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IN THE SUPREME COURT OF THE STATE OF UTAH

DOUGLAS FAIRBANKS CLOSE,

Plaintiff-Appellant,

vs.

ALLENE CLOSE ADAMS,

Defendant-Respondent.

District Court No. 70191

Supreme Court No. 18204

BRIEF OF PLAINTIFF AND APPELLANT, DOUGLAS FAIRBANKS CLOSE

Appeal from a Final Judgment of the

Second Judicial District Court for Davis County

Honorable Douglas Cornaby, District Judge

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FILED

MAR 17 1982

Clerk, Supreme Court, Utah

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CASES CITED

CONSTITUTION OF THE UNITED STATES

LEGAL ENCYCLOPEDIAS

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IN THE SUPREME COURT OF THE STATE OF UTAH

DOUGLAS FAIRBANKS CLOSE,

Plaintiff-Appellant, District Court No. 70191

vs.

ALLENE CLOSE ADAMS, Supreme Court No. 18204

Defendant-Respondent.

BRIEF OF PLAINTIFF AND APPELLANT, DOUGLAS FAIRBANKS CLOSE

NATURE OF THE CASE

This is an action involving Plaintiff-Appellant's ownership of certain Utah Power and Light Stock which he had received a joint ownership with the Deceased Mrs. Edith Branscomb, and which passed to him under his rights of survivorship upon the death of the decedent. The Honorable Douglas Cornaby ORDERED, or ADJUDGED at the close of the trial that the said Stock would be divided which was legally impossible.

DISPOSITION IN LOWER COURT

The matter came to trial on November 13, 1981 in the Second Judicial District Court of Weber County, State of Utah, before the HONORABLE DOUGLAS L. CORNABY. He received, it after this honorable Court had reversed the decision of Judge Ronald O. Hyde and found for the Plaintiff-Appellant as to his holding a tenancy in common with the Defendant-Respondent on the home and Real property received

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by the death of the mother, Edith Branscomb. The Judge complied with the findings of this Court and awarded an undivided ½ interest in the said property to the said Appellant. The Court then awarded ½ of the shares of Utah Power and Light stock to the Defendant-Respondent. It is that portion of the judgement that this appeal is taken from. The Judgement was signed by the Court on the 22nd day of December 1981, and the Appellant filed his Notice of Appeal on the 6th day of January 1982. It is pursuant to that Notice of Appeal that this is before this Honorable Court.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks for relief from the Judgement of the lower court by a reversal of that portion of the Court's judgement which illegally divests the said Appellant of the Utah Power and Light stock which is rightfully his by reason of the death of Mrs. Branscomb in 1977.

STATEMENT OF FACTS

1. In 1962 Plaintiff-Appellant's and Defendant-Respondent's (brother and sister) mother, EDITH BRANSCOMB, (now deceased) conveyed her home and real property at 2527 Gramercy, Ogden, Utah in joint tenancy to herself and her daughter, the Defendant-Respondent. She also conveyed 740 shares of stock in Utah Power and Light in joint tenancy to herself and her son, the Plaintiff-Appellant. R.35

2. Later, on July 29, 1977, the Decedent while still alive signed and delivered a Quit Claim Deed to her son, Plaintiff-Appellant her interest in the said real property.

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3. There is no issue of fact as to the Decedent's competancy to convey the properties as she did on the above referred to occasions. (See R.194)

4. The validity of the July 29th 1977 Deed has heretofore been determined by the Supreme Court of the State of Utah to be a valid Deed and that the conveyance of the Decedent's interest in the real property had the effect of creating a tenancy in common between the parties to this appeal. R.128

5. After being remanded to the District Court of Weber County, the Honorable Douglas L. Cornaby, after hearing the evidence about the competancy of the Decedent and without any evidence at all of a similar intervivos modification of the joint tenancy relationship of the Plaintiff-Appellant and the deceased mother, the Court by his memorandum decision of November 13th, 1981 which was finally reduced to judgement on December 22, 1981, divested the Plaintiff-Appellant of one half (½) of the Utah Power and Light Stock. R.198.

ARGUMENT

ISSUES

1. WHETHER THE COURT MAY LEGALLY ALTER OR MODIFY THE RIGHTS OF OWNERS OF STOCK IN JOINT TENANCY CREATED IN 1962 BY A PERSON OF SOUND MIND, WHICH HAS AFTERWARD RECEIVED OR OWNED IN TOTAL BY THE SURVIVOR OF THE JOINT TENANCY UPON THE MERE FINDING OF THE COURT THAT THE DECEDENT LOVED HER CHILDREN EQUALLY, WANTED THEM TO HAVE THE PROPERTY WITHOUT IT HAVING TO BE PROBATED AND THAT SHE WANTED TO BE FAIR.

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2. WHETHER THE COURT MAY LEGALLY SPECULATE AS TO THE INTENTION OF A DECEASED PERSON FROM THE FOLLOWING FACTS:
A. A CONVEYANCE INTO JOINT TENANCE WITH HERSELF AND HER DAUGHTER IN 1962 OF A HOME AND REAL PROPERTY.
B. THE CREATION OF A TENANCE IN COMMON BETWEEN HER CHILDREN BY HER CONVEYANCE OF HER INTEREST IN SAID REAL PROPERTY TO HER SON IN 1977.
C. THE ABSENCE OF A LIKE TYPE OF CONVEYANCE OF HER INTEREST IN THE UTAH POWER AND LIGHT STOCK TO CREATE A TENANCY IN COMMON BETWEEN HER CHILDREN.

3. WHETHER IT IS AN ABUSE OF DISCRETION AND JUDGMENT TO INFER THAT THE DECEDANT AFTER THE CONVEYANCE OF HER INTEREST IN THE REAL PROPERTY ON THE 29th OF JULY 1977 TO HER SON STILL INTENDED THAT THE DAUGHTER RESPONDENT WOULD OWN THE HOUSE AND REAL PROPERTY AND THE SON APPELLANT WOULD OWN THE UTAH POWER AND LIGHT STOCK SEPARATELY, OR IN THE ALTERNATIVE THAT ONE HALF (½) OF EACH OF THE PROPERTIES WOULD BE DIVIDED BETWEEN THE TWO PARTIES.

POINT 1

ABSENT SOME AFFIRMATIVE ACT ON THE PART OF EDITH BRANSCOMB OR THE PLAINTIFF-APPELLANT PRIOR TO EDITH BRANSCOMB'S DEATH IN 1977, THE UTAH POWER AND LIGHT STOCK, WHICH WAS HELD IN JOINT TENANCY BETWEEN SAID PLAINTIFF-APPELLANT, AND THE DECEDENT PAST ABSOLUTELY TO PLAINTIFF-APPELLANT, AND THE COURT'S JUDGMENT DIVESTING APPELLANT'S OWNERSHIP OF SAID PROPERTY WAS ILLEGAL AND UNCONSTITUTIONAL.

It seems almost superfulous to be arguing the point of law covering the Trial Court's Decision on the 13th day of November 1981. So basic, and so widely understood is the law governing Joint Tenancies and the rights of survivorship, and the law governing a persons absolute ownership of property, that this Honorable Court likely could rule from the bench.

There is no issue of fact as to the conveyance of the Utah Power and Light Stock to the Plaintiff-Appellant and Mrs. Edith Branscomb in joint tenancy in 1962.

There is no issue of fact as to the Stock ownership remaining in the form of a joint tenancy, unaltered by the affirmative act of either of the joint tenants until Mrs.

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Branscomb's death in 1977

While the word's "joint tenancy" as it relates to the Stocks was never used in the trial the following stipulations and testimony was provided for the trial court.

> MR. FROST: Your Honor, the parties have stipulated at this point that as far as the accounting is concerned that we are willing to accept the condition that exists at the present between the parties, regardless of who should prevail. That the accounting would not go back of this date; is that correct?
> MR. VLAHOS: That's correct. PART. TR. 2

CROSS EXAM OF DOUGLAS CLOSE

Q. In 1962 did she convey to your sister the house reserving as joint tenants with her and your sister, Arlene on that home?

A. I think her nome is Allene

Q. Allene, Mrs. Adams.

A. Yes.

Q. At the some time did she then turn over to you some shares of stock in Utah Power and Light?

A. That's right.

Q. And how many shares were there at that time, if you recall?

A. 740

Q. Now, how many shares are there today, sir?

A. 1,480

Q. And at that time your mother gave your sister the house and gave you the stock; is that correct?

A. That's right.

* * * * *

Q. Now, you still retained the shares of stock and had in your possession or control over the years; is that correct?

A. Thats' right. PART. TR. 4-6

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DIRECT EXAMINATION ALLENE ADAMS Cont.

Q. Now, it's true, is it not, that on or about May 1st, 1962, your mother gave a piece of property to you, conveyed it to you in your name and her name as joint tenants; is that correct?

A. I guess that was the time she asked me what I wanted to do, and I told her just do what she wanted.

Q. At the same time did she have stocks in Utah Power and Light?

A. Yes.

Q. And do you know what she did with those?

* * * * * * * * * * *

Q. You are asking that the Court do one of two things, Mrs. Adams. You are asking that the Court either take the stock and the home and divide it equally between you and your brother, take all the stock and the home, add it up and divide it equally; or your brother keep the stock and you keep the home; is that correct?

A. I guess you could say it that way.

Q. Okay.

A. I have always felt like the stock should have been his because this is what mother decided, but she also decided I should have the home, but I don't know.

PART. TR. 6-8.

The most that could be surmised from the above is that Mr. Close owned absolutely the stock. It cannot be surmised that the Respondent, Mrs. Adams, owned the home. It passed into a tenancy in common as this Honorable Court has decided.

Whether the trial court had before it that the Stock passed absolutely to Mr. Close in 1962 or later under his rights of survivorship upon Mrs. Branscomb's death in 1977 is immaterial. There was nothing to divest him of absolute ownership of the said stock, while there was the valid Deed in the case of the real property that caused Plaintiff

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-Appellant to receive an undivided one half interest in the said home and real property.

In the case of the stock, there has to be some legal basis upon which the Court has the power to divest the Plaintiff-Appellant of said stock.

Testimony disclosed little more than the fact that Mr. Close owned some stock which was given to him by the deceased Mrs. Branscomb. No mention was even made or evidence established that would show the relative value of the two properties. Such evidence could have shed some light upon Mrs. Branscomb's intentions to be fair and equitable, if in deed, that is even material under the circumstances. Why Mrs. Branscomb did what she did in changing her original plan is gross speculation.

Plaintiff-Appellant's counsel did not illicit testimony from the said Appellant concerning the uninterrupted joint tenancy on the Utah Power and Light Stock, and that it passed to the said Appellant in 1977 upon Mrs. Branscomb's death. He possibly failed to do so since there appeared to be no way under any circumstances that a Court could divest property which was admittedly and undisputedly his.

There was just no evidence provided the Court to enable it to do what it did, to wit: enforcing the deed giving Plaintiff-Appellant the undivided one half of the real property, and then divesting the Appellant of ½ of his Utah Power and Light Stock.

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The record does disclose the nature of the original conveyance of the stock. It was conveyed in joint tenancy by the decedent, Mrs. Branscomb, to herself and Mr. Close, the Appellant. R. 35. The record, except as to the Answer to Respondent-Defendant's Interrogatory admitting to the stock conveyance March 20, 1982 creating the joint tenancy, Ibid., is absolutely silent. There is nothing to indicate a change in the original plan created by the decedent.

As a result, there remained all of the legal elements of a joint tenancy between Mrs. Branscomb and the Appellant necessary to cause absolute ownership in the Appellant upon the death of Mrs. Branscomb.

> A joint interest is one owned by two or more persons in equal shares by a title created by a single will or transfer when expressly declared in the will or transfer to be a joint tenancy. . .
>
> . . . four unites are essential to an estate in joint tenancy; unity of interest, unity of time, unity of title and unity of possession. . .
>
> Tenhet vs. Boswell, 554 P2d 331

With the death of Mrs. Branscomb, Appellant, being the survivor on the joint tenancy of the Utah Power and Light Stock, he became the absolute owner.

> Survivorship is the distinctive characteristic or major incident of an estate in joint tenancy. Indeed, the right of survivorship is inherent in a joint tenancy estate under the common law, and the incident of survivorship grows out of the application of common-law principles wholly independent of statute. Such right is viewed as existing by implication in a joint tenancy. 48 A C.J.S. JOINT TENANCY § 3

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The Utah Supreme Court has long recognized the law relating to Joint Tenancy, and absent a showing of fraud, mistake, incapacity, or other infirmity, or absent a showing by clear and convincing evidence that the parties intended otherwise the rule of survivorship is applicable and the presumption of validity of the joint tenancy and right of survivorship exists where both parties are living or where a party has deceased. Pagano v. Walker, 539 P.2d 452 (1975); McCullough v. Wasserback, 418 P. 2d 691(1974); Hobbs v. Fenton, 25 Utah 2d 206, 479 P. 2d 472 (1971) Woodward v. Monson, 23 Utah 2d 318, 462 P. 2d 715 (1969); Continental Bank & Trust Co. v. Kimball, 21 Utah 2d 152, 442 P. 2d 472 (1968); Haywood v. Gill, 16 Utah 2d 299, 400 P.2d 16 (1965): Tangren v. Ingalls, 12 Utah 2d 388 (1962): Braeger v. Loveland, 12 Utah 2d 384, 367 P.2d 177 (1962)

The Court, and the Honorable Douglas Cornaby, when it set forth its Findings of Fact and Conclusions of Law wherein it stated:

> 2. That the Court finds that Mrs. Branscombe was certainly competent in 1962 when she began to make a disp osition of her property to both the Plaintiff and to the defendant, her son and daughter respectively.
> 3. The Court believes and finds from the testimony that was given that the nature of what the decedent was doing was transfering the property so that she could avoid probate by distributing this property to those who meant the most to her and to whom she thought ought to have the property. R. 195

The Court in making those findings of fact has foreclosed himself from the action he took, because to find

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that Mrs. Branscombe was competent to do what she did and to find that her motive was to prevent probate, he is also finding that Mrs. Branscombe intended to give the rights of survivorship and absolute ownership to her son of the Utah Power and Light Stock. To then conclude in the Conclusions Law that:

> 3. The court concludes that one-half of the stocks that the plaintiff now has in his possession shall be the property of the Defendant, and that said stock may be ordered sold or the Plaintiff may transfer one-half of the shares, plus any accured dividends to the Defendant from the time of this hearing.

is absured. R.196-197

This Court held in Hobbs v. Fenton, 25 Utah 2d 206, 479 P. 2d 472 (1971) that

> Where the father understood that by placing title to his stocks and bank account in joint tenancy with his daughter with full rights of survivorship, the same would automatically vest full title in the daughter on the father's death. at p.

This case seemed to place emphasis on the fact that the father was shown to have desired and intended such a result, and there was no claim or evidence to indicate any fraud, mistake or undue influence on the part of the daughter. The Court held that the proper passed to the daughter on the father's death. Ibid, p.

There is no question but that Mrs. Branscombe intended to see the stocks pass to the Appellant upon her death, and the trial Court so held. To make such a finding and then divest him of the stock is to deny to the Appellant rights

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to his property. John Locke, the English philosopher which is said to be the source from which Thomas Jefferson got much of the language that went into the Declaration of Independance. John Locke said in his Second Treatise on Government that men have "inalienable rights" to life,liberty and property. While Jefferson substituted the word "property" for "the pursuit of happiness" the word "property" was brought back into the same language that was put in Article 14 Section 1 of the Constitution of the United States i.e. "No State shall deny to any person life, liberty or property without due process of law." While the Courts concentrate upon the process, and require that all of the procedures must be followed to deny a person his property, the real sacred element in that provision is the word "law". A person's property should be considered like his life,"inalienable",unless there is a compelling reason to so alienate it from him.

There is no compelling reason given by the Court in any of its Findings of Fact to divest the stock as it did, and certainly not a finding that ". . . the decedent loved both the Plaintiff and the Defendant equally. . . (or) . . . the Court finds that nothing has been presented in Court to pursuade the Court that she loved the Defendant less . . ."

CONCLUSIONS

The Court cannot substitute its own "belief" in what it thought the Decedent, Mrs. Edith Branscombe, intended for what is presumed under the law that she intended by the act of (1) creating two different joint tenancies with herself on two different properties, (2) thereafter transferring her

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own interest in the one property, to wit; the home and real property under joint tenancy between her and her daughter, and (3) allowing the Stock to remain as it was, in joint tenancy between her and her son.

Under the law, from the foregoing facts, for what ever reason known only to her, it must be presumed that she intended that the Appellant have all of the stock and one half (½) interest in the house and real property. The Trial Court has to first say that Mrs. Branscombe made a mistake. Loving the children equally as she did, she would have given to her daughter her own joint tenancy interest in the Stock if she had only thought of it. Therefore the Court will say she made a mistake, and will correct her mistake.

Equally as good speculation is the speculation that the home and real property was later transferred to the son as a protective measure to become his because of his favorable attitude that she should not be put in a nursing home, but be allowed to remain in the home.

From the testimony of Dr. Benders who treated and cared for her medical needs we read the following:

> Q. What date was she dicharged from the hospital at that time?
> A. She was discharged on February 3rd, '77.
> Q. Did she express to you at that time any concern about going home?
> A. Yes, she did. She was rather insistent on being discharged back to her own home.
> Q. Had you discussed with her going to a nursing home?
> A. We had.
> Q. And what did you decide about that issue?
> A. Well, because of the rather marked amount of physical assistance that she required I think our recommendation was that she go to a nursing home. However, she was determined to go home, and she in fact made that decision and

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the family concurred with it. R. Tr. 96-97.

While it is gross speculation comparable to that used by the Court in its findings, one could conclude that the house was transferred by the decedent to the one she believed would make certain that she could live out her last days there. In this case that would be the son, the Appellant herein.

If we wanted, we could go into the testimony of Janice Arnold who also stated that Mrs. Branscomb didn't want to go into a rest home, and infer that the later disposition of her property was designed to prevent that from happening. This too would undoubtedly be called speculation. R. Tr. 124.

Hence we understand the reasons given by this honorable Court in its rulings that absent some evidence clearly and convincingly tending to show that she did not intend to create the joint tenancy, it must be presumed she intended the result that she created.

That portion of the Court's Judgement that requires that the Appellant surrender one half (½) of the Utah Power and Light Stock should be reversed, and the Appellant be allowed to keep said stocks.

RESPECTFULLY SUBMITTED THIS

_____ day of March 1982.

By _____

_____

Attorney for Appellant.

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CERTIFICATE OF MAILING

I, Lyle J. Barnes, Esq., hereby certify that I mailed two true and accurate copies of the aforegoing Appellant's Brief to the attorney for the Respondent, Pete N. Vlahos, or personally served two copies said Brief to his office at Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401.

LYLE J. BARNES, ESQ.

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