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Lynn Franklin Averett Jackson v. Maria Jackson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE ESTATE OF)	
)	
LYNN FRANKLIN AVERETT JACKSON)	
)	
Decedent,)	
)	Case No. 2000486-CA
MARIA JACKSON,)	(Priority 15)
Appellant.)	

APPELLANT'S REPLY BRIEF

Appeal from Fourth Judicial District Court
of Utah County, State of Utah
The Honorable James R. Taylor, District Court Judge

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COURT OF APPEALS

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ARGUMENT

POINT I

DELIVERY OF A KEY TO LINDA THOMAS DID NOT CONSTITUTE DELIVERY OF THE DEED.

Throughout the Trial, counsel for Linda Thomas took the position that the signing of the Deed and the giving of copies of the Deed to Linda Thomas and Connie Rowan constituted delivery. It appears from Appellee's brief, that the focus has now shifted to the delivery of a key to the Mr. Jackson's safety deposit box has in some way constituted delivery of the deed. In Point III of Appellant's original brief, the text of Linda Thomas' testimony is set out verbatim but in short, Linda Thomas testified that she was uncertain when the key was delivered to her but when asked whether it was longer than one year, she indicated no and when asked whether it was within two months, she said she could not really say (record 59, page 27, line 17- page 28, line 4). When asked regarding the reason she was given a key and what discussions were had between her and her father regarding the purpose for giving her a key, she

stated, "He showed me where he keeps the keys and he just said, I lose a lot of keys so here is a copy." (R59 P25 lines 1, 2) Mr. Jackson did not say anything with regard to her ability to get into the safety deposit box; did not discuss the contents of the safety deposit box; nor did he even make mention of the Deed at the time the key was given to Linda Thomas. (see R59, P 24, L 19 - P25, L13).

It is apparent from Linda Thomas' own testimony that there was no expression of intent to deliver the Deed in conjunction with the giving of the key but rather only an explanation that "I lose a lot of keys so here's a copy." (R59 P.25 lines 1, 2,)

Ms. Thomas cites in her Brief Agrelius v. Mohesky, 494 P.2d 1095 (Kansas 1972) for the proposition that the delivery of a key constitutes delivery of the deed. The Court in its own opinion clearly stated that the mere giving of a key is not sufficient to constitute delivery of the Deed.

It may be conceded that the act of placing an executed Deed in a safety deposit box, to which the grantor has the sole or one of several keys, is not sufficient of itself to evidence the delivery of a deed. However, when such action is coupled with other evidence

disclosing an intent to deliver a present title, a sufficient showing of delivery may be made out. (Emphasis added) Id. at 1101.

The background in Agrelius contained a situation in which mom and dad executed two deeds on the same day each conveying an 80 acre farm to each of their two sons Clair and Kenneth. The Court then went on to state:

On a subsequent occasion in 1944, Mr. Agrelius told Clair of the deeds, handed him a key to the safety deposit box and said, according to Clair, that the deed was in the locked box and that "WW Parker told him that that constituted delivery of the deed to me." Clair first saw the deeds in 1962 at the time of his father's death, but did not remove them from the box until after his mother's death in 1967, at which time he took them to be recorded.

The Trial Court held that delivery of both the deeds was effected at the time Claire was handed the key. The question before us is whether the court, under all the facts and circumstances, was justified in drawing the inference that the deeds were delivered during the grantor's lives... Id. at 1101

The Court then concluded that the delivery of the key with the expression of intent by the grantor constituted delivery of the deed. The facts in Agrelius are much different from the facts at hand.

According to Linda Thomas' testimony, there was no discussion with

regard to the deed when Mr. Jackson supposedly gave her the key. Linda Thomas' own testimony was that Mr. Jackson was giving her the key in case Mr. Jackson's key was lost.

As pointed out by the Trial Court, Linda Thomas had the burden of proof of showing that delivery of the deed occurred. The mere giving of a key to her for safe keeping falls far short of a delivery of the deed. Even if Linda Thomas possessed a key to the safety deposit box during the life of Mr. Jackson it did not mean that the bank would provide her access to the safety deposit box. Linda Thomas who has the burden of proof did not provide any evidence at Trial that she was one of the lessee's on the safety deposit box at the bank. It is clear from her testimony, however, that she never accessed the safety deposit box during the life of Mr. Jackson nor was she ever instructed by Mr. Jackson to access the safety deposit box and obtain the deed.

POINT II

**ONE WHO ASSERTS AN INTER VIVOS GIFT
FROM A DECEASED'S ESTATE MUST SHOW
THAT INTENTION BY CLEAR AND
CONVINCING EVIDENCE.**

Ms. Thomas in her brief cites Christensen v. Ogden State Bank, 286 P.638 (Utah 1930) for the proposition that the giving of a key constitutes delivery. The Utah Supreme Court case in Christensen does not further Ms. Thomas' position.

In Christensen v. Ogden State Bank, the Supreme Court was called upon to make a determination of whether a delivery had occurred of a passbook savings account. Although the Court in Christensen did not involve the transfer of a deed of real estate, the principles outlined with regard to the establishment of an inter vivos gift are instructive to this Court.

In Christensen, Jens Christensen was the owner of a savings account at Ogden State Bank. The ownership of the account was documented in the ledgers at the Bank and evidenced by a passbook which showed the deposits and withdrawals from the savings account. Mr. Christensen during his lifetime signed a card transferring the name designation on the account to read, "Jens Christensen, book #25695, 2877 Grant Avenue, City or Antone Christensen

payable to either or survivor." Id. 640. The passbook was never given to Antone Christensen but was held in the safety deposit box.

Antone Christensen asserted the position that since the records of the bank reflected ownership in himself as well as Jens Christensen that he should be entitled to the savings account. The Ogden State Bank and Jens Christensen's widow asserted the position that since the passbook was not physically transferred or given to Antone Christensen that the inter vivos gift was incomplete.

The Court determined that since the passbook was not delivered to Antone Christensen that it was not a completed gift and ruled in favor of Ogden State Bank and Jens Christensen's widow, thus reversing the decision of the trial court. The Court stated as follows with regard to the requirements of a gift:

When the claim of a gift is not asserted until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift. Robinson v. Bank, supra.

He who attempts to establish title to property through a gift inter vivos as against the estate of a decedent, takes upon himself a

heavy burden, which he must support by evidence of great probative force which clearly establishes every element of a valid gift, - that the decedent intended to divest himself of the title in favor of the donee, and accompanied his intent by delivery of the subject matter of the gift. Matter of O'Connell, supra.

Mindful of the facility with which, after the alleged donor is dead, fraudulent claims of ownership may be founded on pretended gifts of his property asserted to have been made while he was living, it is a but a salutary precaution which demands explicit and convincing evidence of every element needed to constitute a valid donation, whether it be a donation inter vivos or mortis causa. Even then fraudulent claims may prevail. But the rigid requirement of the clearest proof will at least diminish the number. Waylen v. Milhollen, Supra.

It is an elementary rule of law that in gifts inter vivos as well as gifts causa mortis the title to the thing given must pass from the donor to the donee. In contemplation of the law there must be no executory gift...

... If the decedent intended that the title to the savings account, should, during his life, pass to Plaintiff, it is difficult to understand why the deceased did not deliver the key to the safety deposit box to his brother or perform some other act calculated to make it possible for him to get possession of the passbook. Likewise, if the deceased intended to part with title to the account, it is difficult to understand why he should have worried about the paper that he had signed while at the hospital and to entertain the hope that he would fool those who were trying to get his money. While there may be circumstances which will support a gift or voluntary trust in a savings deposit account in the absence of delivery of the passbook and in the absence of the changing of the names of the persons to whom the passbook is issued, we are of the opinion that record in this case does not justify sustaining the

claim of Plaintiff to the savings deposit account upon either of Plaintiff's theories. As we review this record, we are forced to the conclusion that the deceased intended that the Title to the same in his account should remain in himself until his death. Id. 643, 644.

As set out in Christensen cited by Appellee, the court was unwilling to find an inter vivos gift based upon the facts of that case, and consequently reversed the Trial Court.

The final case cited by Ms. Thomas is Wiggill v. Cheney, 597 P.2d 1351 (Utah 1979) the Court sets out the standard as follows:

The rule is well settled that a deed, to be operative as a transfer of the ownership of land, or an interest or estate, therein must be delivered. It was equally settled in this and the vast majority of jurisdictions that a valid delivery of a deed requires that it pass beyond the control or domain of the grantor. The requisite relinquishment or control or dominion over the deed may be established, notwithstanding the fact that the deed is in possession of the grantor at her death, by proof of facts which tend to show delivery had been made with the intention to pass title and to explain the grantor's subsequent possession. However, in order for delivery effectively to transfer title, the grantor must part with possession of the deed or the right to retain it. Id. at 1352.

Ms. Thomas makes no effort to attempt to explain why there may have been a valid delivery even though Mr. Jackson retained possession of the deed.

Linda Thomas' own testimony stated that there was no discussion with regard to the deed when she supposedly received the key, but rather only that she was given the key because her father stated that he loses keys.

CONCLUSION

If one takes all of the facts as testified to by Linda Thomas and Connie Rowan from the time that the Deed itself was signed until Mr. Jackson's death, one cannot say that Mr. Jackson ever allowed the Deed to be taken out of his possession or ever gave up his right to retain it. The Deed was signed at First Security Bank and notarized after which Mr. Jackson physically carried the Deed from First Security Bank back to Mr. Coxson's law office. Mr. Jackson allowed Mr. Coxson to make copies and give copies to his daughters Connie Rowan and Linda Thomas, but then retained the original Deed in his possession. When invited by his attorney to allow the attorney to record the Deed, Mr. Jackson declined. When instructed by Mr. Coxson that the Deed must be recorded in order to complete the transaction, again Mr. Jackson

declined to record the Deed. Mr. Jackson, Connie Rowan, and Linda Thomas, then left the law office with again Mr. Jackson physically retaining the Deed in his personal possession; they dropped Linda Thomas off at her house and then Mr. Jackson and Connie Rowan traveled to Central Bank in Springville, Utah, where Mr. Jackson placed the Deed in a safety deposit box for safe keeping. Neither Connie Rowan nor Linda Thomas had access to the safety deposit box when the Deed was placed in it. According to Linda Thomas at a later date somewhere between two months and one year later, she was given a key to the safety deposit box with an explanation that Mr. Jackson loses keys and so he was giving her a copy. At the time of Mr. Jackson's death, the Deed was retrieved from the safety deposit box.

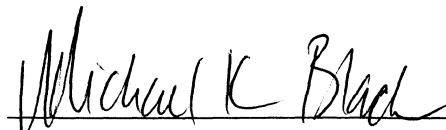
Based upon the foregoing there is certainly not clear and convincing evidence of Mr. Jackson's intent to deliver the Deed or to relinquish his possession of it.

The only clear intent on Mr. Jackson's part comes from his testamentary expression which were in writing in the Codicil wherein he specifically sets out

nominal amounts to be paid to Linda Thomas and Connie Rowan and the remainder of the house to be given to his wife Maria Jackson.

It is respectfully requested that this Court reverse the decision of the District Court in finding that there was not a delivery of the Deed and that the home should pass according to Mr. Jackson's testamentary desires as set out in his Codicil to his Will.

DATED this 16 day of April, 2001.



MICHAEL K. BLACK
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CERTIFICATE OF MAILING

I hereby certify that on the 16 day of April 2001, I mailed a true and correct copy of the foregoing to the following:

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