1980

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

Utah Supreme Court

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

IN THE SUPREME COURT OF THE STATE OF UTAH

DONALD THEODORE SUNDQUIST, :

Plaintiff-Appellant, :

vs. : CASE NO. 17057

MARY ALICE SUNQUIST LEARY, :

Defendant-Respondent. :

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The respondent disagrees with appellant's statement of facts in some instances.

Appellant states that it was conceded that a trust existed. The testimony and argument was that no trust existed, but if one existed it was for a reasonable time period which has expired.

Appellant states that there was no evidence that the children did not intend to continue with their education and that they were, at the time of the hearing, pursuing their higher education. The evidence was that they were at most taking classes only sporadically.

There are additional facts not stated in appellant's brief which should be added. The divorce decree dated in October 1973

ordered that plaintiff and defendant should establish a family trust and that plaintiff and defendant should act as trustees (T.49). Instead of creating such a trust, appellant's attorney drafted a trust document wherein a bank was to act as trustee. Appellant and respondent both signed said document, but the bank did not. Mr. Sundquist conceded that trust was never in effect (T.108 p.40). That document was not introduced in evidence.

The parties set up a joint bank account in their two names, which account was designated as a trust account, but no terms of any trust are in evidence. Appellant testified:

> Q. What trust are you referring to?
>
> A. The one we both signed back in 1973.
> ...
>
> Q. It was never, therefore, in effect; correct?
>
> A. That's right. I was acting as if it were in effect, however.
>
> (T.108 ps.39, 40)

Income from property in California was placed in a joint account. Occasionally sums were drawn out for educational expenses for each of the three children (T.108 p.16).

At the time of the hearing the children were ages 24, 22 and 19.

Alyce, age 24, had attended a full year of college in 1975 and then sporadically took a few clases, including guitar theory and beginning bicycling. She was married in 1978 and is presently living in San Diego (T.108 ps.11, 12, 13). At the time of the hearing she was attending Mesa College in San Diego, taking six

and one-half hours. She submitted to the court a written statement saying that she would leave the matter to the court's discretion as to whether or not a trust, if one existed, should be terminated (Ex. D-2).

Matt, age 22, had not graduated from high school. He had obtained a certificate through a GED program. At the time of the hearing he was working as a truck driver. He had taken no college courses until the quarter in effect at the time of the hearing, and he was then taking a three-hour course at the University of Utah in educational psychology (T.108, p.13). He agreed that if a trust existed it should be terminated (Ex. D-1).

Joel, age 19, had graduated from high school. He took one quarter at the University of Utah and then enlisted in 1979 for a four-year enlistment in the Army. At the time of the hearing he was stationed in Germany where he had college courses available to him given by the University of Maryland. The government would pay three-fourths of the costs thereof. He was not attending any of them. There is a program available to him whereby if he contributes fifty dollars a month during his enlistment, the Army will contribute seventy-five dollars, which would make a total of $7,200 at the end of four years to be used for educational benefits after his enlistment terminates (T.108 ps.13-15). Joel made no request for any funding of his education in Germany (T.108, p.38). He submitted a written statement to the court that he would like to remain impartial as to whether or not the trust, if one existed, should be terminated (Ex.D-3).

Their mother assumed that if the children wanted a college education they would treat the matter seriously and if they intended to attend college they would do so, not just sporadically taking a few courses. The funds have been available for seven years for their education (T.108 p.16). The mother is in favor of their continuing education and has proffered to contribute thereto, but wants to avoid the continuous friction which was created by having funds in a joint bank account with her ex-husband (T.76).

She testified that if the trust were terminated:

> ...then we won't have any reason to have these problems and have to be coming into court every couple years on this matter. And I feel that if it's terminated both Mr. Sundquist and I can help the children individually, if we wish to do so, with their education. In other words, as far as I can see, they'd be getting money from both of us independently, rather than from one source; but they would still be getting help if he wished to help them and if I wished to help them. And I have told all three of them that I would help them. (T.108 ps.15-16)

ARGUMENT

I. NO TRUST WAS CREATED

The decree of divorce ordered the parties to create a trust. The parties signed a trust agreement drafted by counsel for Mr. Sundquist. That agreement named, however, a bank as trustee and called for the signature of the bank. The bank did not sign it and therefore there was no trust agreement. In fact, Mr. Sundquist concedes that agreement was never in effect. Mr. Sundquist testified:

> Q. It was never therefore in effect?
>
> A. That's right. I was acting as if it were in effect, however.
>
> (T.108 p.40)

There was no trust document before the court, none having been introduced in evidence (T.108 ps.50-51).

The appellant cites Loco Credit Union v. Reed, 85 NM 729, 516 P.2d 1112 (New Mexico 1973), as authority that a trust was created. In that case the parties had to do nothing further to create a trust. The decree did not order them to create a trust but rather adjudicated that a fund became a trust res. In this case at bar parties were ordered to create a trust with themselves as trustees, and the evidence shows that this was never done.

Here, Judge Swan stated:

> The Court would find that the parties have appeared before this Court on several occasions in an effort to agree on some method of managing the funds, and that the stipulations and subsequent Court orders, including the addendum to the trust agreement marked as Exhibit C, and this Court's amended order dated October 29th, 1976, which is based upon a written stipulation of the parties, all deal with methods of handling these funds.
>
> This Court, Mr. Swope, just has to find that the parties never did in fact establish a written trust. And whether their conduct could be construed as the establishment of a trust, the terms are so uncertain and ambiguous that this Court cannot define either the purpose of the trust, and what could be done to accomplish this purpose, what expenses would be allowed, or for what period of time, what its duration might be.
>
> As commendable as the intent of the parties might have been to provide for, as they have said, the higher education of these children, they seem to have lacked the ability to provide either the conditions or define the expenditures that might properly be made, or for what period of time. There's just no document before the Court that could be construed as a trust. Anything the Court has would have to be a combination of documents together with the evidence regarding the conduct of the parties, the accountings. I don't believe it's so much a question of whether the trust is terminated as it is a question of whether it was ever in fact established.

Because the Court was involved in making an order requiring the creation of the trust, I believe this imposes on the Court an obligation in addition to the usual requirement the Court would have to apply the law of trusts to these facts, and that further obligation is to, at this late date, determine whether the parties have in fact complied with the Court orders in the decree of divorce. And regardless of the good intentions they may have had, I think they have not done so. This is no reflection on their present counsel, because they were not involved. Mr. Swope was not at all involved in the lawsuit, and it appears that Mr. Yano was attorney and attempted to set up a trust pursuant to the Court order.

For the Court to now attempt to define the terms and conditions under which a trustee would perform, would require this Court to make decisions which are uncertain and ambiguous under the agreement or the stipulations of the parties. The Court would be speculating, at best, in imposing on the parties some conditions that may or may not have been their intent and purpose.

I'm afraid, Mr. Sundquist and Mrs. Leary, the parties have failed in this effort, as they did in the marriage itself. Since the decree of divorce, the parties have failed to put together a trust that they had agreed to do, and that the Court ordered them to do; but instead merely managed some funds, that the evidence shows they were managed. I think that does not create a trust.

I think at this point the Court has to conclude that the only course available to the Court is to order the assets distributed equally to the parties. And counsel will observe the intent of the parties. If they wish to then establish a meaningful and legal trust for these parties, they can do so. But they will be separate trusts, not one administered together.

(T.108 ps.49-51)

Such determination is supported by the evidence.

II. IF A TRUST HAD BEEN CREATED, IT WAS FOR A REASONABLE TIME PERIOD WHICH HAS EXPIRED.

The divorce decree provided that the parties should create a trust and,

> ...that funds be accumulated for the education of the minor children of the parties and at such time as the children have received or terminated their advanced education any sums remaining in said trust funds should be equally divided between the plaintiff and defendant. (T.108 p.49)

Judge Swan further ruled that if this court, pursuant to an appeal, should rule that a trust was created, the funds, nevertheless, should be distributed to appellant and respondent, the residuary beneficiaries, because the time period for the duration of the trust has expired. The final distribution date was not a date certain, but rather was at such time as "the children have received or terminated their advanced education." Applying usual rules of construction, that indefinite time must be determined by deciding what time is reasonable for their receiving their education. Judge Swan made findings of fact which, being supported by the evidence, should be controlling on appeal:

> 11. In the event on appeal the court's ruling herein that no trust was created is reversed, the court further finds that the time and duration of any trust which might have been created is uncertain and that a reasonable time for duration of the trust has elapsed and the trust has terminated. (T.98)

A reasonable interpretation of the evidence fully supports such a conclusion. A twenty-four year old housewife who is occasionally taking a few courses might very well be taking them when she becomes a grandmonther. She has told the court she has no objection to termination. The twenty-two year old son who didn't graduate from high school, and seven years after the existence of the trust was taking his first college course of three hours, is hardly dedicated to higher learning. He has suggested termination. The nineteen year who enlisted in the Army for four years, and who is not taking advantage presently of opportunities available to him for college, has told the court that he has no objection to termination. The court's conclusion that the chil-

dren have had a reasonable time to receive their advanced education is a reasonable one.

Appellant cites Clayton v. Behle, 565 P.2d 1132 (Utah 1977), apparently as authority for the proposition that a trust must continue until all of the beneficiaries consent to its termination. In the Clayton case the trust was for the benefit of the settlor for life, then to his son for life, and upon the death of the son to the issue of the son. At the time of settlor's death he was survived by a son and four grandchildren. The trust contained no reserved right to terminate. The court held that any attempt by the settlor to transfer trust assets after the creation of the trust, was ineffective because the residuary beneficiaries could not be determined prior to the death of the son; and therefore, there could be no termination of the trust by agreement of the beneficiaries because the beneficiaries could not yet be ascertained. All the court was saying in Clayton was that there can be no termination of an irrevocable trust prior to the expiration of the trust period without the consent of all beneficiaries. The court was not saying that if the trust period has expired consent of beneficiaries would be needed for termination. Here, Judge Swan simply adjudicated that the trust period had expired and the trust therefore had terminated.

Furthermore, all of the beneficiaries except the residual beneficiary, Mr. Sundquist, have consented to such determination by the court, and he has received his one-half share of the funds on hand, as residual beneficiary. One son affirmatively stated

he wanted a termination. The other son and the daughter consented to whatever the court determined.

III. THE ISSUE THAT NO TRUST HAD BEEN CREATED WAS RAISED IN THE LOWER COURT

It is conceded that most of the evidence and argument in the court below was directed toward the termination of the relationship because of the continuous conflict between appellant and respondent. However, evidence was presented and arguments were made relating to the existence or non-existence of the trust.

The Order to Show Cause was to show cause why "the decree as 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 the plaintiff and defendant." This did not seek the termination of the trust as such, but rather the termination of the effect of the terms of the decree which provided that a trust be established.

The evidence shows that the bank did not sign any trust agreement (T.108 p.40).

The issue that no trust was created was raised. The Memorandum and Election By Children recites:

> The parents then had a trust agreement drafted... This agreement was signed by the parents but was never executed by the proposed trustee. (T.91)

The comment of the attorney for appellant reflects that the question of non-existence of a trust was raised and discussed in chambers as well as in open court. He said:

> Mr. Lowe has commented about the fact that a trustee was not appointed in the original document. I would like to quote language from 76 Am.Jur. 2.nd, Trusts, Section 32: 'Notwithstanding that a provision for the office of a trustee is essential to the creation and existence of a trust, the nomination of a trustee is not; and the fact that the person nominated as trustee may be incompetent or disqualified, or may refuse to accept the trust or to continue in office, does not affect the validity of the trust...
>
> (T.108 ps.46-47)

Even if the issue of the non-existence of the trust had not been raised, Rule 15(b) U.R.C.P. provides:

> When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

By implication plaintiff, by not objecting to consideration of the issue of non-signing of the trust agreement, consented to have the court consider same.

Relief should be granted regardless of pleadings. Rule 54(c)(1) U.R.C.P. provides:

> Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

IV. THERE BEING NO TRUST, NO ATTORNEYS' FEES TO ENFORCE THE TRUST SHOULD HAVE BEEN AWARDED

The court ruled there was no trust, therefore attorney's fees to enforce a trust were inappropriate. Even if there were a trust, no attorneys' fees should have been awarded to resist the distribution of the assets in the trust to the residual beneficiaries who were entitled thereto upon the expiration of the time period of the trust.

CONCLUSION

The adult children should not indefinitely have a fund preserved for their higher education. They have had a reasonable opportunity to obtain such education. Both parents have proffered further educational expenses if their offspring desire further education. The court came to a reasonable conclusion that there was not trust; but that if there were a trust, it had expired and the residual beneficiaries, appellant and respondent, should have the fund distributed to them.

If there were a trust, two of the children consented to let the court determine what should be done, and the third affirmatively wanted the fund distributed to his parents.

The appellant is not harmed. As a residual beneficiary of one-half of the fund on hand he has received same.

The ruling should be affirmed.

Respectfully submitted

John W. Lowe, Lowe & Associates
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, two copies of the foregoing Brief of Respondent to Appellant counsel, David M. Swope, 820 Newhouse Building, 10 Exchange Place, Salt Lake City, Utah 84111 on this 21 day of November, 1980.

John W. Lowe, Lowe & Associates