

1998

Jeannine Perrenoud and Linda Jenkins v. Lila Ann Harman and Lloyd Mitchel : Reply Brief of Appellee

Utah Court of Appeals

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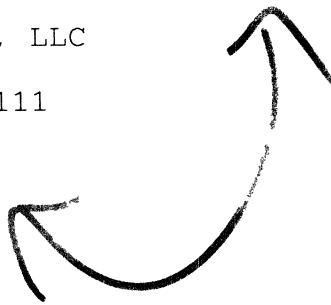
IN THE UTAH COURT OF APPEALS

JEANNINE PERRENOUD and)	
LINDA JENKINS)	
)	REPLY BRIEF OF APPELLEES
Plaintiffs and Appellants,)	
)	
vs.)	
)	
LILA ANN HARMAN and)	
LLOYD MITCHEL)	Case No. 981721
)	
Defendants and Appellees.)	Priority 15

APPEAL FROM THE FINAL JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE WILLIAM A. THORNE, PRESIDING

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this matter pursuant to Section 78-2a-3(2)(j) of the Utah Code.

STATEMENT OF THE ISSUE

The sole issue for the Court to determine is whether the trial court erred as a matter of law by granting summary judgment in favor of Appellees and ruling that Rhoda Thurber, as the sole surviving co-settlor, co-trustee and active beneficiary, acted within the lawful scope of her authority without breaching any owed fiduciary duty by revoking the Trust established by Declaration of Trust dated April 1, 1980.

"Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Because entitlement to summary judgment is a question of law, no deference is due the trial court's determination of the issues presented." Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993).

DETERMINATIVE LAW

"If two or more trustees are appointed to perform a trust, and if any of them is unable or refuses to accept the appointment, or, having accepted, ceases to be a trustee, the

surviving or remaining trustees shall perform the trust and succeed to all the powers, duties, and discretionary authority given to the trustees jointly." Section 75-7-405(2) of the Utah Code.

STATEMENT OF THE CASE

A. Nature of the case

This case is a dispute between the four named beneficiaries of the Declaration of Trust executed by Joseph W. Thurber and Rhoda Thurber on or about April 1, 1980. The corpus of that trust consisted of certain personal property identified within the trust document and the residence owned by the co-settlors. Subsequent to the execution of that trust, and following Joseph Thurber's death, Rhoda Thurber, as the sole surviving co-settlor, joint trustee and active beneficiary unilaterally revoked the trust of April 1, 1980 by testamentary device and by the sale of the marital residence. This case, therefore, centers on the powers that a sole surviving co-settlor, joint trustee and active beneficiary may exercise over a trust.

B. Course of Proceedings

Appellants commenced this action on September 4, 1997 by filing a Complaint in the Third District Court against Appellees. Thereafter, on or about February 28, 1998, Appellants filed their Motion for Partial Summary Judgment. Appellees filed their Motion in Opposition and Cross Motion for Summary Judgment on or about March 10, 1998. On August 28, 1998, the parties argued their respective motions before Judge Thorne. Subsequent to this

hearing, on October 4, 1998, the trial court entered its Findings of Fact and Conclusions of Law wherein the court granted summary judgment in favor of Appellees and denied Appellants' Motion for Partial Summary Judgment. On or about October 30, 1998, Appellants filed their Notice of Appeal.

C. Statement of Facts

1. On or about April 1, 1980, decedents Joseph W. Thurber and Rhoda Thurber, as co-settlors, executed a revocable Declaration of Trust naming themselves as joint trustees of the Trust corpus which consisted of certain personal property identified within the trust document and real property located at 2480 Alden Street, Salt Lake City, Utah. Appellants' First Addendum.

2. Pursuant to the terms of the trust, the parties to this action were named as contingent beneficiaries subject to divestiture. Appellants' First Addendum, paragraphs 1, 3 and 4.

3. Pursuant to the terms of this trust, the decedents reserved the right to revoke the trust, to encumber the trust assets, or to collect any income derived from the trust assets for their own use, thereby naming themselves as the primary active beneficiaries of the trust. No term of the trust document prevents the decedents from completely exhausting the trust corpus. Appellants' First Addendum, paragraphs 2 and 3.

4. Pursuant to the terms of the trust, "the sale or other disposition by us of the whole or any part of the property shall constitute as to such whole or part a revocation of this trust." Appellants First Addendum, paragraph 3.

5. Pursuant to paragraph 5 of the trust document, the surviving co-trustee succeeds to all of the powers, as sole trustee, exercisable by the joint trustees under the Declaration of Trust. Appellants' First Addendum, paragraph 5.

6. Joseph Thurber predeceased Rhoda Thurber. (R.3).

7. On or about December 16, 1985, Rhoda Thurber executed a Last Will and Testament. Pursuant to the terms of that instrument, Ms. Thurber revoked all "testamentary instruments which she had previously executed.

8. On or about June 29, 1992, Ms. Thurber executed a subsequent Last Will and Testament. Pursuant to the terms of that document, Ms. Thurber revoked all other former "wills and codicils" which she had previously executed. At this time Ms. Thurber executed a second trust.

9. On or about August 15, 1992, Ms. Thurber conveyed the real property in question to Holli and Robert Bezzant in exchange for monthly payments of \$612.00 until the balance of the purchase price was paid in full.

10. Ms. Thurber is now deceased.

11. Pursuant to the terms of the testamentary instruments executed subsequent to the 1980 Declaration of Trust, Appellees have received the proceeds from the property in question.

SUMMARY OF ARGUMENTS

Pursuant to the explicit terms of the Trust document and applicable law, decedents as co-settlors established themselves as joint trustees and sole active beneficiaries of the trust corpus. As such, settlors retained the right to revoke the trust and, as joint trustees, to encumber or otherwise utilize the trust assets for their primary benefit. Accordingly, although named as beneficiaries under the document, the actual rights of the decedents' children under the document could not be ascertained until the death of both co-settlors. As such, these children are only contingent beneficiaries subject to divestiture and owed no fiduciary duty by either joint trustee. When Ms. Thurber, as the sole surviving co-settlor, joint trustee and active beneficiary acted to revoke the trust, she did so under the explicit authorization of the Trust document, and inasmuch as Appellants have no claim under the subsequent testamentary documents executed by Ms. Thurber, Appellants have no claim to the property in question.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE APPELLEES.

"A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ." West One Trust Co. v. Morrison, 861 P.2d 1058, 1060 (Utah App. 1993). All of the relevant facts, as set forth above, were presented to the trial court which properly concluded that the terms of the trust permitted Ms. Thurber to revoke the trust following her husband's death. However, an appellate court "may affirm a grant of summary judgment on any ground available to the trial court even if it is one not relied on below." Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993).

II. INASMUCH AS MS. THURBER PROPERLY REVOKED THE 1980 TRUST, APPELLANTS MAY NOT BASE ANY CLAIM TO PROPERTY ON THE 1980 DECLARATION OF TRUST.

Appellants' interest to the property in question stems solely from the 1980 Declaration of Trust. It is undisputed and Appellants do not argue, that subsequent to Joseph Thurber's death, Rhoda Thurber as the sole surviving co-settlor and joint trustee acted to revoke this trust. The sole question before the Court is whether the statement within the Trust document which prevented a sole surviving co-settlor from changing the named beneficiaries also prevented the revocation of the trust itself. When viewed within the context of the entire trust document, it

becomes apparent, as the trial court rightfully concluded, that it does not.

A. The trust clearly establishes that the decedents, rather than the named beneficiaries, were the sole active beneficiaries under the trust.

"[T]rust provisions are not to be construed in the abstract, but rather must be viewed against the background of the entire document." Brenneman v. Bennett, 420 F.2d 19, 23 (8th Cir. 1970) (applying Iowa law) (emphasis added); accord Rubinson v. Rubinson, 620 N.E.2d 1271, 1276 (Ill. App. 1993). Applying this axiomatic rule of construction to the instant case leads to the inescapable conclusion that the 1980 Trust document did not prevent Rhoda Thurber from revoking the trust following her husband's death notwithstanding trust language which prevented Ms. Thurber from changing the beneficiaries within the existing trust.

Viewed as a whole it is apparent that the 1980 trust served primarily as a testamentary device designed primarily to avoid the entanglements often associated with the probate process. As such under the explicit terms of the trust, the Thurbers, as co-settlors, reserved and retained extensive and broad powers under the trust, not only to revoke the trust itself, but to utilize the trust corpus for their own benefit while they were still living. Accordingly, paragraph 2 of the document states unequivocally: "We reserve unto ourselves the power and right to

(a) place a mortgage or other lien upon the property, and (b) to collect any rental or other income which may accrue from the trust property and, in our sole discretion as Trustees, either to accumulate such income as an addition to the trust assets being held hereunder or pay such income to ourselves as individuals." Moreover, paragraph 3 explicitly authorizes the sale of the trust corpus and states that such sale serves as a revocation of the trust: "The sale or other disposition by us of the whole or any part of the property shall constitute as to such whole or part a revocation of this trust." From this language it is clear that the Thurbers in no way intended, by execution of the 1980 document, to limit their control over the trust corpus. Rather, they explicitly retained every right which they possessed prior to such execution. As such, the Thurbers, rather than the *named* beneficiaries, stood as the sole active beneficiaries under the terms of the 1980 trust.

B. The death of Joseph Thurber in no way impaired Ms. Thurber's right to continue exercising broad powers over the trust corpus for her primary benefit while she continued to live.

Contrary to assertions advanced by Appellants, no trust provision serves to limit Ms. Thurber's status as the sole active beneficiary following her husband's death. Rather, Ms. Thurber succeeded to all the benefits she enjoyed prior to her husband's death. As the Utah Supreme Court noted in Matter of Estate of

West, 948 P.2d 351 (Utah 1997), "It defies common sense that a couple creating a revocable inter vivos trust naming themselves as trustees would deliberately preclude themselves from fully utilizing the property for their own benefit while both or either one of them was alive, particularly when it appears that the purpose of the form book trust may have been simply to avoid probate."

Moreover, in addition to succeeding to full beneficial status, Ms. Thurber succeeded to full legal status as well. Paragraph 5, reflecting section 75-7-402(2) of the Utah Code, explicitly states: "Upon the death or legal capacity of one of us, the survivor shall continue as sole Trustee." As such, any act which may have been lawfully exercised by the joint trustees prior to Mr. Thurber's death, could now be exercised by Ms. Thurber unilaterally. As discussed above, since the trust granted the joint trustees broad powers to either sell or encumber the trust property, following Mr. Thurber's death, Ms. Thurber retained this power solely without limitation and rightfully exercised this power in 1992 when she conveyed the trust realty.

C. Any limitation imposed by the trust addendum applies only to powers related to the co-settlors and not to powers exercisable by a trustee.

Appellants' argument that the trust addendum which provides that following the death of one of the co-settlors that the

beneficiaries cannot be changed has no bearing on whether a sole surviving trustee can convey realty and thereby terminate the trust with respect to that realty; the sale of trust property is a power exercisable only by a trustee while the naming of beneficiaries is a right solely exercisable by a settlor. Imposing a limitation on a sole surviving co-settlor with respect to naming beneficiaries in no way affects specific and explicit authority delegated to a trustee elsewhere within the trust, namely the right to sell or encumber trust property for the benefit of the sole surviving active beneficiary. Moreover, this limitation on the surviving co-settlor in no way impacts the consequences of the sale or other disposition of trust property. The trust explicitly states that such sale automatically revokes the trust with respect to that specific property.

D. When viewed as whole, it is apparent that the trust document imposes no limitation on a surviving trustee to manage the property for the benefit of the sole surviving active beneficiary.

When read in its entirety, it is apparent that the 1980 document stands primarily as a testamentary device. As such the Thurburs as settlors, granted themselves extensive authority, as trustees, to manage the property for their own benefit, as primary active beneficiaries, while either one of them continued to live. Taken within this context, Ms. Thurber acted within her authority when she conveyed the property in 1992. And, inasmuch

as this sale served to revoke the trust with respect to this property, Appellants may not claim any interest in the proceeds derived from this property.

III. APPELLANTS ATTEMPTS TO DISTINGUISH THIS CASE FROM WEST IS MISGUIDED.

In Appellants' Brief, Appellants acknowledge that the Utah Supreme Court's recent decision in Matter of Estate of West, 948 P.2d 351 (Utah 1997) bears heavily on the current matter. In that case, the court found that a sole trustee who is also the sole active beneficiary of the trust could rightfully terminate the trust pursuant to the specific authorization granted in the trust document. In dicta, the Court also noted that Herschel West could have revoked the trust as a surviving co-settlor. Id. At 354.

In determining that Herschel West acted within his authority to terminate the trust as a surviving co-trustee, the Court followed a three prong analysis. First, the Court looked to determine whether the trust document authorized the trustees to revoke the trust. Second, the Court looked to determine whether a surviving co-trustee succeeded to all of the powers held by the joint trustees. Third, the Court looked to determine if a trustee's revocation of the trust violated any fiduciary duty owed to the named beneficiaries. Id. at 353-54.

After determining that the trust document specifically authorized a trustee to revoke the trust and that a surviving trustee succeeded to all of the powers held by the joint trustees, the Court found that Herschel West did not violate any fiduciary duty. In reaching this conclusion, the Court made a distinction between active and contingent beneficiaries. "The active beneficiaries of a trust, as distinct from the contingent beneficiaries, are the individuals for whose benefit and support the property is presently being managed." Id. at 355. By this definition, the Court readily accepted that the settlor/trustee in that revocable trust setting constituted the active beneficiary. Evidence of that intent was found in the fact that the settlor/trustee retained exclusive control to manage the property as he saw fit without distributing any income to a named beneficiary.

Finally, the Court noted that the trust property would not be distributed until the death of the surviving trustee at which time the trust corpus may have been exhausted. Since the children's rights did not ripen until the death of the surviving settlor/trustee, the children's were subject to divestiture until that time. Thus, the Court found that Herschel West was the sole active beneficiary of the trust, and as such, Herschel West could terminate the trust as a trustee without violating any fiduciary duty to a named beneficiary.

In the present case, the same three pronged analysis employed by the Utah Supreme Court in West, indicates that Rhoda Thurber acted within her authority to terminate the trust. First, the trust document specifically authorizes the settlor or the trustee to revoke or terminate the trust. See Paragraph 3 of the trust document. Second, Rhoda Thurber, as surviving trustee, succeeded to all of the authority held by the joint trustees. See Paragraph 5 of the trust document, Utah Code Ann. § 75-7-405(2) and West, supra. Third, as the sole active beneficiary of the trust, Rhoda Thurber, as trustee, violated no fiduciary duty by terminating the trust.

Appellants apparently concede that the present case meets the first prong of the analysis. Appellants however, contend that each of the named beneficiaries became active beneficiaries at the trust's inception and that Ms. Thurber did not succeed to all authority exercisable by the joint trustees. Appellants base this distinction on differences which they claim that exist in the language of the two trust document. A plain reading of the two documents indicates that this distinction does not affect the operation of the two documents.

A. No language in the trust document prevents Ms. Thurber from succeeding to all powers held by both joint trustees.

As addressed above, Appellants' contention that the trust addendum prevented Ms. Thurber from succeeding to all powers held

by both joint trustees is unfounded. First, paragraph 5 explicitly states that the surviving trustee does in fact succeed to all authority held by both joint trustees. Second, inasmuch as no section of the trust ever authorized the joint trustees to change beneficiaries, Ms. Thurber as sole surviving trustee could never exercise this right and the addendum therefore places no limitation on powers exercisable by a trustee. Rather, any limitation imposed by the addendum simply limits authority exercisable by a surviving co-settlor, and inasmuch as a co-settlor never had any authority to sell property this addendum does not address any issue before the Court today; whether a sole surviving co-trustee succeeds to all powers properly exercisable by joint trustees.

B. The children's rights under the trust did not become vested until the death of the final settlor/trustee. Until that time the children were owed no fiduciary duty.

In their brief, Appellants quote the language from the respective trust documents which they feel distinguishes West from the present case. Appellants emphasize that the Thurber document does not contain the statement "on the death of the survivor of us" which exists in the West document in the paragraph before the contingent beneficiaries are named. From this distinction, Appellants state: "In short in West 'the trust instrument was clear that the children would not become beneficiaries until the death of the survivor of the two

settlers.' Conversely, in the case at bar the trust instrument is clear that Plaintiffs became beneficiaries on the date of its execution, April 1, 1980." Appellants' Brief, p. 9.

Appellants' distinction has two serious flaws: one textual and one rational. The textual flaw lies in Appellants' assertion that the Thurber trust lacks the phrase, "on the death of the survivor of us," in the granting language. This is not true. The very next sentence of the trust following the named beneficiaries begins "Upon the death of the survivor of us,...our Successor Trustee is hereby directed forthwith to transfer said property and all right, title and interest to the beneficiaries." Thus, the textual distinction simply does not exist.

The rational flaw lies in Appellants' failure to follow the West Court's rationale in designating the named beneficiaries as contingent beneficiaries subject to divestiture. Appellees do not dispute that Appellants became beneficiaries on April 1, 1980. Appellees only argue that until the death of Ms. Thurber, the parties were only contingent beneficiaries subject to divestiture. Appellants have ignored the West analysis entirely. Since Ms. Thurber retained the right to receive income and manage the trust property for her own benefit and terminate the trust at her will, the possibility existed that Ms. Thurber could completely exhaust the trust corpus notwithstanding her right to revoke the trust. Therefore, Ms. Thurber remained the sole

active beneficiary under the trust. Appellants', and indeed Appellees', rights under the trust did not vest until Ms. Thurber died. Before that time, both parties' rights were wholly subject to divestiture and indeed, when Ms. Thurber acted to revoke the trust, all parties lost their status as beneficiaries under that trust. As the sole active beneficiary and the sole trustee, Ms. Thurber did not violate any fiduciary duty by terminating the trust and extinguishing Plaintiffs' rights under the trust.

CONCLUSION

Based on the foregoing, Appellees respectfully request this Court to affirm the trial court's ruling and find that pursuant to the explicit terms of the Trust document and applicable law, decedents as co-settlors established themselves as joint trustees and sole active beneficiaries of the trust corpus. As such, settlors retained the right to revoke the trust and, as joint trustees, to encumber or otherwise utilize the trust assets for their primary benefit. Accordingly, although named as beneficiaries under the document, the actual rights of the decedents' children under the document could not be ascertained until the death of both co-settlors. As such, these children are only contingent beneficiaries subject to divestiture and owed no fiduciary duty by either joint trustee. When Ms. Thurber, as the sole surviving co-settlor, joint trustee and active beneficiary acted to revoke the trust, she did so under the explicit

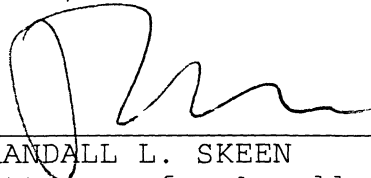
authorization of the Trust document, and inasmuch as Appellants have no claim under the subsequent testamentary documents executed by Ms. Thurber, Appellants have no claim to the property in question.

ADDENDUM

No addendum is necessary.

RESPECTIVELY submitted this 9th day of December, 1999.

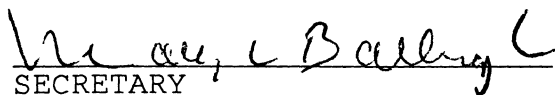
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CERTIFICATE OF SERVICE

The foregoing Reply Brief of Appellee was mailed to Scott B. Mitchell at 2469 East 7000 South, Suite 204, Salt Lake City, UT 84121 on this 9 day of December, 1999.



SECRETARY