1980

Donald Theodore Sundquist v. Mary Alice Sundquist : Brief of Appellant

Utah Supreme Court

John Lowe; Attorney for Respondent;
David M. Swope; Attorney for Appellant;

IN THE SUPREME COURT

OF THE STATE OF UTAH

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DONALD THEODORE SUNDQUIST,	:	
Plaintiff/ Appellant,	:	Case No. 17057
vs.	:	
MARY ALICE SUNDQUIST,	:	
Defendant/ Respondent.	:	

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BRIEF OF APPELLANT

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BRIEF OF APPELLANT

NATURE OF CASE

This is a review of the District Court's ruling on defendant's order to show cause that no trust had been created by the parties or in the alternative that in the event on appeal a trust was found to have been created, said trust is terminated.

STATEMENT OF FACTS

On October 16, 1973, the parties to a divorce proceeding entered into a property settlement agreement and stipulation where in ¶10 they agreed that income derived from the interest held by the parties in a real estate syndicate should be established as a family trust known as the Sunquist Family Trust Fund with the plaintiff and defendant as trustees and with the

restriction and requirement that said funds be accumulated for the education of the minor children of the parties at such time as the children had received or terminated their advanced education, any sums remaining in said trust fund should be equally divided between the plaintiff and defendant (Record, p. 40, 41). The parties' agreement was incorporated into ¶(j) of the Decree of Divorce signed by the court on October 24, 1973 (Record, p. 49, 50). A savings account was set up with the defendant's consent, the purpose of the account was to provide funds to educate the children (Record, p. 108-7, 108-24).

The parties returned to court on April 27, 1976 on plaintiff's order to show cause and entered into a written stipulation wherein the defendant agreed to remove herself as a joint signatory from the account and that the plaintiff would be the sole signator for the account from which funds were withdrawn for the educational pursuits of the children (Record, p. 56, 57). The stipulation of the parties was ratified by an order by the court acknowledging the existence of the fund and the use of the fund for the education of the parties' minor children (Record, p. 60-62). The court then entered an amended order which stated "the trust fund shall continue to contribute to the educational costs of the children so long as proper evidence of costs related to the higher education of the children are provided" (Record, p. 66).

The defendant filed an order to show cause as to why the trust fund created for the education of the minor children of the parties should not be terminated and the proceeds distributed equally between plaintiff and defendant (Record, p. 73). The defendant, in her affidavit filed in support of the order to show cause, states, "the purpose of the trust, to educate the minor children of the parties, has now been accomplished and the assets of the trust should be distributed to plaintiff and defendant equally" (Record, p. 68). The order to show cause came on for hearing on October 16, 1979 and at that time counsel for defendant in argument stated that the trust should be eliminated because of friction (Record, p. 71). At the trial heard on February 8, 1980, the defendant, throughout her testimony, continually acknowledged the existence of a trust and the only remedy sought by her was that the trust be terminated. The main reason for its termination she stated was because of the friction between the parties (Record, p. 108-15, 108-18). The defendant presented no evidence to show that the parties' three children did not intend to go on with their education (Record, p. 108-18). The defendant further admitted in her testimony that she entered into an addendum to the trust agreement on January 25, 1975 which addendum stated that the completion of the trust would be when all the beneficiaries have completed their higher education (Plaintiff's Exhibit "C"). Plaintiff's testimony at the

trial was that the trust was set up for an indefinite period until the parties' children had received their education and that at the time of the hearing, the children were taking courses in higher education (Record, p. 108-28, 108-29, 108-30, 108-34).

RELIEF SOUGHT ON APPEAL

The plaintiff seeks an order of the court directing a reversal of the trial court's order and reinstituting the trust fund with the funds previously divided between the parties and the awarding of attorney's fees for plaintiff's defense of the trust or in the alternative, an order remanding the matter to the trial court so that the issue of whether or not the trust exists can be properly heard with notice to the parties.

ARGUMENT

I.

A TRUST HAD BEEN CREATED BY THE PARTIES PURSUANT TO AN ORDER OF THE COURT

In order to create a trust, certain requirements exist. Those requirements include a competent settlor and a trustee, an ascertainable trust res, and sufficiently certain beneficiaries, 76 Am. Jur.2d Trusts §31. All of the above requirements have been met in the instant case. The settlors, being the parties in this case have clearly manifested their intent in no fewer than eight (8) written documents and have themselves indicated that a trust exists for the education of their children. Both plaintiff

and defendant, in their complaint and answer and counterclaim respectively indicated that they wished a trust fund to be established for the education of the children (Record, p. 2, 6). These intentions were formalized in a property settlement agreement which was subsequently incorporated into the Decree of Divorce (Record, p. 40, 41, and 49). Subsequent to the Decree of Divorce, the parties in fact created a savings account with the proceeds of the fund, the purpose of the savings account was to provide proceeds to educate the children (Record, p. 108-24).

The parties themselves acted as trustees and in fact the plaintiff went to court to remove the defendant as a trustee (Record, p. 54). As a result, the parties entered into a stipulation which acknowledged that the plaintiff was to be the sole signator on the savings account from which the trust funds would be withdrawn (Record, p. 56, 57). An order (Record, p. 60, 61, 62) and an amended order (Record, p. 64, 65, 66) embodying the language of the stipulation and ratifying the same was entered by the court acknowledging the savings account in fact held the trust fund and further acknowledging that the fund was to be used for the education of the parties' children.

Thus, there can be no doubt that the beneficiaries of the trust as named were the parties' children, and that a savings account held the funds which would be used to educate the children. Therefore, the requirements of a trust were fulfilled,

acted and relied upon by the parties and the court itself.

Loco Credit Union vs. Reed, 516 P.2d 1112, (New Mexico, 1973) relates a fact situation quite similar to the case at issue. The parties in obtaining a divorce had entered into a written property settlement agreement wherein the parties agreed that a sum of money on deposit with a credit union (Loco) be held in trust by the plaintiff for the expenses of the college education of the children of the parties and as much of the sum that would not be used for the college education of the son should be used for the expense of the college education of the daughter. The stipulation was incorporated into the Decree of Divorce and subsequent to that time, the credit union attacked the fact that a trust had been created and was in existence. The New Mexico Supreme Court, following basic trust law found that a trust in fact existed and set forth the following ruling:

> There was no provision in the written instrument evidencing the creation of the trust reserving unto the settlors the power to revoke the trust. Therefore, the trust was irrevocable. 4 Scott on Trusts, §330.1 (3rd Ed., 1967) and cases cited therein holding in accord.
>
> The rights and duties of the trustee not detailed in the trust instrument are sufficiently detailed in the law of trusts. No claim has been made by either of the settlors, who are the only ones who have served as trustees, or by the beneficiaries, or anyone on their behalf, that there has been any question as to the rights and duties of the trustee, except as to the extent above indicated. The use to be made of the trust property is clearly stated in the written instrument evidencing the creation of the trust. Minute details, as to the precise items for which funds in an educational trust must be used, are not necessary for the trust's validity. In

fact, a detailed limitation upon the expenditures to be made for precisely anticipated items would be far more likely to defeat the beneficial purposes of an educational trust than would the general provision that the trust funds are to be used for the college education of the beneficiary.

Since the written instrument evidencing the trust's creation fails to show an agreement as to the date of the termination of the trust, it will continue until the trust purposes have been accomplished. The time of the ending of the trust need not appear in the writing. Bogert, Trust & Trustees, Supra, §87 at 489.

The trial court, therefore, had no basis either in law or in fact to support a finding that a trust did not exist.

II.

THE TRIAL COURT ERRED IN RULING THAT THE TERMS OF THE TRUST WERE AMBIGUOUS AND THAT THE PURPOSES OF THE TRUST HAVE BEEN FULFILLED.

The testimony presented at the hearing in the matter by the defendant clearly indicated that the purpose of the trust had not been fulfilled. In response to a direct question by plaintiff's counsel, "do you have any statements or evidence to show the court that any of the three children do not intend to go on with their education?" The defendant responded, "no, I don't." In response to counsel's further questioning, "and, in fact, Joel and Alyce have indicated to you, that they have not, that they wish to further their education? Answer: Yes." (Record, p. 108-18).

The statements submitted at trial by the children (Plaintiff's Exhibit "A" and "B", Defendant's Exhibit 2 and 3)

show that in fact both Alyce and Joel intend to continue on with their education. The statements submitted indicate that the children remain impartial regarding a decision regarding the trust and only Matt Sunquist affirmatively agreed that the trust should be terminated (Defendant's Exhibit 1). In Clayton v. Behle, 565 P.2d 1132 (Utah, 1977) this court stated "a trust may be terminated where its continuance is not necessary to carry out a material purpose of the trust where all the beneficiaries thereof consent, and where none of them are under any incapacity; and where the settlor is the sole beneficiary, by the weight of authority he can terminate the trust at any time and compel the trustee to reconvey the property to him. This is true even though the purposes of the trust have not been fully accomplished." (Emphasis added.) In the present case, not all the beneficiaries have consented to the termination of the trust nor did the settlors reserve any right to terminate the trust. As previously stated in the Loco case, Supra and stated in Clayton: "The rule of law as stated in Scott's Abridgment of the Law of Trusts, 1960 Ed. at page 607 as follows:

> Where a trust is created inter vivos, the question often arises whether the settlor can revoke the trust. Whereby the terms of the trust he has reserved a power of revocation, he can revoke the trust in the manner in which and to the extent to which he has reserved such a power. On the other hand, if he has not reserved a power of revocation, he cannot revoke the trust.

The evidence clearly indicates that the purpose of the trust has

not been accomplished, and the beneficiaries have not all consented to the termination of the trust. Therefore the purposes of the trust have not been fulfilled.

III.

PLAINTIFF WAS PREJUDICED BY THE COURT'S RULING SUA SPONTE THAT A TRUST DID NOT EXIST SINCE SUCH ISSUE WAS NOT RAISED OR TRIED TO THE COURT.

The ruling by the trial court sua sponte that a trust did not exist was prejudicial to the plaintiff in that plaintiff had no opportunity to rebutte by evidence or testimony any of the contentions the trial court had regarding the validity or existence of the trust. Defendant's order to show cause simply states in part:

> Then and there to show cause if any you have why the decree is amended herein, which required that a trust fund be created for the education of the minor children of the parties, should not be terminated and the proceeds distributed equally between plaintiff and defendant. (Record, p. 73)

At the time of the original order to show cause hearing, the thrust of counsel for defendant's argument is set forth in the minute entry "counsel for defendant responds stating that the trust should be eliminated because of friction." (Record, p. 71.) During the hearing on the matter, counsel for defendant never raised the issue as to whether or not the trust was in existence and in fact throughout the record keeps referring to the trust and in closing argument to the court indicated that the

relief sought by the defendant was termination of the trust, not the existence of the trust (Record, p. 108-43, 108-44, 108-45).

This court has stated in National Farmers Union Property & Casualty Company v. Thompson, 4 Ut.2d 7, 13, 286 P.2d, 249, 253, "notwithstanding all of our efforts to eliminate technicalities and liberalized procedure, we must not lose sight of the cardinal principal that under our system of justice, if an issue is to be tried and a parties' rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it."

The defendant, by not raising the issue of the existence of the trust in her pleadings nor at the hearing and the court having ruled sua sponte, severely prejudiced the plaintiff in that the plaintiff could have been prepared to meet those issues and present the necessary evidence though testimony and documents and argument to respond to the issue. By ruling after the case was presented and by the court's raising a new issue, i.e., the existence of the trust itself, the plaintiff was prejudiced.

IV.

THE COURT SHOULD HAVE GRANTED PLAINTIFF'S ATTORNEY'S FEES SINCE PLAINTIFF WAS ACTING TO DEFEND THE EXISTENCE OF THE TRUST IN RESISTING DEFENDANT'S ORDER TO SHOW CAUSE.

The plaintiff was at all times seeking to preserve and protect the trust from termination. The resultant legal fees

which plaintiff incurred were not for his own benefit, but were in defense of the trust. 76 Am. Jur.2d Trusts, §532 states:

> A trustee is entitled to reimbursement or exoneration in a reasonable amount for fees of counsel properly employed in the administration of the estate, for the costs of litigation and suits against the trust estate which it is his duty to defend, and for the costs of suits properly brought in behalf of the estate. (Emphasis added.)

Therefore, if the trust is reinstated, plaintiff should be reimbursed for his legal fees and costs of court incurred herein.

CONCLUSION

The evidence and testimony presented at the time of hearing clearly indicates that the trial court erred in its findings that a trust was not created and that the terms of the trust were ambiguous and that the purposes of the trust have been fulfilled. The evidence at the hearing clearly indicates that two of the parties' children were planning to continue on with their higher education, that an account was set up with the proceeds of the real property and was being utilized for the sole purpose of meeting the children's educational financial needs.

THEREFORE, the trial court's order should be reversed and the trust be reinstated with plaintiff to be reimbursed for his attorney's fees incurred in defense of the trust. In the alternative, should the court find that the evidence contained in the record is not sufficient to establish the existence of a

trust, then the matter should be remanded to the trial court for a hearing to determine whether or not a trust is in existence.

RESPECTFULLY SUBMITTED,

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Attorney for Plaintiff/Appellant