

1956

Warren M. O'Gara v. Archie Findlay : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *O'Gara v. Findlay*, No. 8527 (Utah Supreme Court, 1956).
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**IN THE SUPREME COURT
of the
STATE OF UTAH**

UNIVERSITY UTAH

JAN 28 1957

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WARREN M. O'GARA, Executor
of the Estate of NANCY E.
HIRIGARAY, Deceased,

Appellant,

— vs. —

ARCHIE FINDLAY,

Respondent

Case
No. 8527

BRIEF OF APPELLANT

FILED
OCT 11 1956

Clerk, Supreme Court, Utah

PETER M. LOWE,
Counsel for Appellant

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POINT II. THE COURT ERRED IN FAILING TO SUSTAIN PLAINTIFF'S OBJECTION TO THE TESTIMONY AS TO WHAT WAS SAID TO THE GRANTOR AT THE TIME THE DEED WAS MADE.

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Appellant,

— vs. —

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BRIEF OF APPELLANT

STATEMENT OF FACTS

The action in the lower Court was brought by the Executor of the Estate of Nancy E. Hirigaray, deceased, for the purpose of setting aside a deed of conveyance to certain real property located in Davis County, Utah. The facts are as follows: the defendant, Archie Findlay, lives in Blackfoot, Idaho, and is a nephew of the deceased-grantor; the deceased, Nancy E. Hirigaray, lived in Layton, Utah, until just before her death on January 12, 1955; in the early spring of 1949, the deceased wrote to Archie Findlay and asked him to come down to help her with

her property (TRS 19 and 26); on April 26, 1949, Archie Findlay came from Idaho and picked the deceased up in his car and they went together to the Barnes Banking Company, Kaysville, Utah, where the deceased executed a deed (Ex. A.), together with instructions as to how the property or its proceeds was to be divided upon her death (TRS 19 and 29); the deed and instructions were left at the Barnes Banking Company in an envelope marked "Nancy E. Hirigaray and Archie Findlay" (Ex. C.); on June 27, 1949, Hirigaray executed another set of instructions by which she eliminated two persons named in the first instructions (Ex. 1.) and picked up the first instructions (TRS 37 and 41); on July 11, 1952, Hirigaray went to the Barnes Banking Company and executed a new set of instructions (Ex. 2.), and then again on March 15, 1954, Hirigaray again changed her instructions; on the day of the execution of the deed Hirigaray had Archie Findlay's name put on two savings accounts in two Salt Lake City Banks but subsequently put another person's name on the accounts and removed the name of Archie Findlay (TRS 22); after execution of the deed Archie Findlay returned to Idaho and did not see the deed or instructions again until after the death of Hirigaray in January, 1955.

ARGUMENT

POINT 1

THE WEIGHT OF THE EVIDENCE SHOWS CLEARLY THAT THE GRANTOR ON THE DEED HAD A TESTAMENTARY PLAN IN MIND AND FAILED TO COMPLY WITH THE STATUTORY REQUIREMENTS FOR A TESTAMENTARY DISPOSITION.

The basic problem in this action is whether or not the plaintiff's decedent legally delivered a certain deed dated April 26, 1949, to the defendant so as to create in him a then present interest; or whether the decedent really intended to create a testamentary plan of distribution of this property, which plan must fail because it did not conform to the statutory requirements for such plans.

The law of our state in this field is succinctly stated in the recent case of *First Security Bank v. Burgi* —U—, 251 P2d 297 (1952) which reads in part as follows:

“(1) Delivery is essentially a matter involving intent, and such intent is to be arrived at from the facts and surrounding circumstances, both before and after the date of the deed, including declarations of alleged grantor where it appears the declarations are made fairly and in ordinary course of life.”

(2) Where father executing deed and bill of sale in favor of son intended that deed and bill of sale were to become operative only upon death of father, the deed and bill of sale were testamentary in character and intent and were inoperative for failure to conform to statutory requirements for testamentary disposition.”

This action is brought by the Executor of the alleged grantor's estate for the purpose of bringing the property within the estate and under the jurisdiction of the probate court. The defendant did not pay anything for the property. He testified that the decedent asked him to do her a favor and he said that he would do so. (TRS 19 and 26). The defendant and decedent went to her bank where a Mr. Gailey was instructed to prepare a deed form. The decedent said that she wanted to make a deed to defendant and that he was to sell the land any time after her death and distri-

bute the money to certain designated persons. Even at the time of trial, defendant did not pretend that there was any other purpose but to sell the property after decedent's death and make distribution in accordance with her instructions (TRS 19, 24, 25 and 27). The deed was put in an envelope marked (among other things) with the two names "Nancy E. Hirigaray and Archie Findlay." A separate sheet of instructions as to the distribution of the proceeds of the sale of her property after her death was also included in the envelope with the deed. After the deed was signed and left at the Barnes Banking Company, Kaysville, Utah, the defendant went back to his home in Idaho and did not discuss the matter of the property with decedent again, nor did he inquire at the bank about the deed until almost a month after decedent's death on January 10, 1955, when he obtained the deed and had it recorded. During the almost six years between the signing of the deed and its recordation decedent rented the farm lands, and collected rents, paid the taxes, and did not even discuss the deed or property with defendant. Further, the decedent continued to live on the premises and did all things in relation to said premises to the same extent as she had done previous to the signing of the deed and gave no indication of giving up the premises or ceasing to treat it as her own during her lifetime.

From the time the deed was made until the time of trial the defendant, Archie Findlay did not claim any interest in the real estate. The whole object of his participation in this matter was to accommodate Hirigaray in executing a testamentary plan of distribution of the Hirigaray estate. Just before Hirigaray went to the hospital on what proved to be her final illness Archie Findlay talked to her in order "to get it all straightened out as to how she wanted everything divided, the household furniture and stuff, so

there would be no argument about it later” (TRS 25). It was in July, 1952, that Hirigaray rewrote her instructions as to the distribution of her estate at which time Archie Findlay appears as a distributee for the first time (Ex. 2). The written instructions have an appearance and language much like that of a codicil to a will — they are testamentary in tone.

On June 27, 1949, the decedent went to the Barnes Banking Company and made a set of instructions which reads in part:

“After my death said Archie Findlay was to dispose of the property and divided the proceeds of sale among several others that are mentioned on a statement made by me on 26th of April, 1949. Since that time I have given cash to Mrs. Mabel Timothy and Myrtle Schofield, and for that reason they are to not have any share of proceeds coming from the sale of real estate and improvements and the total shall be divided among the others mentioned in said statement of April 26, 1949.”

At the time of trial the original instruction sheet could not be produced and its loss being explained by Mr. Gailey to the effect that Mrs. Hirigaray picked it up on June 27, 1949 (TRS 37).

On July 11, 1952, decedent went to her bank and had a new set of instructions prepared which read in part as follows:

“The understanding that I have is that at my death he is to dispose of the property and the proceeds from sale to be divided among the following persons:

To Mrs. Ann Jensen of Blackfoot, Idaho, three hundred dollars; Josephine Avery of Layton, Utah, five hundred dollars; to Margaret Nord three hundred dollars; the remainder to be divided equally among the following named persons: Archie Findlay of Blackfoot, Idaho, William Findlay of Blackfoot, Idaho, George Findlay of Blackfoot, Idaho, Mattie Miles of Blackfoot, Idaho, Mrs. Ruth Wilkinson, all of the above being nephews or nieces of mine, also Arthur Findlay of Layton, Utah, Stephen T. Findlay of Clearfield, Utah, and Parley Findlay of Ogden, Utah. In the event that either of the above die before I do then if they leave any issue their share to be divided among the children of deceased."

On March 15, 1954, the decedent altered her instructions as follows:

"March 15, 1954. Ben Nord is now dead and for that reason I ask that his share be divided equally among the others mentioned. That is what he would have received to be divided among others as tho he had not been mentioned at all."

The testimony of Mr. Gailey and the defendant did not disclose any statement of decedent contrary to the written words of these various instruction sheets (TRS 45). Defendant candidly admits that decedent told him he could sell the property "anytime after her death."

A review of the evidence of this case creates and compels the inescapable conclusion that the decedent had a testamentary plan and intent in mind when she executed the deed on April 26, 1949. It is fitting and proper that the Court declare the decedent's deed null and void and that the property be delivered to plaintiff to be distributed in accordance with the orderly and protective procedures of the probate jurisdiction of our Courts.

POINT II

THE COURT ERRED IN FAILING TO SUSTAIN PLAINTIFF'S OBJECTION TO THE TESTIMONY AS TO WHAT WAS SAID TO THE GRANTOR AT THE TIME THE DEED WAS MADE.

The problem under this point concerns the evidence appearing on page 28 of the transcript and similar evidence appearing on page 36 of the transcript. On page 28, Archie Findlay was being examined by Rex Hardy as follows:

Q. Now at the time you were in the bank was there any discussion about the delivery of this particular deed?

A. Yes, Mr. Gailey explained it to her.

Q. Do you recall what he stated?

Mr. Lowe: I object to the explanation of a third party, inadmissible, not being the statement of the deceased or grantor and it certainly would be hearsay, this man is not a party.

The Court: Objection overruled.

Later a motion was made to strike all of the testimony along this vein (TRS 30). Objection was also made to similar testimony by Mr. Gailey (TRS 36).

This situation comes squarely within the prohibition of our "dead man statute" Section 78-24-2 (3), UCA 1953.

Maxfield v. Sainsbury, 110 U. 280, 172 P2d 122
Sine v. Harper,U....., 222 P2d 571

The testimony of Mr. Gailey would not be inadmissible, perhaps, under the "dead man statute" but was a unilateral statement involving a conclusion of law to which there was no reply by Hirigaray. On page 45 of the trans-

cript Rex Hardy was cross-examining Mr. Gailey concerning the conversations at the time the deed was prepared. The following appears:

Q. At the time that this conversation was taking place did Mrs. Hirigaray make any statement indicating her understanding as to the need of delivering the deed?

A. I didn't get the last part.

Q. The Court: Did she make any statement to you?

Q. Mr. Hardy: Which would lead you to know, or indicate what her understanding was?

A. No. She did not!

At the very best this evidence is only admissible as an admission by silence. The law provides that such evidence is admissible only when it is a statement of fact (and not a conclusion of law) and when the statement is heard and understood by the person whose interest is affected.

31 Corpus Juris Secundum 1057,1060.

The evidence in this case falls far short of being an admission by silence. The evidence shows that at the very time of the deed another written instrument provided that "after her death the property was to be sold and divided among certain people. Hirigaray exercised her control over the property by naming new distributees and eliminating others upon three subsequent occasions. If Mrs. Hirigaray considered that she could change the distributees at her pleasure and eliminate some (or all), then she certainly did not intend to relinquish title and control when the deed was made.

CONCLUSION

Certainly the weight of the evidence is to the effect that the deceased had a testamentary plan in mind at the time the deed was made, and thus it should be held to be void in order that the property be made a part of the decedents estate and be distributed under the orderly processes of the Courts. It is easy to see that should the defendant fail to comply with the express will of Mrs. Hirigaray as contained in her various written instructions, then a number of Court actions would probably ensue.

The decision of the lower Court should be reversed.

Respectfully Submitted,

PETER M. LOWE

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