

1979

Rebecca B. Larrabee v. Glenwood B. Larrabee And  
Royal Dairy Products Company, Mary Dorothy  
Poulsen, Margaret Iona Aitken, Geraldine L.  
Hogan, Cornelia L. Hancock, Otto Blaine Larrabee,  
Jr., And Warren H. Larrabee : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT  
OF  
THE STATE OF UTAH

REBECCA B. LARRABEE, )  
 )  
Plaintiff-Appellant, )  
 )  
vs. )  
 )  
GLENWOOD B. LARRABEE, )  
 )  
Defendant-Respondent, )  
 )  
and )  
 )  
ROYAL DAIRY PRODUCTS COMPANY, )  
 )  
MARY DOROTHY POULSEN, MARGARET )  
 )  
IONA AITKEN, GERALDINE L. )  
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HOGAN, CORNELIA L. HANCOCK, )  
 )  
OTTO BLAINE LARRABEE, JR., AND )  
 )  
WARREN H. LARRABEE, )  
 )  
Defendants. )

Case No. 16589

APPELLANT'S BRIEF

Appeal from the Judgment of the Third Judicial District  
Court of Salt Lake County, Honorable Bryant H. Croft, Judge

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FILED

OCT 25 1979

Clerk, Supreme Court, Utah

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HOGAN, CORNELIA L. HANCOCK, :  
OTTO BLAINE LARRABEE, JR., AND :  
WARREN H. LARRABEE, :  
Defendants. :  
:

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APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This case involves the interpretation of two written agreements dealing with real property, an Agreement (Plaintiff's Exhibit 4-P), dated September 7, 1973, and a Trust (Plaintiff's Exhibit 1-P), dated November 7, 1973.

The following issues are presented on appeal:

1. Was the Agreement of September 7, 1973, an agreement to create a revocable trust at a later date and therefore did not grant Defendant-Respondent, Glenwood Larrabee, a present interest in the Property?

2. Were the interests granted to Glenwood Larrabee by the Trust of November 7, 1973, extinguished by the subsequent revocation of that trust?

#### DISPOSITION IN THE LOWER COURT

The trial court found that the Agreement of September 7, 1973, granted an interest in the property to Glenwood Larrabee, and that the revocation of the Trust of November 7, 1973, did not revoke that interest granted by the September 7, 1973 Agreement.

#### RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the trial court's interpretation of the Agreement of September 7, 1973, and of the Trust of November 7, 1973. Appellant contends that the trial court's construction was clearly erroneous in light of the intentions of the parties expressed in the Agreement.

#### STATEMENT OF FACTS

Rebecca B. Larrabee, the Plaintiff-Appellant, is the owner of real property hereinafter referred to as "the property" consisting of Lots 2, 3, 4, 5, 6, and 7 of Block 2, Dieter and Johnson, Main Street Addition, as recorded in the office of the Salt Lake County Recorder, together with all improvements thereon.

On September 7, 1973, Mrs. Larrabee and her children executed an Agreement (hereinafter referred to as "the Agreement", Plaintiff's Exhibit 4-P) in which the Plaintiff-Appellant agreed to cause title to "the property" to be conveyed to Otto, Warren, and Glenwood Larrabee, three of her children,

as trustees of a revocable trust, for the use and benefit of Plaintiff-Appellant during her lifetime and for distribution to her children upon termination of the trust. "The Agreement" also set forth the terms under which the trust estate was to be distributed to the children. Other terms not dealing with the contemplated trust were also contained in "the Agreement".

Pursuant to the terms of "the Agreement" on November 7, 1973, Plaintiff-Appellant executed a revocable trust (hereinafter referred to as "the Trust" Plaintiff's Exhibit 1-P), wherein she conveyed "the Property" to Otto Blaine Larrabee, Jr., Glenwood B. Larrabee, and Warren H. Larrabee, jointly as "Trustee". "The Trust" provisions set forth that the Trustor had reserved the right to revoke "the Trust" and also provided for distribution of the Trust Estate. "The Trust" provided as follows:

(c) Distribution Upon Termination. Upon the termination of the Trust, Trustee shall distribute the residue of the Trust Estate to MARY DOROTHY POULSEN, MARGARET IONE AITKEN, GERALDINE L. HOGAN, CORNELIA L. HANCOCK, OTTO BLAINE LARRABEE, JR., GLENWOOD B. LARRABEE, and WARREN H. LARRABEE, or if any of such persons are deceased, to the surviving issue of them by right of representation, in equal shares, provided that said equal shares shall be modified in accordance with the provisions of an Agreement between the Trustor and her children, dated the 7th day of September, 1973. (A copy of which Agreement is attached to this Trust Agreement, and by reference is incorporated herein.)

Plaintiff's Exhibit 1-P, p.2.

On or about October 20, 1977, Mrs. Larrabee, through a letter bearing the same date from her attorney (Plaintiff's Exhibit 2-P) notified Mr. Glenwood Larrabee that she had revoked the Trust Agreement of November 7, 1973. She also signed a statement to the same effect on January 18, 1978. (Plaintiff's Exhibit 3-P)

Plaintiff-Appellant brought this action herein for a declaratory judgment, seeking to have the Court declare the Agreement of September 7, 1973, "null and void and of no effect". Complaint p. 3. The case was tried to the Court on April 6, 1979, before the Honorable Bryant H. Croft, District Court Judge. The Agreement of September 7, 1973, was placed into evidence together with the Trust Agreement of November 7, 1973. The Statement of Revocation dated January 18, 1978, and the Letter of Revocation dated October 20, 1977, were also placed into evidence.

The Court found that "The revocable Trust Agreement was revoked, but such revocation did not revoke the agreement of the parties". Record, p. 82. From that Judgment, the Plaintiff-Appellant appeals.

#### ARGUMENT

##### POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE AGREEMENT OF SEPTEMBER 7, 1973, GRANTED GLENWOOD LARRABEE AN INTEREST IN THE PROPERTY.

The trial court, in finding that Glenwood Larrabee continued to have an interest in the property subsequent to the revocation of the Trust of November 7, 1973, based its finding on the interpretation that Glenwood Larrabee was granted an interest in the property under the terms of the Agreement of September 7, 1973. Record, p. 84. This construction is contrary to the intent of the parties as expressed within the Agreement itself. The parties clearly intended the provisions of the Agreement of September 7, 1973, dealing with the Trust, to be only an Agreement to make a future trust and not to grant any interest in the property. The trial court's construction of the Agreement of September 7, 1973, is in error.



In construing contracts, the standard of interpretation has been set out by the Utah Supreme Court in the case of Thomas J. Peck and Sons, Inc. v. Lee Rock Products, Inc. 30 Utah 2d 187, 515 P.2d 466 (1973). In itemizing the basic principles of contract law, the Court said:

The most fundamental of these is that the meaning and effect to be given a contract depends upon the intent of the parties and that this is to be ascertained by looking at the entire contract, and all of its parts in their relationship to each other. . . .

515 P.2d at 448.

The intent of the parties is clearly shown within the four corners of the Agreement of September 7, 1973. The parties stated in the recitals that:

WHEREAS, the parties hereto wish to provide for the maintenance, operation, and possible future distribution of said property by this agreement.

Plaintiff's Exhibit 4-P, p.2.

The Agreement further shows that the Agreement had been necessary because:

. . .Glenwood has operated the property, sometimes using a corporate form, but primarily for his own benefit, and has paid or obligated himself to pay as rent therefor, an amount which now appears to be inadequate and which is delinquent.

Plaintiff's Exhibit 4-P, p. 2.

The Agreement also sets forth Glenwood's reason for executing the Agreement. The Agreement further states:

WHEREAS, Glenwood has been in possession of the property since 1952, and has made substantial improvements to it upon an understanding that he would have the benefit of any excess in the value of the property over \$62,000.00 (being the original agreed value of the property of \$57,000.00 plus \$5,000.00 cash reserve in Royal Dairy, used by Glenwood in connection with said improvements).

Plaintiff's Exhibit 4-P, p.1.

Rebecca Larrabee's reasons for executing the Agreement are also stated explicitly. The recitals show that:

Rebecca is the owner of substantially all of the stock of Royal Dairy and of the following described real property hereinafter referred to as "the Property":

Lots 2, 3, 4, 5, 6, and 7, of Block 2, DIETER and JOHNSON, Main Street Addition, as recorded in the office of the Salt Lake County Recorder, together with all improvements thereon.

Plaintiff's Exhibit 4-P, p. 1.

The circumstances surrounding the execution of the Agreement as set forth in the Agreement itself can be summarized as follows: Rebecca Larrabee owned the property upon which Glenwood Larrabee was operating a business. Glenwood Larrabee had made substantial improvements in the property, believing that he was entitled to the value of the property less its value at the date he began the improvements, but, that he had failed to stay current in his rent payments. The parties were concerned also, that the rent income from the property was inadequate. The parties, in order to solve the problems existing regarding the property, entered into the Agreement in order to provide for the maintenance and operation of the property and for the possible future disposition of the property.

The Appellant maintains that the trial court failed to be guided by the intent of all of the parties to the Agreement in its interpretation of the Agreement. The trial court's interpretation cannot be justified when the intent of all of the parties is considered.

The trial court should have found, and we urge this Court to find, that the Agreement of September 7, 1973, was a multi-phase agreement setting forth a complex plan for the settlement of all disputes with respect to the property.

and for the future maintenance, operation, and possible future distribution of the property.

Paragraph 1 of the Agreement clearly and explicitly states the Agreement of Rebecca Larrabee with respect to the property in question. Although she owned the property outright, she agreed to transfer ownership to three of her sons, Otto, Warren and Glenwood, as trustees of a revocable trust. This revocable transfer and trust was to be:

For the use and benefit of Rebecca during her lifetime and for distribution to her children upon her death or after September 1, 1976, whichever last occurs.

Plaintiff's Exhibit 4-P, p.2. This provision clearly coincides with the intent of all of the parties. The parties must have decided that the operation of the Property by three sons as Trustees as opposed to the sole operation by Glenwood, was the proper method to provide for the maintenance and operation of the property. The fact that the transfer was to be by way of a revocable trust also coincides with the implied wish of Rebecca to provide for the maintenance and operation of the Property without giving up entirely her complete ownership of the Property.

The provisions contained in Paragraph 1 of the Agreement are clear and unambiguous and, when construed in light of her intent as stated in the Agreement, those provisions can only be construed to be a promise by Rebecca Larrabee to create a trust in the future. She agreed "to cause title to the property to be transferred . . . ." In "the Agreement" she made no present transfer of the property in trust. The terms of Paragraph 1 explicitly state that a Trust was to be created in the future.

The effect of Rebecca Larrabee's promise is well settled under the law of trusts. Her promise created no present trust. The Oregon Supreme Court in quoting 1 Scott, Trusts, 162 Section 26, in the case of Claude v. Claude, 22 P.2d 776, (Ore. 1951), stated the applicable law:

If an owner of property declares his intention to create a trust to the property in the future, or promises that he will create such a trust, whether by transferring property to another as trustee, or by constituting himself trustee, no trust is presently created. Although a manifestation of intention to create a trust is all that is needed for its creation, it must be a manifestation of intention to create a present trust and not merely to create a trust to arise at some future time.

228 P.2d at 789. Since no present trust was created by the Agreement of September 7, 1973, not until the execution of the subsequent Trust Agreement did any trustee or beneficiary obtain any interest, whether vested or contingent in the property. The title to the property remained in Rebecca Larrabee until the execution of the Trust Agreement.

The Agreement of September 7, 1973, after setting forth Rebecca Larrabee's promise to create the future trust in paragraph 1, then states in paragraph 2, the parties' agreement with respect to the distribution of the Property under the contemplated Trust Agreement. A reading of paragraph 2 and of its subparagraphs clearly shows the provisions of paragraph 2 to be the dispositive provisions that the parties intended Rebecca Larrabee to include in the Trust Agreement she was to later execute. First, the distributive paragraph immediately follows the paragraph in which Rebecca Larrabee promised to create the Trust. Paragraph 1 had provided that the transfer to the Trustee was to be ". . . for the use and benefit of Rebecca during her lifetime, and for distribution to her children upon her death or after September 1, 1976, whichever last occurs." Plaintiff's Exhibit 4-P, p.2. Paragraph 2 then provides for the

distribution to "said children". The distribution to "said children" in paragraph 2 obviously refers to the Trust distribution to Rebecca's children previously referred to in paragraph 1. It does not provide for a separate distribution which would occur outside of the Trust. Secondly, the termination dates of the Trust contained in paragraph 1 are again referred to paragraph 2(a) and paragraph 2(b). This further shows that the terms contained in paragraph 2 of the Agreement were those terms the parties intended to be included in the separate Trust Agreement.

Paragraph 2 shows that the parties were setting forth a plan of distribution under the Trust for which the children of Rebecca Larrabee were to share equally in the distribution of the Property subject to the specific distribution to Glenwood Larrabee. Glenwood was to "be entitled to the value of the property in excess of \$62,000.00", under the terms of the Trust distribution, and the Trust's terms further granted him the right of first refusal and the right of purchase in order "to secure in him said interest". (Plaintiff's Exhibit 4-P, p.2) These rights were directly tied to the Trust distribution by the clear and unambiguous language of the Agreement of September 7, 1973. Consequently, being tied to the Trust's distribution terms, the right of first refusal, and the right to purchase, did not arise until the revocable trust was created. It had no separate existence separate and apart from the contemplated Trust. Clearly, such was the intent of the parties and clearly, such is the proper interpretation as required by the language of the Agreement and the intent of the parties as ascertained from the instrument, itself.

Since the parties clearly intended the provisions of the September 7, 1973 Agreement dealing with the contemplated Trust to create no present interest in the property, the trial court's interpretation of the Agreement to the contrary is in error. The parties explicitly intended the right of first refusal and the right to purchase the property to be tied to the distribution terms of the revocable trust and explicitly intended those rights to arise only from the terms of the contemplated revocable trust. It was not intended that these rights arise from the Agreement of September 7, 1973.

#### POINT II

THE TRIAL COURT ERRED IN FINDING THAT GLENWOOD LARRABEE'S INTEREST IN THE PROPERTY WAS NOT TERMINATED BY THE REVOCATION OF THE TRUST.

The trial court erred in finding that Glenwood Larrabee continued to have an interest in the property subsequent to the revocation of the Trust. Since the terms relating to the Trust and the Trust distribution contained in the Agreement of September 7, 1973, were only an agreement to make a trust containing those specified terms, only when Rebecca Larrabee executed the Trust of November 7, 1973, did Glenwood Larrabee obtain a vested interest in the property. However, that interest was subject to divestment through revocation of the Trust. When the Trust was revoked, the interest was divested and terminated. The trial court erred in finding that the rights of Glenwood Larrabee continued to exist following revocation of the Trust.

As explained in Point I above, the Agreement of September 7, 1973, contained a promise by Rebecca Larrabee to create a revocable trust at a later date containing specific, dispositive provisions set forth in the

Agreement. Rebecca Larrabee fully performed her promises, by executing the Trust Agreement, on November 7, 1973, Plaintiff's Exhibit 1-P. In the Trust Agreement, Rebecca "assigned, transferred, conveyed and delivered" to the joint "Trustee", Otto Blaine Larrabee, Jr., Glenwood B. Larrabee, and Warren H. Larrabee, the property to which was referred in the Agreement of September 7, 1973. In continued performance of the Agreement of September 7, 1973, Rebecca Larrabee provided that the distribution, upon termination of the Trust would be in equal shares to her children:

. . . (0)r if any of said persons are deceased, to the surviving issue of them by right of representation, in equal shares provided that said equal shares shall be modified in accordance with the provisions of an agreement between Trustor and her children, dated the 7th day of September, 1973 (a copy of which Agreement is attached to this Trust Agreement, and by reference is incorporated herein).

Plaintiff's Exhibit 1-P, p. 2. The Trust Agreement further, in Article VIII, entitled "Power of Trustor to Amend or Revoke" states:

Notwithstanding anything in this Trust Agreement to the contrary, Trustor will have the right at any time or times to amend any of the provisions of this Trust Agreement or to amend any Amendment thereto by an instrument in writing executed by Trustor, and delivered to Trustee; provided, however, that Trustor shall not have the power to amend the Trust Agreement, in such a way as to increase the duties of Trustee or to impose any additional burdens on him, without the consent of Trustee. Trustor shall have the right at any time or times to revoke this Trust Agreement in whole or in part, by an instrument in writing executed by Trustor and delivered to Trustee, upon paying all sums due to Trustee and indemnifying Trustee against loss from liabilities lawfully incurred in the administration of the Trust.

Plaintiff's Exhibit 1-P, p. 8.

In the interpretation of the Trust Agreement of November 7, 1973, and its relationship to the Agreement of September 7, 1973, the Utah Supreme Court's recital of the rules of construction to be used with respect to Trusts stated in the case of Makoff v. Makoff, 528 P.2d 797 (Utah, 1974) should be followed. In the Makoff decision, the court stated:

The general rules of construction of written instruments apply to the construction of trust instruments, and those rules require determination of the intention of the settlor where the creation of the trust is a unilateral matter. However, in case the trust is based on a written instrument, the intention of the settlor must be ascertained from the language thereof, and the court may not go outside of the language in an effort to give effect to what it thinks the intent was. If the language is unambiguous, there is no need for wondering what the true intent may have been, and parole evidence is inadmissible to vary the terms set out. (Foot notes omitted.)

528 P.2d at 798.

With respect to the Trust Agreement of November 7, 1973, a lack of recitals makes it difficult to ascertain the intent of the parties by looking only at the terms of the Trust. However, the intent of the parties was unmistakably explained in the Agreement of September 7, 1973. The two agreements should be construed together.

Where there are two or more instruments creating, defining or relating to the Trust, they may or should be construed together to effectuate the intention of the creator as where a trust instrument incorporates another instrument by reference, in which case, the instrument referred to will be construed as part of the first agreement, except to the extent that the instrument may be inconsistent.

90 CJS Trusts, Section 164. p. 32.



If both agreements are construed together, both are found to be entirely consistent with the expressed intention of the parties. The Agreement of September 7, 1973 contained a promise by Rebecca Larrabee to create a revocable trust in the future which would contain the dispositive provisions specified in the Agreement. The Trust of November 7, 1973, was executed by Rebecca Larrabee as the vehicle through which she performed that promise. There can be no question that the Trust contained the dispositive provisions specified in the Agreement for in creating the Trust, she incorporated the very provisions by attaching a copy of the Agreement and incorporating its terms by reference. Since the Trust was merely the vehicle for performance of the Agreement, the intent of the parties would have been identical with respect to both documents. The parties, at the time of the execution of the Trust, still wished: "To provide for the maintenance, operation and possible future disposition of the property". Plaintiff's Exhibit 4-P, p. 2.

The intent to provide for the possible future and distribution of the property clearly coincides with the Agreement of the parties that the Trust be a revocable trust. The language of the Agreement referring to the creation of a revocable trust and the language contained in the revocable Trust, itself, is unambiguous. The language in both agreements indicates that a conscious choice was made by the parties. They provided for the possible future disposition of the property through the use of a revocable trust as opposed to providing for the certain future distribution of the property through the use of an irrevocable trust. Since the Trust was revocable, its dispositive provisions were likewise revocable and since those provisions were not capable of independent existence outside the Trust Agreement, all interest set forth in the dispositive provisions were divested through the revocation.

The trial court, in finding the Glenwood Larrabee had an interest in the Property separate and apart from the Trust was reacting to an imagined inequitable result which the Court felt would occur if the Court had found that Glenwood Larrabee's interest was destroyed by revocation. In referring to Glenwood Larrabee, the trial court said: "He spent a lifetime in the building there, remodeled it, and certainly his efforts are entitled to some consideration." Transcript. p. 117.

The court erred in concerning itself with the details of how Glenwood Larrabee fared under the Agreement, instead of with the clear meaning of the language of the Agreement as intended by the parties. The Utah Supreme Court addressed this issue in Holley v. Federal American Partners, 29 Utah 2d 212, 507 P.2d 381 (1973), where the Court explained:

. . . just how the parties fare under the contract is not the concern of the courts, but in the absence of some unconscionability, it should be enforced according to the meaning of its terms as intended by the parties insofar as they can be ascertained.

507 P.2d at 383.


Therefore, where the parties, as they have done here, clearly provide that the Trust is to be revocable, the Court must construe the Trust to be revocable. Since the distributive provisions set forth in the Agreement of September 7, 1973, are set out by the parties in such a way so as only to be effective if the Trust is in effect, the Court has no alternative but to find that it is the intent of the parties that the interests set forth in the dispo provisions are terminated upon revocation of the Trust. The trial court

clearly erred in the present case when it found that Glenwood Larrabee continued to own an interest in the dairy property after the revocation of the Trust. No interest was intended by the parties to be granted by the Agreement of September 7, 1973, because those provisions were merely a promise to create a future trust. Furthermore, revocation of the Trust terminated any interests granted by the Trust Agreement of November 7, 1973. This Court is urged to find that the revocation of the Trust Agreement of November 7, 1973, divested Glenwood Larrabee of any interest in the dairy property.

#### CONCLUSION

Through the Agreement of September 7, 1973, and the Trust of November 7, 1973, the parties to the Agreements intended that Glenwood Larrabee be granted an interest in the dairy property only through the dispositive provisions of a future Trust. By providing that the Trust was to be revocable, the parties also intended that the dispositive provisions of the Trust would also be revoked, therefore extinguishing any interest in and to the property granted the beneficiaries of the Trust. The trial court clearly erred in finding that Glenwood Larrabee continued to have an interest in the Property after the revocation of the Trust. This Court is urged to give the Agreement in question the interpretation intended by the parties. This Court is urged to find that the Agreement of September 7, 1973, did not grant to Glenwood Larrabee or any other Trust beneficiary, an interest in the dairy property, and that when the interest was created at the time of the execution of the Trust of November 7, 1973, that interest was extinguished when the Trust was revoked.

RESPECTFULLY SUBMITTED,

  
Roy G. Haslam  
Biele, Haslam & Hatch  
Attorney for Plaintiff-Appellant

CERTIFICATE OF MAILING

On the 2<sup>nd</sup> day of October, 1979, two true and accurate copies of the foregoing APPELLANT'S BRIEF were mailed to the office of Gerald E. Nielson, Attorney for Defendant-Respondent, 3737 Honeycut Road, Salt Lake City, Utah 84106.

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