

1989

Joseph Opheikens and Fanny Opheikens v. Arthur C. Sheron and Barbara O. Sheron : Brief of Respondent

Utah Court of Appeals

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BRIEF

UTAH

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DOCKET NO. **89 0069** STATE OF UTAH

IN THE UTAH COURT OF APPEALS

JOSEPH OPHEIKENS and
FANNY OPHEIKENS,

Plaintiffs/Appellants,

vs.

ARTHUR C. SHERON and
BARBARA O. SHERON,

Defendants/Respondents.

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Case No. 890069

Priority No. 14(b)

BRIEF OF RESPONDENTS

Appeal from Second Judicial District Court
of Weber County, State of Utah
The Honorable David E. Roth, District Court Judge

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FILED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

JOSEPH OPHEIKENS and	*	
FANNY OPHEIKENS,	*	Case No. 890069
Plaintiffs/Appellants,	*	
vs.	*	
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BARBARA O. SHERON,	*	Priority No. 14(b)
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STATEMENT OF THE NATURE OF PROCEEDINGS

This is an appeal from a final order of Judge David E. Roth heard in the Second Judicial District in and for Weber County, State of Utah, concerning the title to real property.

NATURE OF CASE

This case involves a determination as to the title of real property. The appellants claim that the property was conveyed by Deed to be held in trust for them. The respondents claim they hold both legal and equitable title to the property by reason of Deed subject only to a life estate in the appellants.

COURSE OF PROCEEDINGS

The plaintiffs/appellants filed a Complaint against the defendants/respondents in the Weber County District Court. The matter was tried, non-jury, before Judge David E. Roth on the 25th and 26th of May, 1988. The Findings of Fact, Conclusions of Law and Judgment was signed by Judge Roth on the 21st day of June, 1988.

The plaintiffs/appellants appealed to Utah Supreme Court on the 21st day of July, 1988. This matter was transferred from the Utah Supreme Court to the Court of Appeals on the 6th day of February, 1989.

DISPOSITION AT TRIAL COURT

The district court judge, David E. Roth, setting

without a jury, entered a judgment in this matter on the 21st day of June, 1988. The court found that the defendants/respondents own the Fee Title to the real property in question subject to a life estate in the plaintiffs/appellants.

RELEVANT FACTS WITH CITATIONS TO THE RECORD

The plaintiff/appellants, hereinafter referred to as the appellants, are Joseph Opheikens and his wife Fanny Opheikens. The defendants/respondents, hereinafter referred to as the respondents, are Arthur C. Sheron and his wife Barbara O. Sheron. The parties will be referred to by appellants and respondents and by their names in order to identify the source of some of the testimony. Reference will be made to the page number of the court record rather than to the page number of the transcript.

The appellants are the parents of the respondent, Barbara O. Sheron, and at the time of the trial were 80 years of age. (Record, p.231) Prior to 1953, Barbara Sheron had been married to an individual by the name of Jack Griven. He died in an automobile accident in 1953 and as a result of that accident Barbara Sheron received \$1,900.00 and an insurance policy that paid her \$92.90 per month. After the death of her first husband, Barbara Sheron and her daughter from that marriage, Kathleen, lived with the appellants. (R.315) Upon receiving the \$1,900.00 from the death of her first husband, Barbara Sheron suggested that the appellants build a home on a lot they owned. Barbara

Sheron used the \$1,900.00 she had received from her husband's death to construct the home. In addition, she worked along side her father during the entire construction of the home. (R.316-317) The appellants borrowed \$4,500.00 from Froerer Corporation to finish the home and at a later time borrowed an additional \$700.00 from Froerer Corporation to install cabinets in the home. (R.239) Barbara Sheron paid \$92.90 on the mortgage borrowed by the appellants for a period of one year. She and her new husband, Arthur C. Sheron, lived in the home for a period of three months after it was constructed. (R.318-319) The respondents moved to a home that was adjacent to the property on which the new home had been built and which the appellants were occupying.

The appellant, Fanny Opheikens, handled all the financial matters for her family. (R.232) Fanny Opheikens liked to gamble and played Bingo seven nights a week. (R.320-321) She used the money from her husband's paycheck to cover her gambling losses and consequently became delinquent in the moneys owed on the mortgages and taxes on the home. In 1957 Froerer demanded payment of the \$700.00 which had been loaned to the appellants to install the cabinets. The appellants were unable to provide the money so the respondents borrowed the money and paid the debt to Froerer. (R.319-320, 364-365) Froerer made the demand on the \$700.00 because the appellant, Fanny Opheikens had not been making the interest and/or mortgage payments required under the mortgage and the loan on the \$700.00. Between June of 1958 and

December of 1967 the appellants had paid nothing towards the principal on the home mortgage. (Exhibit 12, R.282) When the respondents paid the \$700.00, Froerer reinstated the mortgage, but increased the monthly payments to \$110.00 per month. (R.364)

In approximately December of 1967, the appellant Fanny Opheikens informed the respondents that the house was being foreclosed by Froerer because she had not paid taxes for a period of five years. The property had been advertised and placed for sale for delinquent taxes by the county. (R.321-322) A neighbor, Elizabeth Dale, who was a close friend of the appellant Joseph Opheikens, also became aware of the fact that the property was being placed for a tax sale and was interested in purchasing the home. (R.417) The respondent Arthur Sheron met with the appellant Joseph Opheikens and suggested that the respondents would acquire the money to pay the taxes which amounted to \$1,028.00. Joseph Opheikens informed the respondent that he was a damn fool and that he should let Froerer have the home. (R.367) The respondents borrowed \$1,028.00 from Joe Deemer and agreed to pay the taxes on the condition that the appellants would deed the home over to them. The appellant Fanny Opheikens suggested that a Quit Claim Deed be drafted by her attorney Ira Huggins. (R.368-369) A deed was drafted by attorney Ira Huggins at a meeting between Mr. Huggins, Fanny Opheikens, and Arthur Sheron. At that time Attorney Huggins informed Fanny Opheikens that if she signed the deed she would be giving up all ownership to the home to the respondents. (R.369-

370) The deed was then taken back to Joseph Opheikens and the appellants signed the deed the next day in front of a notary.

(R.370) The respondents told the appellants that they could continue to live in the house during their lifetime if they would pay the remaining mortgage and taxes on the home. The respondents paid the insurance on the home. (R.372-373, 325-326)

The appellants had represented to the respondents and to others that they always intended the home to go to their daughter Barbara Sheron and to her oldest daughter Kathleen Lilly because the home had been built from the insurance money received from the death of Barbara's first husband and Kathleen's father.

(R.318, 363) The appellants deny that they made any such statements. However, other witnesses testified that they had heard the appellants make the statements. One of those witnesses was Elizabeth Dale, an old time friend of the appellants who had known them since 1957, and had social contact with them daily.

(R.412-413) Elizabeth Dale testified that Joseph Opheikens told her on a number of occasions that the home was to belong to Barbara and her oldest daughter because of the insurance money that had been invested in the home. (R.415-416)

Elizabeth Dale testified that she had been told by the appellant Joseph Opheikens that he would not have a roof over his head if it had not been for what the respondents had done for him. (R.420-421)

Kathleen Lilly testified that she recalled hearing her grandmother say the house was to go to her and her mother Barbara Sheron because it was built with blood money. (R.443-444) Vanna

Sandburg, the daughter of Arthur and Barbara Sheron, testified that she was close to her grandparents and that her grandmother would make a point of telling her that the home after the appellants death would be going to Barbara Sheron and Vanna's sister Kathleen Lilly. (R.454)

The Quit Claim Deed deeding the property from the appellants to the respondents was signed on the 7th day December, 1967. (Ex.1) The respondents from that time on maintained the yard, plowed the snow, built a patio, and performed other work on the property for which they did not charge the appellants. (R.331-332, 374-375, 447) The respondents did not have any complaints from the appellants until approximately 1984 when they received a letter from an attorney representing the appellants claiming that they held the home in trust for the appellants. (R.330) The respondents refused to turn the house over to the appellants and the appellants filed a Complaint in this matter. The Complaint alleged that the respondents were holding the house in trust for the appellants. However, the appellant Joseph Opheikens testified at the trial that he had never informed the respondents that they were holding the house in trust for him. (R.229) The appellant Fanny Opheikens testified that she had asked that the home be returned to the appellants, but the respondents said they would not do so. (R.299) Fanny Opheikens testified that when the Deed was executed, she did not have a close relationship with her daughter and had an uncomfortable relationship with her son-in-law. She also testified that she

did not have a confidential relationship with either of the respondents. (R.295-296) Joseph Opheikens was very confused in his testimony and stated that the whole matter was a puzzle to him. (R.221)

ARGUMENT

POINT I

THE RESPONDENTS OWN THE FEE TITLE TO THE REAL PROPERTY.

The respondents received a Quit Claim Deed from the appellants for the real property in question on the 7th day of December, 1967. (Ex.1) Judge Roth, after hearing this case, entered a judgment which stated in part, "It is hereby ordered that the defendants own the Fee Title to the following described property subject to a life estate in Joseph Opheikens and Fanny Opheikens;..." The Court in its bench ruling stated as follows:

One fact I can find for certain, and that is that in my opinion, based upon the evidence, the plaintiffs did quit claim their interest to this property to the defendants. That the claimed document is clear on its face. And there is no question as to what its effect is. And I am satisfied that both plaintiffs signed that deed. There is no evidence that in 1967 that either plaintiff was in poor health or of unsound mind. (R.470)

Paragraph 3 of the original Complaint and of the Amended Complaint of the appellants acknowledges that the appellants executed a deed to the respondents. That allegation was admitted by the respondents in their answer. Judge Roth ruled at the beginning of the trial that the appellants had admitted that they

had executed the deed and that would not be an issue during the trial. (R.193-195)

In Baker v. Pattee, 684 P.2d 632 (Utah 1984) the Supreme Court said that there is a presumption of validity upon the delivery of a deed and that a party attacking the validity of a written instrument such as a deed must do so by clear and convincing evidence. The court also stated:

...This court will disturb the findings of fact in equity cases only where the evidence clearly preponderates against them... We are not bound to substitute our judgment for that of the trial court, and because of its advantages position, we give considerable deference to its findings and judgment....

In the case of In re Estate of Ruth H. Hock v. Jack M. Fennemore, 655 P.2d 111 (Utah 1982) the court considered a case in which there was an allegation of a constructive trust. The court stated:

In this case, as in most cases involving constructive or resulting trust, we are called upon to alter a deed or other writing which is regulated in form and is presumed to convey a clear and unambiguous title. When such a deed or document is attacked, the party alleging the variance must prove the claim by clear and convincing evidence....

The burden was upon the appellants to prove by clear and convincing evidence that the deed did not convey Fee Title to the respondents and/or that a constructive trust should be imposed on the property. The respondents admitted during the course of the trial that they had agreed that the appellants would have a life estate in the property. The court therefore concluded that the respondents owned the Fee Title subject only

to a life estate in favor of the appellants. The appellants did not present any testimony that would invalidate the deed or place any restriction on the real property other than that agreed to by the respondents. The appellants do not contend in their Brief that they met the burden of producing clear and convincing evidence which would justify the invalidation of the deed. Instead the appellants attempt to switch the burden to the respondents as indicated in Point III of the appellants' Brief.

The appellants' Brief claims that the appellants were not adequately compensated for the deed which they executed to the respondents. The appellants' Brief relies entirely upon the testimony of the appellants to support this contention. The Supreme Court has held in many cases that it will review the evidence presented in the trial court in the light most favorable to the prevailing party or the respondents. The evidence presented by the respondents as set forth in the Statement of Facts clearly demonstrates that the findings of the judge in favor of the respondents was supported by the evidence.

The home which was quit claim deeded to the respondents was originally built at the suggestion of the respondent Barbara Sheron from \$1,900.00 insurance money that she received from the death of her husband. (R.315) Barbara Sheron worked side by side with her father in constructing the home. (R.316-317) The appellants borrowed \$4,500.00 to finish the home and Barbara Sheron paid the mortgage payment for a period of one year after the home was built although she and her new husband only lived in

the home for three months. (R.239, 318-319) After Barbara Sheron had stopped making the mortgage payments, the appellant Fanny Opheikens, because of her gambling, failed to make the payments on a regular basis thereby resulting in a threatened foreclosure by the mortgage holder. (R.282, Ex. 12) In order to keep the house from being foreclosed, the respondents paid \$700.00 to the mortgage holder so that the mortgage would be reinstated. (R.364) Thereafter, in December of 1968 the mortgage holder again threatened to foreclose on the home because the appellants had not paid property taxes for a period of five years. (R.321-322) The respondents borrowed \$1,028.00 and paid the taxes on the basis that the property would be deeded to them by the appellants. The Quit Claim Deed was drafted by the appellants' attorney. (R.368-369) After the property was deeded to the respondents, the respondents paid the insurance on the home and told the appellants they could continue to live in the home during their lifetime if they would pay the remaining mortgage and keep the taxes current on the home. (R.372-373, 325-326) After the property was deeded to the respondents, they maintained the home and performed other improvements on the property for which they did not ask and did not receive compensation. (R.331-332, 374-375, 447)

Judge Roth found that there was no good evidence before the court as to what the value of the home would have been in 1967 and that the appellants did not present any evidence of value. The only evidence presented was the estimate of the

respondent Arthur Sheron that the home would have been worth \$12,000.00 to \$15,000.00 in 1967. The court also found from the evidence presented by the respondents that other homes in the area during this time period were selling for very modest amounts. (R.472-473) Judge Roth found that the respondents had contributed a total of \$3,628.00 for the construction of the home and to avoid foreclosure on the home and concluded that this was a reasonable price given the fact that the appellants were receiving a life estate in the home. (R.472-473)

In order to prevail on their Complaint, the appellants had to prove by clear and convincing evidence that the deed was not valid or that it was being held in trust for them by the respondents. The appellants did not present any evidence to the effect that the property was being held in trust for them by the respondents. The appellant Joseph Opheikens was asked whether or not he had ever informed the respondents that he thought they were holding the ownership of the home in trust for him. His answer was no, that no discussion was ever had concerning the matter. (R.229) The appellants did not present any evidence that would justify their claim that the deed was invalid or that the respondents had been unjustly enriched.

POINT II

THE APPELLANTS HAVE MISUNDERSTOOD AND/OR

MISCONSTRUED THE RULING OF THE TRIAL COURT

The appellants have appealed on the basis that the

trial court committed error in awarding the respondents a remainder interest in the property which they claim was not requested in the respondents' pleadings. There seems to be no other basis for the appeal. The appellants obviously have misconstrued the ruling of Judge Roth. Judge Roth found that the Fee Title to the land was transferred by Quit Claim Deed from the appellants to the respondents, but that the respondents had agreed to give the appellants a life estate in the property. Judge Roth stated in his decision from the bench that the respondents ended up with a remainder interest in the property. However, he did not award the respondents a remainder interest as alleged by the appellants. In fact the respondents, by agreeing to a life estate, retained a reversion interest. A remainder interest can only be created in favor of a stranger to the deed and therefore cannot apply to the respondents. Moynihah, Corneluis J., INTRODUCTION TO THE LAW OF REAL PROPERTY, p.111 (West Publishing Company, 1962) While Judge Roth made reference to a remainder, he ruled that the respondents owned the fee to the real property subject only to a life estate in the appellants which legally created a reversion interest. While the distinction between the two interests are subtle, it is clear that the judge did not impose a constructive trust against the appellants which resulted in the respondents having a remainder interest.

The appellants incorrect assumption that the court imposed a constructive trust upon the respondents runs throughout

the appellants' Brief. Consequently, the arguments contained in the Brief are not relevant. This is demonstrated by Point II of the appellants' Brief wherein they contend that the respondents were granted relief which they did not request in their pleadings. The respondents at all times maintained that they were the fee owners of the property. Had the appellants understood the court's ruling, there would be no reason for the argument contained in Point II of the Brief. In Point I of the appellants' Brief, they argue that the imposition of a constructive trust in favor of the respondents has the effect of reconveying the real property or restoring the real property to the former owners or the appellants. The appellants then argue that the court did not reconvey the property to the appellants and therefore committed error in creating a constructive trust for the respondents. This argument makes no sense in light of the fact that the court held that the respondents were the fee owners of the property and that a constructive trust was imposed against the respondents in favor of the appellants in the form of a life estate.

POINT III

THE RELIEF SOUGHT BY THE APPELLANTS ON APPEAL

SHOULD NOT BE GRANTED.

It is hard to tell from the appellants' Brief what relief they are asking of this court. The only part of the

appellants' Brief that addresses that issue is the conclusion. Apparently the appellants are not asking for a new trial, but are asking the court to reverse the trial court's decision and rule that the appellants own the Fee Title to the real property and that the only right the respondents have is to be paid back the moneys they have invested in the home.

The Court of Appeals in an equity case does have the right to enter an order based upon the evidence given in the lower court. The Supreme Court has held that in the review of an equity case, the trial court's findings of fact and ruling should not be disturbed unless the evidence clearly preponderates against the lower court ruling. Hock v. Fennemore, supra. The Supreme Court has also stated that considerable deference should be given to the findings of a trial court because of its advantaged position. Baker v. Pattee, supra. There is an additional reason why the court should not substitute its judgment for that of the trial court in this case.

It is the position of the respondents that the court committed error in a couple of instances in its decision in imposing a life estate in favor of the appellants. The respondents elected not to appeal on those issues because they were willing to allow the appellants to have a life estate in the property.

It was the respondents' position that the appellants action was barred by the Statue of Limitations. The deed in this case was executed in 1967. The appellants did not instigate

their action until after 1984, more than 17 years after the date of the deed. The Utah Supreme Court in the case of Baker v. Pattee, supra. held that the statute of limitations in an action for the cancelation of a deed was controlled by U.C.A. § 78-12-25(2) which provides for a four year statute of limitations. The court stated that in case of undue influence and/or duress, the limitation period begins with the termination of the influence or duress.

The appellant Fanny Opheikens testified that she was aware that the respondents did not intend to return the property to her as early as 1968. (R.298-299) The appellants did not claim that there was any undue influence or duress. The appellant Joseph Opheikens did not make any claim of a confidential relationship, undue influence, or duress. He stated that he did not tell the respondents that they were holding the house in trust for him. (R.229) His sole complaint was that he did not remember signing the deed and that the whole matter was a puzzle to him. (R.208, 221) The appellant Fanny Opheikens testified that when the deed was executed in 1967 she did not have a close relationship with her daughter, had an uncomfortable relationship with her son-in-law, and did not have a confidential relationship with either of the respondents. (R.295-296) She also stated that in 1967 she was approximately 60 years of age as was her husband and that both she and her husband were in good health and of clear mind. (R.297-298) Judge Roth found that there was no evidence that the respondents manipulated or put undue pressure

on the appellants. He also found that neither attempted to take advantage of the appellants. (R.470-471)

It seems clear that the statute of limitations on this action began to run at the time the deed was executed, which was 1967, or when the appellants clearly knew that the respondents did not intend to return the property to them which would have been in 1968. Consequently, the appellants' action was barred by the statute of limitations after 1972. The respondents made a motion at the beginning and during the trial to dismiss the actions because of the statute of limitations. The court refused to grant the motion and stated: "...and for the reason I don't think it is a very satisfying way to end this litigation in a family case." (R.313) The respondents did not appeal from the court's failure to dismiss the case because of the statute of limitations because the respondents were willing to abide by the court's decision. However, if the Court of Appeals elects to overturn the court's decision and enter an order without referring the matter for a new trial, the respondents would be denied an opportunity to pursue a remedy which they might have appealed if any decision other than the one by Judge Roth was imposed upon them.

The respondents believe that the court committed an error in ruling that a life estate was created by a constructive trust as opposed to an express trust. The respondents did not appeal from Judge Roth's ruling in this regard because they

agreed that there was an express trust and were willing to be bound by the life estate. At the conclusion of the case presented by the appellants, the respondents made a motion for a dismissal on the basis that the appellants had presented no evidence concerning an express trust. The appellants' attorney Stephen Farr conceded that they were not trying the action on the basis of an express trust, but rather on the theory of a constructive trust. Judge Roth ruled that there was no evidence that had been presented by the appellants that supported the existence of an express trust and granted the respondents' motion to dismiss on that basis. Judge Roth continued the trial solely on the theory of whether or not there was a constructive trust that should be imposed against the respondents. (R.273-276) Had the appellants called the respondents to testify as part of their case, they would have learned that there was an express trust; but since the appellants did not carry their burden, they lost the opportunity to prevail on that theory.

The theory of constructive trust was considered by the Utah Supreme Court in Histsley v. Ryder, 738 P.2d 1024 (Utah 1987). In that case Justice Zimmerman stated the burden of proof is on the party asserting a constructive trust to prove the case by clear and convincing evidence and that the burden of proving a constructive trust cannot be met by simply showing that there was a transaction between close family members. He stated that in order to impose a constructive trust, in addition to the family relationship, there must be shown age and infirmity, actual

dominance, a course of management of the affairs of another, or other facts making it inequitable to deny a constructive trust.

He stated in part:

...Indeed, the court was required to presume that the transaction was in all respects regular, absent evidence to the contrary....

A constructive trust cannot be imposed upon the respondents because there was a family relationship involved in this transaction. There was no evidence showing age or infirmity, actual dominance, a course of management of the affairs of another, or any other fact which would demonstrate that it was inequitable to deny a constructive trust.

After dismissing the appellants' action on an express trust, Judge Roth continued the trial and heard the testimony of the respondents to the effect that they had agreed to give the appellants a life estate. Consequently, Judge Roth found himself in a position where he wanted to impose a life estate on the property, but could not do so because of an express trust. Therefore, he found there was a constructive trust imposing a life estate even though the evidence was not sufficient to justify such a finding. The appellants did not appeal this error on the part of the trial court because they believe the results were equitable. However, if this court were to substitute its order for that of the trial court, a result could occur which was not anticipated by the respondents and the respondents would be denied an opportunity to pursue a remedy which they might have otherwise appealed.

CONCLUSION

The respondents are the owners of the Fee Title to the property in question by reason of a Quit Claim Deed from the appellants. The appellants did not sustain their burden of demonstrating by clear and convincing evidence that the deed given to the respondents was invalid or that the property was being held in trust for the appellants. The trial court did not impose upon the appellants a constructive trust resulting in a remainder interest in the respondents as alleged by the appellants. The court clearly ruled that the respondents owned the Fee Title to the property subject only to a life estate in the appellants. This resulted in the respondents having a reversion interest in the property instead of a remainder interest as alleged by the appellants.

The relief sought by the appellants is not clear. However, it would be manifestly unjust for the Court of Appeals to substitute its ruling for that of the trial court. The respondents believe that the trial court committed an error in failing to dismiss the action as being barred by the statute of limitations and in determining that there was a constructive trust imposed against the respondents for a life estate in favor of the appellants. The respondents' did not appeal these issues because they believe the ultimate result of the court's order was equitable. However, if the appellate court were to substitute its judgment for that of the trial court, the respondents would

be denied an opportunity to pursue remedies which they might have appealed if the decision had been other than as rendered by the trial judge.

RESPECTFULLY SUBMITTED this ____ day of February, 1989.

ROBERT A. ECHARD
Attorney for Respondents

CERTIFICATE OF MAILING

I hereby certify four (4) true and correct copies of the foregoing Brief of Respondent was mailed, postage prepaid, this ____ day of February, 1989 to Stephen W. Farr and G. Scott Jensen, Attorneys for Appellants, at Bamberger Square, Building 1, 205 - 26th Street, Ogden, UT 84401.

ROBERT A. ECHARD
Attorney for Respondents