1987

Ruth S. Hiltsley v. Hallalene M. Ryder : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RUTH S. HILTSLEY, personally and RUTH S. HILTSLEY, administratrix of the Estate of Milton J. Hiltsley, aka M.J. Hiltsley,

Plaintiff,

vs.

HALLALENE M. RYDER,

Defendant.

Estate of Etta Wood, by her personal representative, Douglas P. Simpson,

Intervenor/Appellant.

No. 870377

APPELLANT'S BRIEF

Appeal from Judgment of the
Third Judicial District Court for Salt Lake County
Honorable Dennis Frederick

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STATEMENT OF THE KIND OF CASE

Intervenor appeals from a final Order of the Third Judicial District Court, Judge Dennis Frederick, granting a summary judgment to Defendant and denying summary judgment to Intervenor. The basic dispute between Hiltsley, plaintiff, and Ryder, defendant, has been before this Court on a prior occasion and a decision was made on June 10, 1987 reversing the judgment. The language of this Court in its decision reads as follows: "Because the trial court should have required that Etta Wood's estate be joined before deciding the case as it did, we reverse the case and remand for

joinder of Etta Wood's estate." The remittitur from the Supreme Court was filed with the County Clerk of Salt Lake County on July 10, 1987. On July 20, 1987, the personal representative of the estate of Etta Wood was ordered joined as a party plaintiff. On July 30, 1987 the Complaint in Intervention was filed in the Third Judicial District Court. Answer of Respondent was filed on August 17, 1987. Intervenor, on the 21st of August, 1987, filed a Motion for Summary Judgment with Memorandum in support of the motion. Respondent filed a Cross-Motion for Summary Judgment September 4, 1987. The matter was duly argued and submitted and the Court, on September 14, 1987, granted Respondent's Cross-Motion for Summary Judgment and denied Intervenor/Appellant's Motion for Summary Judgment.

This matter is now before the Court on Intervenor's appeal from the trial court's order.

RELIEF SOUGHT ON APPEAL

Intervenor seeks reversal of the trial court judgment and for judgment that the sums determined by Judge Croft as held in trust amounting to $43,623.43 be determined by the Court to be assets of the estate of Etta Wood and for judgment accordingly.

STATEMENT OF FACTS

Intervenor/ Appellant in this matter, pursuant to the order of this Court, filed her Complaint in Intervention. The personal representative then moved for summary judgment. The motion was based upon the ground that the matter in issue as to the ownership of the assets of the estate of Etta Wood was a basic issue tried

by Judge Croft in the original action between Hiltsley and Ryder. Judge Croft, in his memorandum opinion, states as follows:

> It seems clear to me that Milton must be considered as having received that $30,000.00 in trust for Etta and this money was not his money to invest as he did and did not become his upon her death to give away or use for his own purposes. It is thus apparent that at least $10,000.00 each of the three accounts mentioned came from Etta's funds. (Tr. 53)

The document which supports the trial court finding was introduced without objection from any party. It is the journal of the deceased Milton J. Hiltsley (Ex.10). There are three pages in which Milton Hiltsley refers to Etta Wood's estate. Page 250 contains the following notations:

> For Etta: accounting
>
> 9/19 - Ck to Public Service of New Mexico for utilities 9.68
>
> 9/24 - Transferred acc to Tracy Collins 2,000.00
> Deposited 409.71
> Transferred 2,409.91
>
> 9/24 - Check cash for running exp to hosp. 75.00
> $147.47 bal in New Mexico checking
>
> 9/28 - Am. Savings to bring savings from New Mexico.

Page 253 dated October 5, 1979 reads as follows:

> 10/5/79 - Received money from Etta's account transferred to Salt Lake from Albuquerque, N.M. 30,000.00 + 314.00 - a shortage of 8.+.
>
> The Am. Savings will check this shortgage for me.
>
> Placed $10,000.00 in savings pass book
> " $10,000.00 in money market at A.M. Savings
> " $10,000.00 in money mkt @ P.F.S.

Neither party to the original action questioned the authenticity of these entries in the Milton J. Hiltsley journal.

Page 262 reads as follows:

Etta died on January 20, 1980 - 9:30 P.M. She was buried at Santa Fe, New Mexico on January 23, 1980 at 2 P.M. a graveside service.

A small but very nice service and burial. The same type stone as Alton's, is to be placed on her grave.

Air fare	480.00
Mortician	1260.68
Flowers	15.00
Head stone	143.68
Telephone	11.25
Meals @ Santa Fe	15.00
	2025.61

There was no evidence contrary to the written exhibit. At no place in the journal is there any claim of Milton Hiltsley or the defendant that these funds were theirs by reason of gift or other transfer from Etta Wood during her lifetime.

Judge Croft traced the three $10,000.00 deposits through the bank accounts and entered judgment that defendant pay the personal representative of Etta Wood $10,000.00 with interest from the first of November, 1979. This sum was invested on November 1, 1979 in the condo purchased by Milton Hiltsley and Hallalene Ryder.

Judge Croft determined that an account No. 11-0132799 at American Savings & Loan contained Etta's funds. August 25, 1981, the day before his death, deceased placed the name of Hallalene Ryder on the account as joint tenant.

The third $10,000.00 was traced by Judge Croft into Account No. 003-300,723-6 at Prudential Federal Savings & Loan. Defendant Hallalene Ryder's name was also on this account as a joint tenant. This deposit was traced through several accounts. On the death of Milton Hiltsley, the funds were in Account

No. 715-101,422-2 at Prudential Federal Savings & Loan. It stood in the name of Milton J. Hiltsley and Hallalene Ryder as joint tenants.

Following Hiltsley's death, without the deposit certificate, Hallalene Ryder withdrew the balance in the account of $18,363.65. Transfer was made by the bank in reliance upon an Affidavit and Guarantee for Lost Evidence of Account, Exhibit 30-P, signed by defendant. She swore that the following was true:

> I/We Hallalene Ryder and Milton J. Hiltsley (Deceased) being duly sworn on my/our oath(s), do hereby declare and represent that I am/we are the owner(s) of Savings Passcard/Passbook/Certificate of Account No. 715-101422-2 issued by PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION hereinafter designated ASSOCIATION, of Salt Lake City, Utah, on or about the 4th day of September, 1981 that I/we have not in any way disposed of said Passcard/ Passbook/Certificate or of our interest therein; that said Passcard/Passbook/Certificate has been lost, misplaced or destroyed, and I am/we are unable to produce the same.

The money market certificate which represented the Prudential Federal Savings & Loan account was found by plaintiff in a secret tin box hiding place after Milton J. Hiltsley's death (see Finding No. 18, Tr. 92).

Trial court found that at the time of the Affidavit (Ex. 30), defendant knew that the certificate of deposit was in the possession of plaintiff (see Finding No. 21 of Findings of Fact, Tr. 93). Court found also that the co-owner of the certificate, one Fred Hansen, claims no contribution to the account and that his name was on the account as an accommodation to defendant and at her request (see Findings of Fact No. 20, Tr. 93).

Judge Croft's Findings of Fact are based on evidence which was not disputed by any contrary evidence.

INTERVENOR PLEADINGS

Intervenor's Complaint in Intervention makes claim on the assets that were determined by Judge Croft to be assets which came from Etta Wood.

The Complaint alleges that during the lifetime of Milton J. Hiltsley he had a confidential relationship with Etta Wood, his sister, and handled for her and on her behalf her assets which were in his possession (Par. 4, Complaint in Intervention, Tr. 590). These allegations are not disputed.

In the Memorandum in Support of Defendant's Cross-Motion for Summary Judgment, defendant recites as uncontroverted facts the appointment of Ruth S. Hiltsley as personal representative of Milton J. Hiltsley, the fact that she, in her representative capacity and personally, brought the original action against defendant. She sets forth several of the findings of Judge Croft including paragraphs 3 and 4 of the Findings and paragraphs 1 and 2 of this court's decision. She cites also as uncontroverted the Findings of Judge Croft contained in paragraph 20 (Tr. 93) relating to present state of the Prudential Federal Savings & Loan account. Judge Croft signed his judgment on March 29, 1983. Defendant recites also that it is uncontroverted that Judge Croft ordered the defendant to pay the estate of Etta Wood the $10,000.00 represented by a contribution to the purchase price of defendant's condo and that the trial court then ordered defendant to pay the American Savings & Loan Association

Certificate No. 11-013277-9 and the Prudential Federal Savings & Loan Association Account No. 003-300,723-6 to Etta Wood's estate.

Plaintiff was granted judgment for $4,924.66, her share of a tenancy in common account which she did not sign off.

It is undisputed that the trial court awarded defendant an American Savings & Loan passbook account on which she was a joint tenant with Milton J. Hiltsley. It was uncontroverted also that Etta Wood, a sister of Milton J. Hiltsley, died on January 20, 1980 and that Douglas P. Simpson was appointed her personal representative on May 25, 1983.

A fact not admitted as uncontroverted by defendant is the following findings by Judge Croft:

> Thus it would appear that the total amounts in these two accounts, together with the $10,000 used on the condominium purchase, would all have to be considered as funds which decedent held in trust for Etta Wood at the time of her death and such would be subject to probate as part of Etta Wood's estate. (Tr. 94)

In Finding No. 16, subparagraph (d), Court found that the sum of $9,849.32, part of a tenancy in common account, was to be divided between the tenants in common, Ruth Hiltsley and deceased, each having an interest of $4,924.66 (Tr. 90). The Court concluded that Ruth Hiltsley should be awarded in her individual capacity the sum of $4,924.66, one-half of the tenancy in common balance invested in defendant's condo(Tr. 94, Conclusion 1). Conclusions of Law then allocated to the estate of Etta Wood $10,000.00 out of the investment in the condominium (Par. 2, Conclusions). The balance in the account at American Savings & Loan, 11-013277-9, and Account No. 003-300723-6 at Prudential

Federal Savings & Loan (Conclusions, Tr. 96).

It is undisputed that this Court in its decision, after accurately reciting the Findings by the trial court, then determined that because the estate of Etta Wood was not a party, the trial court erred in rendering judgment in favor of the estate of Etta Wood.

This Court then ordered:

> Because the trial court should have required that Etta Wood's estate be joined before deciding the case as it did, we reverse the case and remand for joinder Etta Wood's estate.

In Justice Zimmerman's concurring opinion, he, while concurring in the result, states:

> I would advise the trial court that it erred in finding a constructive trust on the state of the facts before it.

The Cross-Motion for Summary Judgment filed by defendant in the trial court stated that the motion was upon the ground that there was no material issue of fact and defendant was entitled to judgment as a matter of law and that the motion was based upon the pleadings and the Memorandum in Support of the Cross-Motion (R. 614-615).

The Memorandum in Support of Defendant's Cross-Motion for Summary Judgment, after reciting some of the uncontroverted facts, under points and authorities, sets forth as its point and authority: Intervenor's Claims are Barred by the Statute of Limitations. The position is that the statute of limitations started to run on May 25, 1983, the day of the appointment of Intervenor as personal representative. It further appears that

her position is that from May 25, 1983 until July 29, 1987, a period of four years and two months elapsed, and therefore the Intervenor's claim was barred (Tr. 611-12).

LEGAL ARGUMENT

POINT I. SECTION 78-12-40, U.C.A. GRANTS INTERVENOR A YEAR IN WHICH TO FILE HER COMPLAINT IN INTERVENTION

The statute on which parties both rely is Section 78-12-40, U.C.A., which is entitled "Effect of failure of action not on merits". It reads as follows:

> If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

This Court has on two separate occasions interpreted the meaning of the statute and applied it to cases before it. The first case is Thomas v. Braffet's Heirs, 6 Utah 2d 57, 305 P.2d 507 (1956). This was an action in which various parties sought to quiet title to land in Uintah County. Some of the parties had not joined in the action as plaintiffs but were named as defendants. This Court, in unanimous opinion, held as follows concerning the proper interpretation of 78-12-40:

> Plaintiffs maintain that this statute by its express terms extends the statute of limitations only to 'plaintiffs', and that it cannot be invoked by defendants. We think, however, that the purpose behind the statute is plain and that the legislature intended that anyone who had a cause in litigation which was dismissed for some reason 'otherwise than upon the merits' should have a reasonable time, which

> is set as one year, to reassert and attempt to establish his rights in court. There is no reason to believe that the legislature had any disposition to favor 'plaintiffs' over any other class of litigants. We think that the word 'plaintiff' as used in this section was meant to include not only the party who brings the action, but any party who affirmatively seeks relief, as did the defendants here, in this and the prior action.

In the case at bar, Intervenor, while not a party to the original action, was a person whose claim was adjudicated and for whom the trial court granted substantial rights.

As is clear from a reading of Thomas v. Braffet's Heirs, supra, the word "plaintiff" should not be given a restrictive interpretation but should include any party who affirmatively seeks relief in this or in the prior action. The Intervenor in this action, during the time before the statute of limitations had expired, filed her petition with this court to be joined in the action as an intervenor. The motion was filed on June 30, 1983 in the Utah supreme Court and was denied September 19, 1983.

It is clear then that Intervenor appeared and sought the relief granted her by Judge Croft prior to the time that the statute of limitations had run.

A general principle of law seems to be that these statutes which toll the running of the statute of limitations are to be liberally construed in order to accomplish the purpose of the statute. See 51 Am Jur 2d, Sec. 143, page 714, Re Goldsworthy, 45 NM406, 115 P.2d 627, 148 ALR 722. The language of the New Mexico Supreme Court is as follows:

> We see no cogent reason to strive to discover a contrary legislative intent. In the first place, the law favors right of action rather than the right of limitation. Gresham v. Talbot, 326 Mo 517, 31 SW2d 766. Therefore, a statute which tolls the statute of limitations should be liberally construed in order to accomplish that purpose.

The United States Supreme Court in American Pipe & Construction Co. v. Utah, 94 Sup Ct 765, 414 U.S. 538, 38 L.ed.2d 713, ruled that persons who were in a class were entitled to proceed after a class action had been dismissed upon the grounds that the number of parties in the class were not sufficiently large. The Court held members of the class could bring their individual suits after the statutory period had expired. The case set forth public policy concerning statutes of limitations generally. Headnote 9 states as follows:

> Statutory limitation periods are designed to promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. Clayton Act, Sec. 4B, 5(b), 15 U.S.C.A. Sec. 15b, 16(b).

Recent cases have followed the Supreme Court ruling.

A number of cases have permitted the limitation to be tolled where a wrong party was sued in the very beginning by the plaintiff. See Cox v. Ohio Parole Commission, 31 Ohio App.3d 216, 509 N.E.2d 1276 (1986), an action filed aginst individual members of the Parole Commission. Proper defendant was the Parole Commission. There the Ohio Supreme Court held:

> Moreover, the savings statute is remedial in nature and is to be given a liberal construction. See Cero Realty Corp. v. American Mfrs. Mutl. Ins. Co., (1960), 171 Ohio St. 82, 12 O.O.2d 92, 167 N.E.2d 774.

See, also, Chadwick v. Barba Lou, Inc., (1982), 69 Ohio St.2d 222, 23 O.O.3d 232, 481 N.E.2d 660.

Day Surgicals, Inc. v. State Tax Commission, 469 N.Y.S.2d 262 (1983), recites that the tolling statutes are designed to ensure the right of a litigant who diligently seeks recourse in the courts. The broad purpose of the statute would be aborted by narrow construction. See, also, Morrissey v. Board of Education, 291 A.2d 1126, 40 Conn. Sup. 266; Bradley v. Burnett, 687 S.W.2d 53.

The Intervenor here, as soon as the facts became known about the disposition of the assets of the estate of Etta Wood, made every effort to assert its claim against defendant. The personal representative was promptly appointed and a Motion to Intervene was filed by him in this court. From that time on, defendant was apprised of plaintiff's position. The decision of Judge Croft was even more effective in giving to defendant notice of the interest of the estate of Etta Wood in assets passed from Milton Hiltsley, deceased, to the defendant.

This court interpreted 78-12-40 in the case of Dunn v. Kelly, 675 P.2d 571 (Utah 1983). The facts in the Dunn case are clearly distinguishable from the present facts. In the Dunn case, a reported child had filed an action through his guardian ad litem. During the proceedings it was discovered that said child was not the child of the deceased and the court dismissed his action. Subsequent to the time that the statute of limitations had run, plaintiff there was appointed personal representative. He then filed an action to obtain damages for all of the heirs of the

deceased Nelson Dunn, Jr. This court held that there was no legal relationship between the original plaintiff Brandunn Waiters and the plaintiffs. there was no right to claim the benefits of the statute tolling the time because of the case filed by a guardian ad litem.

Intervenor respectfully submits that the statute of limitations has not run and should not be made a bar to its action for assets which were clearly and properly the assets of Etta Wood's estate.

POINT II. THE CLEAR EVIDENCE CONVINCED THE TRIAL COURT THAT A CONSTRUCTIVE TRUST EXISTED.

The majority opinion of this court did not discuss the question of whether or not a constructive trust of the Wood assets in the hands of Hiltsley had been properly determined by Judge Croft. However, in the concurring opinion of Justice Zimmerman, it appears that he had some question as to whether or not the evidence presented to Croft was sufficient to establish the relationship of trustee and trustor between Hiltsley and Wood. (Pg 1026, 738 P.2d).

The facts relating to the relationship between Hiltsley and Wood are undisputed. Relevant to consideration of the constructive trust are the following facts:

(1) On October 5, 1979, Hiltsley received from his sister, Wood, $30,000.00. At that time, Wood was in Salt Lake City, either in the hospital or at Hiltsley's home (R. 89, Croft Finding No. 15).

(2) Etta Wood died on January 20, 1980.

(3) Wood was Hiltsley's sister.

(4) Hiltsley managed Wood's affairs after she came to Salt Lake City from Albuquerque, New Mexico. Hiltsley acted as Wood's representative, paid her funeral bills, and kept an account of her burial expenses (see pgs 250, 253, 262 of Exhibit 10).

(5) Judge Croft found that it was clear that Hiltsley received the $30,000.00 from Etta Wood in trust for her (Finding No. 25, R. 94).

(6) Ryder makes no claim that any of the funds in the accounts where Hiltsley deposited Wood money came from her resources.

Footnote 5 of the opinion of this court Hiltsley v. Ryder, 738 P.2d 1024, pg 1026, states as follows:

> In making this disposition, we in no way rule upon the merits of the constructive trust issue. To do so would be improper since the record was developed without representation by Etta Wood's estate. However, for the benefit of the trial court, we refer it to Ashton v. Ashton, 733 P.2d 147, 151-52 (Utah 1987), and Baker v. Pattee, 684 P.2d 632, 636-37 (Utah 1984).

The trial court, in determining the summary judgment issues, apparently did not consider the questions of constructive trust and the cases cited in Footnote 5. Since the facts relating to the establishment of a trust were found by Judge Croft to exist and the relevant facts are undisputed, it appears to Intervenor that this is a matter that is a question of law only for the court to decide.

In the cases cited in Footnote 5, the relevant facts

relating to the establishment of constructive trust were before this court in a different scenario, but nevertheless the court's decision, Intervenor believes, is pertinent and relevant to her rights and the case now before this court.

In Ashton v. Ashton, 733 P.2d 147, the relationship was that of brothers. The constructive trust was imposed upon a brother. There were the rights of a joint tenant to be considered by the court. The court held: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." This quote is from Utah Rules of Civil Procedure 52(a).

It is Intervenor's position that Judge Croft's decision was not clearly erroneous when he determined that Hiltsley held the assets of Wood in trust.

Defendant, as far as Intervenor is able to determine, has never attempted to make a showing that the trial court's Findings of Fact were "clearly erroneous".

The majority opinion then sets forth the law concerning constructive trusts and cites the numerous authorities in Utah which have supported establishment of such trusts. See Footnote 6, 733 P.2d 150, which reads as follows:

> See, e.g., In re Estate of Hock, 655 P.2d 1111, 1115 (Utah 1982); Carnesecca v. Carnesecca, 572 P.2d 708, 710, (Utah 1977); Hawkins v. Perry, 123 Utah 16, 23, 253 P.2d 372, 375 (1953); Haws v. Jensen, 116 Utah 212, 216, 209 P.2d 229, 231 (1949).

Ashton v. Ashton also sets forth the sections of the

Restatement of Trusts and then reconciled the language of that section with the court's rulings in Park v. Zions First National Bank, 673 P.2d 590 (1983), where the court had occasion to construe and compare the language of the Restatement of Trusts, Section 442, and the Restatement of Restitution, Section 160. In Park the court held:

> Section 160 presents the broadest possible application of a constructive trust. It provides that a constructive trust may arise '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 . . .' Such breadth has also been described as follows:
>
> > Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust.

In Parks v. Zions First National Bank, a material difference is that the relationship was that of husband and wife rather than brother and sister. Where a husband and wife relationship exists and there is a transfer of property, courts have held that a gift may be presumed. However, where the relationship is that of brother and sister, no such presumption arises.

In Ashton v. Ashton, the court finally determined that the trust existed on the transfer from brother to brother which bound the joint tenant of the trustee, in that instance his wife, and imposed a trust on the assets transferred by a deceased brother.

The other case cited by the court in the decision on this matter is Baker v. Pattee, 684 P.2d 632. In Baker v. Pattee, a trust was determined not to exist. The question of whether or not a confidential relationship existed, however, was discussed and the language of the court, Intervenor submits, is especially applicable to the relationship that existed between Hiltsley, the minister, and Wood, his sister. This court stated:

> [12, 13] A confidential relationship is presumed between parent and child, attorney and client, and trustee and cestui que trust. Blodgett v. Martsch, Utah, 500 P.2d 298 (1978). The same holds true between a spiritual advisor and a dying man. Corporation of the Members of the Church of Jesus Christ of Latter-day Saints v. Watson, 25 Utah 45, 69 P.531 (1902). Where a confidential relationship exists, a presumption of unfairness arises which must be overcome by countervailing evidence, and the burden shifts to the defendant to prove absence of unfairness by a preponderance of the evidence. Robertson v. Campbell, Utah 674 P.2d 1226 (1983) (finding of undue influence in execution of trust shifted burden to defendant to prove absence of undue influence in a subsequent alleged ratification of the trust); Johnson v. Johnson, 9 Utah 2d 40, 337 P.2d 420 (1959); In re Swan's Estate, 4 Utah 2d 277, 293 P.2d 683 (1956). In all other relationships the existence of a confidential relationship becomes a question of fact. Blodgett v. Martsch, supra.

The relationship between trustor and trustee in the case at bar is that of brother and sister. The question of whether or not this relationship gives rise to an inference of gift was discussed by this court in Matter of Estate of Hock, 655 P.2d 1111. The court there also had the relationship of brother and sister before it and the decision was that this relationship did not give rise to an inference that a gift was intended. This court held:

> [9] Sections 442 and 443 of Restatement (Second) of Trusts provide that if the transfer of property is made to one person, the purchase price is paid by another, and the transferee is a 'wife, child or other natural object of bounty of the person by whom the purchase price is paid,' a purchase money resulting trust will not arise unless the one paying the purchase price manifests an intention that the transferee should not have the beneficial interest in the property. Comment a. of Sec. 442 notes that this exception to the resulting trust rule does not apply in the case of brothers and sisters, aunts or uncles or nieces or nephews where the payer does not stand in loco parentis to the legal titleholder. We hold that where the funds of a sibling are used to purchase property and the legal title is held by another sibling, the presumption of a resulting trust in favor of the payer will arise as if no family relationship existed between the parties.

Both in Ashton v. Ashton, supra, and in Hawkins v. Perry, 123 Utah 16, a party other than the original trustee claimed an interest. In both cases the interest was that of the wife of the trustee. In both cases this court held that the co-tenant acquired no interest which would be independent of the trust in favor of the trustor unless it could be shown that the relationship of bona fide purchaser existed.

It is undisputed that defendant gave no consideration for the interest that she got from Milton Hiltsley. Neither she nor Hansen claim that they have paid any consideration for whatever interests the documents create.

In Ashton v. Ashton, supra, and Hawkins v. Perry, supra, a confidential relationship was found to exist. In Hawkins v. Perry the trustee was the uncle of a minor child 16 years of age and also a minister.

It is respectfully submitted that the undisputed facts and the cases decided by this court support the findings of Judge

Croft that a trust existed and that the assets of Wood were held by Hiltsley in trust for her.

POINT III. UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL, INTERVENOR SHOULD BE GRANTED JUDGMENT AGAINST DEFENDANT AND THE ITEMS AWARDED BY THE COURT DECISION GRANTED TO HER.

Collateral estoppel has been the subject matter of numerous decisions by this court. In Searle Brothers v. Searle, 588 P.2d 689 (1978), this court followed th lead of the California Supreme Court enunciated in Bernhard v. Bank of America National Trust & Savings Association, 19 Cal.2d 807, 122 P.2d 892 (1942). The decision sets up four tests for applying the doctrine of collateral estoppel. They are:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?

2. Was there a final judgment on the merits?

3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

4. Was the issue in the first case competently, fully and fairly litigated?

Since Searle, the court has applied in a number of cases the doctrine of collateral estoppel without varying from the standards set forth in Searle. They are Wilde v. Mid-Century Insurance Company, 635 P.2d 417 (Utah 1981); Shaer v. State by and Through Utah Department, 657 P.2d 1337 (Utah 1983); Penrod v. Nu Creation Creme, Inc., 669 P.2d 873 (Utah 1983); Baxter v. Department of Transportation, 705 P.2d 1167 (Utah 1985).

The problem of application of the doctrine of collateral estoppel which is not present in this case is mutuality of parties. Defendasnt had every opportunity to litigate all issues in the matter of Hiltsley v. Ryder. She was represented by extremely competent counsel, present counsel on this appeal, who vigorously and diligently represented her through all the litigation in the action.

A case which spells out carefully the use of the doctrine of collateral estoppel is B.R. De Witt v. Albert Hall, 19 NY2d 141, 278NYS2d 596, 225 NE2d 195, 31 ALR3d 1035.

The New York Court of Appeals then recapped the development in the doctrine of mutuality in the following language:

> To recapitulate, we are saying that the "doctrine of mutuality" is a dead letter. While we have not expressly so held, the trend of our decisions leads to this conclusion (see 5 Weinstein-Korn-Miller, NY Civ Prac, par 5011.42). This view finds support in other States (Bernhard v. Bank of America, supra; Coca Cola Co. v. Pepsi-Cola Co., 6 WW Harr 134, 36 Del 124, 172 A 260; DePolo v. Greig, 338 Mich 703, 62 NW2d 441; Gammel v. Ernst & Ernst, 245 Minn 249, 72 NW2d 364, 54 ALR2d 316; Lustik v. Rankila, 269 Minn 515, 131 NW2d 741; Cantrell v. Burnett & Henderson Co., 187 Tenn 552, 216 SW2d 307; cf. First Nat. Bank of Cincinnati v. Berkshire Life Ins. Co., 176 Ohio St 395, 199 NE2d 863; see, also, Ordway v. White, 14 AD2d 498, 217 NYS2d 334; but see Reardon v. Allen, 88 NJ Super 560, 213 A2d 26) and Federal courts (see, e.g., Zdanok v. Glidden Co., 327 F.2d 944 [2d Cir]; Graves v. Associated Transp., 344 F2d 894 [4th Cir]; cf. Berner v. British Common-Wealth Pacific Airlines, 346 F2d 532 [2d Cir.].
>
> In this case, where the issues, as framed by the pleadings, were no broader and no different than those raided in the first lawsuit; where the defendant here offers no reason for not holding him to the determination in the first action; where it is unquestioned (and probably unquestionable) that the first action was defended with full vigor and

> opportunity to be heard; and where the plaintiff in the first action, the operator of said vehicle, although they do not technically stand in the relationship of privity, there is no reason either in policy or precedent to hold that the judgment in the Farnum case is not conclusive in the present action (see Currie, Mutuality of Collateral Estoppel, 9 Stan L Rev 281; Currie, Civil Procedure: The Tempest Brews, 53 Calif L Rev 25; Thornton, Further Comment on Collateral Estoppel, 28 Brooklyn L Rev 250).

All of the criteria for application of the doctrine of collateral estoppel are met in the present case. Intervenor submits that it is entitled to have judgment entered in accordance with the judgment heretofore entered by the Honorable Bryant Croft on the 29th of March, 1983.

CONCLUSION

Intervenor/Appellant submits that the statute of limitations does not bar her recovery, that the facts and the cases decided by this court show that a constructive trust was created between Wood and Milton Hiltsley and the assets of Wood were traced through HIltsley to the defendant Ryder. Intervenor further submits that under the doctrine of collateral estoppel, judgment should be granted in her favor and against defendant and the assets that Judge Croft traced through that came out of the Etta Wood property should be determined to be assets of the estate of Etta Wood. Orders necessary to carry out this result should be entered by the court.

RESPECTFULLY SUBMITTED this _____ day of January, 1988.

DWIGHT L. KING & ASSOCIATES, P.C.

DWIGHT L. KING
Attorney for Intervenor/Appellant

CERTIFICATE OF MAILING

Undersigned certifies that two copies of the foregoing Appellant's Brief were mailed to DeLyle H. Condie, Attorney for Defendant/Appellant, McKay, Burton, Thurman & Condie, 500 Kennecott Building, Salt Lake City, utah 84133, this _____ day of January, 1988, postage prepaid.

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