1979

Douglas Fairbanks Close v. Allene Close Adams : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

DOUGLAS FAIRBANKS CLOSE,

Plaintiff and Appellant,

vs. Case No. 1[illegible]

ALLENE CLOSE ADAMS

Defendant and Respondent,

APPELLANT'S BRIEF

APPEAL FROM THE JUDGEMENT OF THE SECOND
DISTRICT COURT FOR WEBER COUNTY, HONORA
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IN THE SUPREME COURT OF THE STATE OF UTAH

DOUGLAS FAIRBANKS CLOSE, :

Plaintiff and Appellant, :

vs. : Case No. 16630

ALLENE CLOSE ADAMS :

Defendant and Respondent, :

APPELLANT'S BRIEF

APPEAL FROM THE JUDGEMENT OF THE SECOND DISTRICT COURT FOR WEBER COUNTY, HONORABLE RONALD O. HYDE

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CASES CITED

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NATURE OF THE CASE

This is an action for partition of property in which both Plaintiff and the Defendant claim an interest. Mrs. Edith Branscomb, the deceased mother of both parties originally conveyed the property in question to herself and the Defendant as Joint tennants with full right of survivorship. Prior to her death the said Mrs. Branscomb quit claimed her interest to the Plaintiff and the Defendant now refuses to acknowledge Defendants interest.

DISPOSITION IN LOWER COURT

The matter came to trial on April 30, 1979 in the

Second Judicial District Court in and for the County of Weber. At the outset the court indicated it did not want to hear any testimony as it was convinced that a joint tennancy could not be severed by one joint tennant independent of any other joint tennant. The court finally agreed to hear three of Plaintiff subpoened witnesses; a physician, a social worker and the deceased housekeeper. The Defendant did not attempt to offer any evidence. The court then in effect dismissed the action by holding "I find that the giving of a quit claim deed is an unilateral act and does not terminate a joint tennancy." The court further decreed that Allene Close Adams was the owner of the property in question.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the Trial Courts ruling that a joint tennant cannot sever a joint tennancy without the approval and consent of co-joint tennants and further requests the court to rule that both parties are now tennants in common and that the property be sold and the proceeds divided equally between said parties.

STATEMENT OF THE FACTS

On May 1, 1962, Edith L. Branscomb, the deceased mother of the parties, conveyed by warranty deed her home at 2527 Grammerey, Ogden, Utah to herself and her daughter as Joint Tennants (TR.2). Relations between the mother and daughter deteriorated (TR.41) and (TR.46) and thereafter on

July 29, 1977 Mrs. Branscomb quit claimed her remaining interest in her home to her son Douglas F. Close (TR.2) She subsequently died on December 26, 1977 and Defendant refused to acknowledge Plaintiff's interest in the property necessitating the action for partition.

ARGUMENT

POINT I

The Court erred in holding that Mrs. Branscomb could not sever the joint tennancy she formed with her daughter by quit claiming her interest as a joint tennant to her son, the Plaintiff herein. Defendant's contention that a joint tennancy is incapable of severance without consent of all joint tennants is not supportable. In the California case Delanoy vs. Delanoy 13 P2d 513, Frederick William Delanoy held property in joint tennancy with his wife Theresa Louise Delanoy. The former conveyed his interest to his mother. The wife alleged that the property was community property and the deed to the mother was voidable at the option of the wife because she, the wife, did not join therein. The trial court held the deed valid and that the mother and wife were the owners respectively of an undivided one-half interest in the property as tennants in common. The court determined that the property was incapable of partition and ordered premises sold and proceeds divided.

On appeal the Supreme Court affirmed holding

"It therefore follows of course that Frederick had the power to convey his separate estate by way of gift or otherwise without the approval or consent of his wife. It also follows that upon such a conveyance the joint tennancy was terminated and the plaintiff and defendant became tennants in common, each the owner of an undivided one half interest in the property."

The court was confronted in this case with an issue regarding community funds and property which it resolved without confusing it with joint tennancy question.

Language helpful in resolving the issues before the court is found in the California case Tenhet vs Boswell 554 P2d 331 which considered the issue of whether a lease severed a joint tennancy.

"A joint interest is one owned by two or more persons in equal shares by a title created by a single will or transfer when expressly declared in the will or transfer to be a joint tennancy".....The statute requiring an express declaration for the creation of joint interests, does not abrogate the common law rule that four unities

are essential to an estate in joint tennancy; unity of interest, unity of time, unity of title and unity of possession.....

The requirement of four unities reflects the basic concept that there is but one estate which is taken jointly; if an essential unity is destroyed the joint tennancy is severed and a tennancy in common results.....accordingly one of two joint tennants may unilaterally terminate the joint tennancy by conveying his interest to a third person (DELANOY VS DELANOY 1932 216 Cal 23, 26, 13 P2d 513) Severence of a joint tennancy or course, extinquishes the principal feature of that estate-the jus accrescendi or right of survivorship. Thus a joint tennants right of survivorship is an expectancy that is not irrevocable fixed upon the creation of the estate; it arises only upon success in the ultimate gamble-survival-and then only if the unity of the estate has not theretofore been destroyed by voluntary conveyance.

(Delanoy vs Delanoy).....or by any other action which operates to sever the joint tennancy."

Utah Law reflects the same reasoning: Tracy Collins Trust Co. vs Frances Boydell Goeltz and et all 5 Utah 2d 350, 301 P2d 1086 involved an action to foreclose a mortgage. Lower court held that a husband could sever a joint tennancy held by himself and his wife on real property by executing himself a new mortgage on said property. Plaintiff and Respondent was awarded judgement against both husband and wife for amount paid on old mortgage because of subrogation rights and against husband alone for money received over and above the amount of old mortgage. This court affirmed stating

"Francis Boydell Goeltz (husband) was in a position to lawfully convey or encumber the property to the extent of his interest. He as joint owner of the property and as joint obligor under the 1936 mortgage, was entitled to negotiate for the enlarged loan"

Even the appellant did not question that the joint tennancy could be severed but alleged the mortgage was void because of the lack of the wife's signature.

The court further stated, Page 365,

"Nor is there any merit to appellants second contention. Appelant does not dispute the proposition that a joint tennant of real property by conveying

or mortgaging his interest therein by a valid deed or mortgage severs and terminates the joint tennancy by the creation of a tennancy in common.....it is apparent that the mortgage was not void but only inoperative to create a lien against appellants interest in the property beyond making it subject to the right of respondent resulting from its being subrogated to rights of Pacific Mutual Life Insurance Co."

Even the case cited by the Respondent in the District Court Nelson Vs Davis 592 P2 594 supports the position that a joint tennant may divest himself of his interest without the approval of any other joint tennant. In that case the Court held that a joint tennant could not sever a joint tennancy, in a divorce action, where the joint tennant was under a court order not to dispose of the marital property in question. Justice Crockett further observed that the purported deed did not sever the joint tennancy, not because of the inherent inability of the joint tennant, but because there was no evidence of delivery by the joint tennant of the deed to her daughter. Commenting more specifically concerning the issue the opinion stated on Page 596,

"It is not to be questioned that a joint tennant

> may in proper circumstances make a bona fide conveyance of his interest in property to a third person or that this has the effect of terminating the joint tennancy, and converting the ownership into a tennancy in common." (Citing Tracy Collins vs Goeltz 301 P2d 1086)
>
> "However this is not accomplished by a unilateral declaration (emphasis added) of termination of such a tennancy. such a declaration is but a nullity which has no effect upon the joint tennancy."

It is the Appellants position that the "Unilateral declaration" mentioned above referred to a document entitled "Notice of Termination" which the joint tennant recorded with the defective deed. It appears that the Lower Court and the Respondent mistakenly connected the words "unilatered declaration" with the deed instead of with the document "Notice of Termination"

CONCLUSION

If the lower courts ruling is upheld it will have the effect of destroying one of the important features of a joint tennancy. No longer will it be possible for a grantor to conve

property to himself and a third person without the third person immediately obtaining a vested interest in and to the entire property. The right of the Grantor to exercise control over his own property interest will be eliminated. This construction would also be applicable to a grantee or a remaining joint tennant with the effect of restricting the alienability of property. Such a result would be contrary to public policy and would place the District Court in this instance in the role of a legislator.

That such a proposition is not the law in the State of Utah is demonstrated by the above cases cited by the Appellant. These cases hold that a joint tennant does not obtain a vested interest in a right of survivorship upon creation of the estate or tennancy. That this right is fixed only upon the death of co joint tennants and then only if the unity of the tennancy has not been terminated by conveyance. Equally convincing is the case cited by the Respondent in his Brief in the lower court Nelson vs Davis. This Court there stating that it was not to be questioned that a joint tennant in proper circumstances could convey his interest to a third person and that such a conveyance terminated the joint tennancy. Appellant respectfully urges that there is nothing in the Nelson vs Davis case that supports the ruling of the District Court.

By failing to put on any testimony in the lower court and by failing to advance any other theories, the Respondent has placed it's entire case on the position that a joint tennant

obtains a vested interest immediately upon the creation of a joint tennancy. That said interest cannot be conveyed away or disposed of without the permission of or without the death of any other joint tennant. This position is not supportable and is contrary to the law in the State of Utah. Based upon the foregoing reasons argument and law the Appellant respectfully urges this Court to reverse the judgement rendered below and hold that the joint tennancy created by the Parties Mother with her daughter, the defendant, was terminated by a deed to the Plaintiff. That the Parties are now tennant in common and that the property be sold and proceeds divided equally between the Parties.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that two copies of the foregoing Appellants Brief were mailed postage prepaid to Pete N. Vlahos Attorney for Respondant to Legal Forum Buidling, 2447 Kiesel Bldg., Ogden, Utah 84401 this 3rd day of December 1979.

Clarence J. Frost

CLARENCE J. FROST