them or pay the taxes on the

It is submitted that the fact listed in paragraph 2 above is in error as the record is clear that the land owned by Plaintiffs and adjacent to the disputed land was farmed just like the disputed land and that Plaintiff Beth Godfrey and her mother lived some distance away (p. 20). It would not make a difference to the ultimate disposition of the case because the real issue is whether Plaintiff's possession and conduct was sufficient to establish a claim of adverse possession but it does point out a clear mistake in fact relied upon by the trial court. It is submitted that none of the factors listed by the court establish adverse possession under the law. In reviewing the record, there are several important factors that the Court failed to consider, which rebut soundly Plaintiff's case, and as the court pointed out in the Cooper Case, the question of whether the possession is adverse is factual, so one must look at the facts in light of the burden of proof on the Plaintiffs.

1. Plaintiffs and their predecessors in interest took possession of the disputed land originally by permission. The law is clear that once possession begins with permission, the statute does not begin to run on the seven year period of adverse possession until a clear notice of a change from permission is given. See Gameson v. Remer 96 Idaho 789, 537, P.2d 631 (1975) and Tindle v. Linville, 512 P.2d 176 (Oklahoma 1973). Not only did the Plaintiffs or their agents fail to give the Defendant any notice of an adverse use (see p. 29), nothing was said by Plaintiffs or their agents to Defendant or their representatives under circumstances

that had Plaintiffs really believed they owned the property, one would expect them to at least protest the Defendant's claim. For example, Stan Lott, who purchased the property from the Defendant estate, talked with Dale Godfrey, at the property while Mr. Lott was digging a test-hole on that property to see if he could build a home. Dale Godfrey even showed Mr. Lott the line between the parcel belonging to Plaintiffs and the disputed land (p. 55). Not a word was said that the disputed land belonged to Plaintiffs or even a question raised about Mr. Lott's right to acquire and use the land. (p. 55-56). If Dale Godfrey did not know of the Plaintiff's claimed ownership, how was the Defendant to know.

Also, when Hyrum Godfrey took the family through Clarkston and pointed out his mother's lot during a family reunion, Dale was present but made no protest or objection to that claim (p. 65).

Also, when Dale received a letter from the estate stating its intention to sell the disputed land, no one contacted the Defendant alleging any ownership interest on behalf of the Plaintiffs. Instead they allowed the lot to be sold to Stan Lott without objection to the court approving the sale in the probate estate. Their first objection was to wait until after the sale was approved by the court in the probate estate and then file this lawsuit.

The final fact is the undisputed conversation with Annie T. Godfrey in May, 1974 wherein she requested the heirs of Elizabeth M. Pack Godfrey to sell their interest in the disputed land to her for the cost of completing the probate followed up by a similar request by her attorney as evidenced as Exhibit 1. There is no hint that any title is claimed by adverse possession in either request. The law is clear that Plaintiffs must prove notice of their adverse claim before the seven year period begins to run.

The only evidence in the record which would put Defendant on notice that the permissive use was changed to adverse use was Exhibit 9 or the Warranty Deed with the defective legal description. Without a complete and correct legal description, it can be no notice. Even then, as noted in Exhibit 1, Defendant was deceased and all of her children lived outside of Cache County. More than that must certainly be required to change permissive use to adverse use.

2. The parties seeking to prove adverse possession are family members with the Defendant. Our Court noted in the case of Sheppick v. Sheppick, 44 Utah 131, 138 Pac. 1169 (1914) that where the family relationship of the parties consist of mutual trust and continual confidence, something extra is required to establish adverse possession. As so well stated in 3 Am Jur 2d Adverse Possession, §147, p. 229:

"It is a general principle taht members of a family may not acquire adverse possession against each other in the absense of a showing of a clear, positive, and continued disclaimer and disavowal of title, and an assertion of an adverse right brought home to the true owner a sufficient length of time to bar him under the statute of limitations from asserting his rights. Stronger evidence of adverse possession is required where there is a family relation between the parties than where no such relation exists. The existence of a family relationship between the parties will prevent or rebut a presumption of adverse holding."

The file is replete with testimony that the Clarkston family and the Fielding family often met at family reunions and were on good terms with each other. Although Plaintiffs make a point to claim at trial that they are not "blood" relatives of Eliza M. Pack Godfrey, (p. 20), they certainly met often with their cousins. There is nothing in the record which would cause the Fielding family to suspect that the Clarkston family was not taking care of the property until the Fielding family wanted to retake possession as the Fielding family always assumed was the case. The Fielding family had not sought to retake possession until after it was sold to Stan Lott and he was not denied possession until this lawsuit was filed.

3. There is no evidence that Plaintiffs ever changed the original use. The old granery that George Godfrey built is still there (p. 5 & 72). It is fenced and farmed the same wa As stated before, the one who used the property, Dale Godfrey, could still show Stan Lott the property line. Nothing Plaintiffs or their agent did was in any way different than

the agreement in 1910 when George Godfrey left Clarkston. This because especially evident if Plaintiff's rely on the beginning of the seven year period as 1965 as alleged in their complaint.

4. The question of the payment of property taxes is unclear.

In 1955, after Beth Godfrey had worked at the court House for one year in the recorder's office the taxes are assessed to George Godfrey notwithstanding the provisions of §59-5-12, UCA 1953 which require the assessment to be in the name of the owner. Since it is the County Recorder's office that prepares the assessment list it seems the burden should be upon the Plaintiff to explain why the error was made where one of the Plaintiffs worked in the county recorder's office. In 1966 or 1967 the assessment rolls are changed to someone who holds no record interest in the property. Again no explanation is given by the Plaintiffs for the change. When the Defendant discovered that the assessor was obtaining improper information from the County Recorder, the error was corrected by the County Recorder without difficulty and in 1977 the assessment was made in the name of the true owner, Eliza M. Pack Godfrey. In view of the provisions of §59-5-17, UCA 1953, may the assessor now come back and re-assess the taxes to the correct name and thus defeat any claim of payment of taxes. It appears that because of the difficulties involved the Court should disregard the evidence as to payment of taxes since they were not legally assessed as

required by §78-12-12, UCA 1953, and in view of the Utah Supreme Court's statement in Tintic Undine Mining Co. v. Ercanbr 98 Utah 560, 74 P.2d 1184 (at page 570 of Utah Reports):

The records are at the courthouse, and the assessor must not be permitted to deprive an owner of his property by neglect and palpable inaccuracies in his official work.

5. Plaintiffs must also show their possession is exclusive. The only evidence of Plaintiff Lanneita Godfrey's claim is the incomplete deed. There is no evidence of possession, use or even claim of payment of taxes on her part and she did not even appear at trial. As the trial court correctly pointed out, the proposed parole evidence did not explain the ambiguity of the deed (p. 74) and therefore any claim she has should be dismissed. The evidence was that Plaintiff Beth Godfrey paid the taxes but less than clear that she had possession. Dale Godfrey said he operated the land for his mother Annie T. Godfrey (p. 54) who was the one who sought the deeds from Hyrum Godfrey representing Eliza M. Pack Godfrey's family. Annie T. Godfrey also hired the attorney to send the letter and deed to clear title. Plaintiff's possession is not exclusive of Annie T. Godfrey.

6. Defendant did not abandon the interest of the heirs in the disputed land by failure to include it originally in the probate of Eliza M. Pack Godfrey's estate. Neither Hyrum Godfrey or his attorney L. Tom Perry is alive so therefore, we do not know for sure why this property was not included. It is understandable why a single man living alone with his mother would want to probate the home property in Fielding and obtain deeds from his brothers and sisters

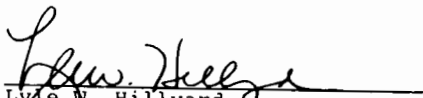
to protect his home after his mother's death. It is also understandable that the family who understood the Clarkston property was being held until someone wanted to build on it should not be so concerned about clearing title until someone showed an interest. No one wanted to build on it or sell it and it was maintaining itself. More interesting is the probate of George J. Godfrey's estate almost 30 years after his death, wherein no mention is made of the disputed land. The Plaintiffs, one of who acted as administratrix of the estate, must have believed that George J. Godfrey did not establish any ownership in the property by use for 35 years. George J. Godfrey's family continued to pay the property taxes in his name for another 20 years. Beth Godfrey's explanation is less than satisfactory if she is claiming the property was owned by the Clarkston family for the many years of possession and use.

CONCLUSION

The trial court in addition to finding a fact that is not supported by the evidence, failed to find the necessary facts of adverse use as required by Utah Law before adverse possession can be proven. Further, the record does not support such a finding. Plaintiffs gained possession by permission with no notice that they were changing this to adverse use. They are family members with a close social and friendly past. The use is still the same as in 1910 and completely compatible with the permissive use as originally

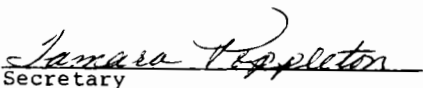
given. Plaintiffs further have failed to show their possession was exclusive. Plaintiffs have failed to prove their claim and therefore their cause of action should be dismissed and the Trial Court's judgment vacated.

RESPECTFULLY SUBMITTED,



Lyle W. Hillyard
Attorney for Defendants-Appellants

I hereby certify that I mailed a copy of the foregoing brief of Appellant to Miles P. Jensen at 56 W. Center, Logan, Utah, 84321 on this 19th day of December, 1978.



Secretary