

2000

# Jeannine Perrenoud, Linda Jenkins v. Lila Ann Harman, Lloyd Mitchell : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

\* \* \* \*

JEANNINE PERRENOUD and  
LINDA JENKINS,

Plaintiffs/Appellants,

vs.

LILA ANN HARMAN and LLOYD  
MITCHELL,

Defendants/Appellees.

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\* **APPELLANTS' REPLY BRIEF**  
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\* Case No. 981721  
\*  
\* Priority 15  
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PLAINTIFFS' APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL  
DISTRICT COURT, THE HONORABLE WILLIAM A. THORNE PRESIDING

\* \* \* \*

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**FILED**  
Utah Court of Appeals

JAN 11 2000

Julia D'Alesandro  
Clerk of the Court

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## ARGUMENT

### **I. The settlors clearly intended to prohibit each other from cutting the other's children out of the picture.**

Defendants do not dispute that interpretation of the Declaration of Trust at issue in this case requires a determination of the settlors' intent, *see Makoff v. Makoff*, 528 P.2d 797, 798 (Utah 1974), or that

[i]n ascertaining the intention of the settlor[s] [this Court] may consider the entire instrument aided by the surrounding circumstances existing at the time of creation of the trust.

*Id.* (emphasis added). Nevertheless, in part IIC of their Argument, defendants contend that the limitation in the Declaration of Trust that "[i]f one of the above listed should be deceased, the beneficiaries cannot be changed" (R.7) applies only to the surviving settlor and not to the surviving trustee.

According to defendants,

[plaintiffs'] 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.<sup>1</sup>

While this argument may have some academic appeal, it requires either that the settlors' intention be completely ignored or a determination that the settlors' intention was absurd. Under the Declaration of Trust, Joseph and Rhoda Thurber each wore two separate hats: that of a settlor and that of a

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<sup>1</sup>Reply [sic] Brief of Appellees at 9-10.

trustee. Acceptance of defendants' interpretation of the language of the addendum would require a determination that Joseph's and Rhoda's intent was not to prevent each other from depriving the other's children of their beneficial interests in the trust, but, rather, that if one of them did decide to deprive the other's children of their beneficial interests, he or she would be required to do so not with his or her surviving settlor's hat on, but with his or her surviving trustee's hat on. Picture Joseph and Rhoda sitting around the fire one cold winter evening long ago quietly discussing the terms of the trust which they were contemplating establishing for their beloved children. Joseph says to Rhoda, "Rhoda, after I die, if you decide that you don't want my daughter to receive any of our property, that's okay; I don't mind. But, I don't want you to do it by changing the beneficiaries of our trust. I want you to put on your surviving trustee's hat, sell all of our property and give all the proceeds to your kids." And Rhoda responds, "Okay dear, that sounds a little peculiar to me, but whatever you say."

That, of course, is not what happened. Defendants have never disputed, and the trial court specifically determined, that Joseph and Rhoda "wanted to set up a trust that would not be changed after one [of them] died." (R.127, pp.20-21). It would certainly not have mattered to Joseph and Rhoda whether it was the surviving settlor's powers or those of the surviving trustee that were used to do the changing. They did not want the survivor to be able to change the trust, period.

In short, acceptance of defendants' contention that the Declaration of Trust's limitation on the changing of beneficiaries applies only to the settlors' powers and not to those of the surviving trustee would require that Joseph's and Rhoda's intent be ignored and should be rejected.

## II. Defendants misread West.

In part III of their Argument, defendants assert that the *West*<sup>2</sup> "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."<sup>3</sup> That is clearly not the case.

The precise ruling in *West* is as follows:

...we conclude that Herschel West, Sr., as sole trustee, could sell or dispose of the property as he saw fit. **This involved no breach of his fiduciary duty since he was at that point the sole beneficiary.**

948 P.2d at 356 (emphasis added).

The determinative factor was that Herschel was the "sole beneficiary," **not**, as defendants contend, that he was the sole "active" beneficiary. The *West* court's ruling that Herschel was the sole beneficiary was based upon its determination that "[t]he trust instrument is clear that the children do not become

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<sup>2</sup>*Matter of Estate of West*, 948 P.2d 351 (Utah 1997).

<sup>3</sup>Reply Brief of Appellees at 12 (emphasis added).

<sup>4</sup>The Court did, of course, also characterize Herschel West as an "active" beneficiary. 948 P.2d at 355. However, its discussion in that regard was simply to establish that he was in fact a beneficiary at all in light of the fact that "the trust instrument does not specifically name [him and his first wife] as beneficiaries." *Id.*



beneficiaries until the `death of the survivor' of the two settlors." 948 P.2d at 355 (emphasis added). As discussed in Appellants' Opening Brief, however, the language of the Declaration of Trust at issue in the case at bar is determinatively different from the language of the trust instrument at issue in *West*. Unlike the trust instrument at issue in *West*, there is no provision that plaintiffs were not to become beneficiaries until the "death of the survivor" of the two settlors. To the contrary, the language of Joseph and Rhoda Thurbers' Declaration of Trust is very clear that plaintiff's became beneficiaries on the date of its execution, April 1, 1980.

Defendants attempt to minimize this distinction by characterizing it as having "two serious flaws: one textual and one rational." Explaining the so-called "textual flaw," defendants direct the court's attention to language found not in the part of the Declaration of Trust which identifies the beneficiaries, as was the case in *West*, but in the following sentence which addresses termination of the trust:

Upon the *death of the survivor of us*, unless all the beneficiaries shall predecease us or unless we shall die as a result of a common accident or disaster, our Successor Trustee is hereby directed forthwith to transfer said property and all right, title and interest in and to said property unto the beneficiaries absolutely and thereby terminate this trust...

(R.6) (emphasis added).

In short, while the words "death of the survivor of us" do appear in the Declaration of Trust at issue in this case, they

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<sup>5</sup>Reply Brief of Appellees at 12.

appear in a completely different context than they do in *West* and, unlike the situation in *West*, they have nothing to do with establishing the date upon which plaintiffs became beneficiaries.

In support of what they refer to as the "rational flaw," defendants contend that plaintiffs "have ignored the *West* analysis entirely."<sup>7</sup> According to defendants, because Rhoda retained the right to receive income and manage the trust property for her own benefit the possibility existed that Rhoda could have completely exhausted the trust corpus without ever having to resort to her power to revoke the trust. Apparently, what defendants are suggesting is that plaintiffs would have been no better off if Rhoda had simply used all of the trust res for her own benefit, rather than transferring it to defendants.

That may or may not be the case. However, that is not what happened. What happened is that Rhoda did exactly what she and Joseph agreed not to do: deprive each others' children of their beneficial interests in the trust after one of them died.

Distilled to its essence, defendants' position is that *West* stands for the proposition that any time you have a revocable trust "designed primarily to avoid the entanglements often associated with the probate process [and the settlors/trustees] reserve[] and retain[] 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 [are] still

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<sup>7</sup>Reply Brief of Appellees at 15.

living,"<sup>7</sup> then under such circumstances the trustees owe no fiduciary duty to the named beneficiaries. The short answer to this position is that if that is what the West court had in mind, it would have been very easy for it to have said so. It did not. As indicated above, what it did say was that when Herschel West quit-claimed his home to himself and his second wife, "he was at that point the sole beneficiary," of his and his first wife's trust. Accordingly, at that point there were no other beneficiaries to whom a fiduciary duty might be owed. The same cannot be said in the case at bar. Plaintiffs were clearly present beneficiaries to whom Rhoda Thurber owed fiduciary duties.

#### CONCLUSION

Based on the foregoing, plaintiffs respectfully request that the trial court's order granting summary judgment in favor of defendants be reversed and that this case be remanded to the trial court with instructions for the entry of summary judgment in favor of plaintiffs with respect to their conversion claim.

DATED this 17<sup>th</sup> day of January, 2000.

  
Scott B. Mitchell  
Attorney for Plaintiffs

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<sup>7</sup>Reply Brief of Appellees at 7.

<sup>8</sup>948 P.2d at 356.

**MAILING CERTIFICATE**

Undersigned certifies that two copies of the foregoing were mailed this 17<sup>th</sup> day of January, 2000, via first class U.S. Mail, postage prepaid, to the following:

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