

1990

In the matter of the estate of Lyman W. Hemmert aka L. W. Hemmert, deceased, Rose Nagy Hemmert : Brief of Appellant

Utah Supreme Court

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Brian R. Florence; Florence & Hutchison; attorney for personal representative.

Ben H. Hadfield; Mann, Hadfield & Thorne; attorney for appellant.

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BRIEF

900482

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF)
LYMAN W. HEMMERT aka L. W.)
HEMMERT, Deceased,)

ROSE NAGY HEMMERT,)

Appellant,)

Supreme Court No. 900482

Priority (16)

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FIRST DISTRICT COURT
IN AND FOR BOX ELDER COUNTY, STATE OF UTAH
HONORABLE F. L. GUNNELL, JUDGE

BEN H. HADFIELD
MANN, HADFIELD & THORNE
98 North Main - Zions Bank Building
P. O. Box 876
Brigham City, Utah 84302-0906

Attorneys for Appellant

BRIAN R. FLORENCE
FLORENCE & HUTCHISON
818 - 26th Street
Ogden, Utah 84401

Attorneys for Personal
Representative

FILED

APR 19 1991

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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P. O. Box 876
Brigham City, Utah 84302-0906

Attorneys for Appellant

BRIAN R. FLORENCE
FLORENCE & HUTCHISON
818 - 26th Street
Ogden, Utah 84401

Attorneys for Personal
Representative

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| Table of Authorities | ii |
| Jurisdiction of Appellate Court | 1 |
| Statement of Issues Presented for Review | 1 |
| Constitutional Provisions and Statutes Involved | 1 |
| Statement of the Case | 2 |
| Statement of Facts | 3 |
| Summary of Arguments | 5 |
| Argument | |
| I. The Validity of the Prenuptial Agreement Should be Determined by the Law of the State Where the Contract Was Made. | 6 |
| II. Utah has the Most Significant Contacts with the Prenuptial Agreement. | 8 |
| III. If Florida Law is Applied, a "Meeting of the Minds" is a Prerequisite to the Creation of a Valid Agreement. The District Court Erred in Refusing Appellant's Jury Instruction on This Issue and Directing Judgment for the Estate. | 12 |
| IV. If Florida Law is Applied, Fraud May Void the Prenuptial Agreement. The District Court Erred in Refusing Appellant's Jury Instructions on the Issue of Fraud and Directing Judgment for the Estate. | 16 |
| Conclusion | 17 |
| Appendix Jury Verdict July 13, 1990 | |
| Memorandum Decision August 10, 1990 | |

TABLE OF AUTHORITIES

| <u>CASE</u> | <u>PAGE(S)</u> |
|--|----------------|
| <u>Allstate Ins. Co. v. Sullam</u> , 349 N.Y.S.2d 550 (1973) | 9 |
| <u>Ashland Oil, Inc. v. Tucker</u> , 768 S.W.2d 595 Mo. Ct. App. (1989) | 9 |
| <u>Berman v. Berman</u> , 749 P.2d 1271 (Utah App. 1988) | 9 |
| <u>Boggs v. Anderson</u> , 381 P.2d 419, 72 N.M.136 (1963) | 6 |
| <u>Boise Cascade v. Utilities Inc.</u> , 468 N.E.2d 442 127 Ill. App.3d 4 (1984) | 9 |
| <u>Carlson v. Boryla</u> , 490 P.2d 700 (Colo. App. 1971) | 6 |
| <u>Consolidated Mut. Ins. Co. v. Radio Foods Corp.</u> , 240 A.2d 47, 108 N.H. 494 (1968) | 9 |
| <u>Dairyland Ins. Co. v. State Farm</u> , 701 P.2d 806, 41 Wash. App. 26 (1985) | 9 |
| <u>D'Aston v. D'Aston</u> , 794 P.2d 500 (Utah App. 1990) | 9 |
| <u>Dick v. Dick</u> , 355 A.2d 110, 167 Conn. 210 (1974) | 6 |
| <u>Dohm & Nelke v. Wilson Foods</u> , 531 N.E.2d 512 Ind. Ct. App. (1988) | 9 |
| <u>Estate of Roberts</u> , 388 So.2d 216 (Fla. 1980) | 13 |
| <u>Fowler v. A & A Co.</u> , 262 A.2d 344 (D.C. App. 1970) | 6 |
| <u>Goff v. Indian Lake Estates</u> , 178 So.2d 910 (Fla. 1965) | 13 |
| <u>Goodman v. Olsen</u> , 305 So.2d 753 (Fla. 1974) | 7 |
| <u>In re Danz' Estate</u> , 283 A.2d 282, 444 Pa. 411 (1971) | 6 |
| <u>Joiner v. McCullers</u> , 28 So.2d 823 (Fla. 1947) | 17 |
| <u>Kramer v. Bally's Park Place, Inc.</u> , 535 A.2d 466, 311 Md. 387 (1988) | 6 |

| | |
|---|-------|
| <u>Norse Petroleum A/S v. LVO Intern. Inc.</u> , 389 A.2d 771 (Del. Sup. 1978) | 6 |
| <u>Osborn v. Osborn</u> , 226 N.E.2d 814, 10 Ohio Misc. 171 (1966) | 9, 10 |
| <u>Owens v. Hagenbeck-Wallace</u> , 192 A.158, 58 R.I. 162 (1937) | 6 |
| <u>Padova v. Padova</u> , 183 A.2d 227, 123 Vt. 125 (1962) | 6 |
| <u>Reynolds v. Continental Mortg. Co.</u> , 377 P.2d 134, 85 Idaho 172 (1962) | 6 |
| <u>Ross v. Ross</u> , 393 P.2d 933, 96 Ariz. 249 (1964) | 6 |
| <u>Simms v. Metropolitan Life Ins. Co.</u> , 685 P.2d 321 (Kan. App. 1984) | 6 |
| <u>Telex Corp. v. Hamilton</u> , 576 P.2d 767 (Okla. 1978) | 6 |

STATUTES

| | |
|--|-------|
| Utah Code Annotated 75-2-201 | 2 |
| Utah Code Annotated 75-2-204 | 1 |
| Utah Code Annotated 78-2-2 | 1 |
| Florida Statutes Annotated §732-702(2) | 2, 13 |

OTHER AUTHORITIES

| | |
|---|---|
| Restatement (Second) of Conflict of Laws (1969) American Law Institute | 8 |
|---|---|

IN THE SUPREME COURT OF THE STATE OF UTAH

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| HEMMERT, Deceased, |) | APPELLANT'S BRIEF |
| |) | |
| ROSE NAGY HEMMERT, |) | Supreme Court No. 900482 |
| |) | |
| Appellant, |) | Priority (16) |
| |) | |

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellate review of the District Court Judgment involves two questions of law to be reviewed for correctness. In both instances the standard of review involves a determination as to whether the District Court correctly applied the law in overturning the jury verdict and entering judgment for the estate. In reviewing questions of law, no deference is given to the trial court's position. Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989)

(Insert)

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| |) | |
| Appellant, |) | |
| _____ |) | |

JURISDICTION OF APPELLATE COURT

The Supreme Court of the State of Utah has jurisdiction over this matter as an appeal from a final Order of the District Court pursuant to UTAH CODE ANNOTATED 78-2-2 (as amended).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellate Review of the District Court judgment involves the following questions of law to be reviewed for correctness.

1. Was the District Court correct in applying Florida law to determine the validity of the Prenuptial Agreement executed in Utah by the parties on September 10, 1976?
2. If Florida law is applied in determining the validity of the Prenuptial Agreement, did the District Court err in entering judgment for the estate?

CONSTITUTIONAL PROVISIONS AND STATUTES HERE INVOLVED

UCA §75-2-204. **Waiver of right to elect and of other rights.** The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written

contract, agreement, or waiver signed by the party waiving **after fair disclosure**. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement. (emphasis added)

F.S.A. §732-702(2). No disclosure shall be required for an agreement, contract or waiver executed before marriage.

STATEMENT OF THE CASE

This case was filed pursuant to U.C.A. 75-2-201 whereby Appellant, Rose Nagy Hemmert, as the surviving widow of the deceased, Lyman Hemmert, exercised her right to an "elective share" of the deceased's estate. The personal representative of the estate raised a Prenuptial Agreement dated September 10, 1976 as a defense to the claim for elective share. This case was tried to a jury in the First District Court in Brigham City on July 12 and 13, 1990 and the jury returned a verdict finding there was not fair disclosure in the preparation and execution of the Prenuptial Agreement and it was, therefore, invalid. On August 10, 1990 the District Court issued a Memorandum Decision reversing its own jury instructions, ruling that Florida law should have been applied, and determining that since under Florida law no disclosure is required in the execution of a

Prenuptial Agreement, judgment should be entered for the estate and Appellant's claim for elective share denied.

STATEMENT OF FACTS

Rose Hemmert is an immigrant from Hungary, having come to the United States in the early 1970s. She has never had any formal training in English. In 1975 she met Lyman Hemmert in Miami, Florida. During the following year the parties courted each other, both in Florida and in Utah. Rose resided in Logan, Utah during the summer of 1976. At that time and for many years preceding, Lyman resided in Brigham City, Utah. Lyman's attorney, Dale M. Dorius, practicing in Brigham City, prepared a Prenuptial Agreement in behalf of Lyman. This agreement was executed by the parties on September 10, 1976 in Utah. The parties were married in Utah on September 16, 1976.

Rose testified that at the time the Prenuptial Agreement was signed, she had no comprehension as to the meaning or purpose of the agreement, but signed it because her prospective husband assured her that he would "take care of her." She further testified that at the time the Prenuptial Agreement was signed, she had not conferred with any legal counsel representing herself, nor had anyone who spoke Hungarian attempted to explain the meaning or content of the agreement to her. Attorney Dale M. Dorius testified that in preparing the Prenuptial Agreement he had negotiated with a Hungarian speaking attorney in Florida who represented Rose. The telephone records of Mr. Dorius for that time period did not document any telephone calls from his office

to such an attorney, nor could Mr. Dorius produce any correspondence either to or from such an individual.

Immediately after the marriage the parties traveled from Utah to Miami, Florida. During the entire ten and one-half year duration of the marriage the parties split their time between their condominium in Miami, Florida and an apartment which they always maintained in Brigham City, Utah. Lyman returned to Brigham City at least five or six times every year.

At the time of execution of the Prenuptial Agreement and throughout the entire term of the marriage the vast majority of Lyman's assets were located in Utah. Lyman died on February 9, 1987. On February 29, 1987 a Petition for Formal Probate of Will and Formal Appointment of Personal Representative was filed by Lyman's daughter, Alonna Cook, in the First District Court, Box Elder County, Utah. The Petition alleged: "At the time of death the decedent was domiciled in this county."

At trial Dr. Robert W. Belka, Chairman of the Foreign Language Department at Weber State College testified as an expert witness for the Appellant. He testified about an evaluation system used by the United States State Department in evaluating foreign language skills. Based upon his review of a 49 page deposition given by Rose Hemmert in December, 1989, he testified that Rose Hemmert's English language skills were insufficient for her to comprehend the meaning of the Prenuptial Agreement.

A letter dated March 9, 1981 in Lyman's handwriting addressed to an automobile insurance company was introduced into

evidence, wherein Lyman advised the insurance company that Rose was not fluent in the English language and probably did not understand the correspondence which it had sent to her. He requested that all future correspondence be directed to him, and provided only a Utah address.

The personal representative of the estate testified that in 1976 Rose "had a difficult time with the English language."

SUMMARY OF ARGUMENTS

The traditional and apparently majority rule in the United States is that the validity of an agreement is determined by the law of the place where the agreement was made. An emerging trend advanced by the American Law Institute suggests that the validity and interpretation of a contract should be governed by the jurisdiction having the most significant contacts with the agreement and the parties. The facts in this case dictate that under either of the foregoing theories, Utah law must be applied in determining the validity of the Prenuptial Agreement.

In the alternative, if Utah law is not applied to determine the validity of the Prenuptial Agreement, this matter should be returned to the District Court with directions to conduct a new trial. Under existing Florida law, a meeting of the minds is necessary to the creation of a valid agreement. Also, under Florida law, fraud or misrepresentation may void an otherwise valid agreement. The District Court refused Appellant's requested instructions on both of these issues.

ARGUMENT

I. THE VALIDITY OF THE PRENUPTIAL AGREEMENT SHOULD BE DETERMINED BY THE LAW OF THE STATE WHERE THE CONTRACT WAS MADE.

Counsel has not discovered any Utah Appellate Court Opinions concerning the "choice of laws" question presented by this case. A review of the case law from other jurisdictions indicates that the majority or traditional rule is lex loci contractus. This means that the contract is governed by the law of the location where the contract was made. The courts seem to particularly adopt this approach when addressing questions as to the validity of a contract. The following citations provide a representative sample of this approach:

Ross v. Ross, 393 P.2d 933, 96 Ariz. 249 (1964), Carlson v. Boryla, 490 P.2d 700 (Colo. App. 1971), Dick v. Dick, 355 A.2d 110, 167 Conn. 210 (1974), Norse Petroleum A/S v. LVO Intern., Inc., 389 A.2d 771 (Del. Superior 1978), Fowler v. A & A Co., 262 A.2d 344 (D.C. App. 1970), Reynolds v. Continental Mortg. Co., 377 P.2d 134, 85 Idaho 172 (1962), Simms v. Metropolitan Life Ins. Co., 685 P.2d 321 (Kan. App. 1984), Kramer v. Bally's Park Place, Inc., 535 A.2d 466, 311 Md. 387 (1988), Boggs v. Anderson, 381 P.2d 419, 72 N.M. 136 (1963), Telex Corp. v. Hamilton, 576 P.2d 767 (Okla. 1978), In re Danz' Estate, 283 A.2d 282, 444 Pa. 411 (1971), Owens v. Hagenbeck-Wallace, 192 A. 158, 58 R.I. 162 (1937), Padova v. Padova, 183 A.2d 227, 123 Vt. 125 (1962).

It is undisputed that the contract involved in this appeal was made and executed in the State of Utah. If the parties expected the contract to be governed by Florida law, logic dictates that a Florida attorney would have been retained to draft the agreement. The evidence shows that a Utah attorney prepared the agreement.

The trial court erred in its interpretation and application of Florida law. The court ruled that since by statute Florida does not require any type of disclosure in the creation of a prenuptial agreement, the jury instruction requiring fair disclosure as mandated by Utah statute, was improper. However, as noted, the Prenuptial Agreement was made and executed in Utah. Florida law states that the nature, **validity**, and interpretation of contracts, are to be governed by the lex loci of the country or state where the contracts are made or are to be performed; but the remedies are to be governed by the lex fori. Goodman v. Olsen, 305 So.2d 753 (Fla. 1974). If the trial court is consistent in its determination that Florida law governs in this case, then the Goodman case mandates that the trial court apply Utah law and, therefore, the "fair disclosure" test, in determining the validity of this contract. This means that the jury was properly instructed and has rendered a legitimate verdict determining the prenuptial agreement invalid.

II. UTAH HAS THE "MOST SIGNIFICANT CONTACTS" WITH THIS PRENUPTIAL AGREEMENT.

As an alternative to the traditional lex loci rule, a modern trend has emerged which adopts the Restatement (Second) of Conflict of Laws approach. Section 188 of the Restatement (Second) provides:

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the **most significant relationship** to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties, (citation omitted) the **contacts** to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state the local law of this state will usually be applied . . .

Restatement (Second) of Conflict of Laws § 188, p. 575 (1969)

(emphasis added).

If the most significant contact test is the law in Utah, then the foregoing principles apply to a Prenuptial Agreement in the same respect they apply to any other contract.

Utah Courts have applied general contract principles when interpreting prenuptial agreements. See D'Aston v. D'Aston, 794 P.2d 500 (Utah App. 1990), Berman v. Berman, 749 P.2d 1271, 1273 (Utah App. 1988). (A prenuptial agreement should be treated like any other contract).

A number of states have adopted the most significant contacts test, as articulated in the following opinions: Boise Cascade v. Utilities Inc., 468 N.E.2d 442, 127 Ill. App.3d 4 (1984), Dohm & Nelke v. Wilson Foods, 531 N.E.2d 512 Ind. Ct. App. (1988), Ashland Oil, Inc. v. Tucker, 768 S.W.2d 595 Mo. Ct. App. (1989), Consolidated Mut. Ins. Co. v. Radio Foods Corp., 240 A.2d 47, 108 N.H. 494 (1968), Allstate Ins. Co. v. Sullam, 349 N.Y.S.2d 550 (1973) and Dairyland Ins. Co. v. State Farm, 701 P.2d 806, 41 Wash. App. 26 (1985).

In its Memorandum Decision of August 10, 1990 reversing the jury verdict and directing judgment for the estate the District Court placed significant emphasis on the case of Osborn v. Osborn, 226 N.E.2d 814 (1966) 10 Ohio Misc. 171. Appellant has no quarrel with the Osborn opinion. In applying Osborn, the District Court failed to note distinguishing facts and misinterpreted the legal theory of the opinion. In Osborn the husband and wife executed a prenuptial agreement in Massachusetts, were married in Massachusetts, and thereafter returned to the husband's home in Ohio. In contrast to the

present case, however, the deceased had been a lifelong resident of the State of Ohio. The prenuptial agreement had been prepared by the deceased's Ohio attorney in the State of Ohio and then mailed to Massachusetts. Further, the majority of the deceased's property was located in the State of Ohio at the time of his death. Finally, Mr. Osborn's estate was being probated in the State of Ohio.

The District Court seems to believe that Osborn stands for the principal that the law of the "marital domicile" should govern in the validity and interpretation of prenuptial agreements. The Osborn opinion makes no such assertion but rather bases its decision upon the "most significant contacts" test. Osborn states:

It would appear that Ohio follows a developing conflict of laws principle being advanced by the American Law Institute which advocates putting more emphasis upon the intention of the parties and other additional factors designed to apply the law that has the **most substantial contacts** with the agreement in question.

. . . There can be little question that Ohio has the **most significant contacts** with and paramount interest in the parties, in the agreement, and in questions concerning its validity. Osborn, 10 Ohio Misc. 171, 226 N.E.2d at 818. (emphasis added)

A review of the facts in Osborn demonstrates that Ohio had the most significant contacts. That is the standard established by Osborn.

The following facts are dispositive in determining which jurisdiction has the most significant contacts with the Hemmert Prenuptial Agreement:

1. The Prenuptial Agreement was prepared in Utah by a Utah lawyer. T. 166 L. 22-25, T. 167 L. 1-3, T. 168 L. 17-18, Pl. Ex. #2.

2. The Prenuptial Agreement was executed in Utah. T. 84 L. 12-23, Pl. Ex. #2.

3. Lyman Hemmert resided in Utah for many years prior to his marriage to Rose Hemmert. T. 231 L. 6-20, Def. Ex. #4 and #10, Dorius Dep. P. 2 L. 18-23.

4. Rose Hemmert resided in Utah for approximately two months prior to signing the Prenuptial Agreement. T. 53 L. 5-15, T. 232 L. 8-18, Def. Ex. #4.

5. Lyman and Rose Hemmert were married in the State of Utah September 16, 1976. T. 59 L. 8-12, Def. Ex. #4.

6. At the time of execution of the Prenuptial Agreement, most of Lyman Hemmert's assets were located in Utah. T. 172 L. 14-25.

7. At the time of his death, most of Lyman Hemmert's assets were located in Utah. (Inventory, Document #21)

8. Lyman and Rose Hemmert maintained an apartment in Brigham City, Utah, throughout the ten and one half years of marriage. T. 152 L. 12-15.

9. During the marriage Lyman Hemmert returned to Brigham City, Utah, at least five or six times every year. Rose Hemmert returned to Brigham City at least every summer. T. 66 L. 16-24, T. 153 L. 3-5.

10. Correspondence issued by Lyman Hemmert in 1981 showed a Brigham City, Utah, return address. Pl. Ex. #1.

11. The Probate of Lyman Hemmert's Estate was commenced in Brigham City, Box Elder County, Utah, on February 19, 1987.
(Petition, Document #3)

12. In her Verified Petition for Formal Appointment of Personal Representative, Alonna Cook stated under oath that Lyman W. Hemmert was domiciled in Box Elder County, Utah at the time of his death on February 9, 1987. (Petition, Document #3)

Appellant challenges the estate to compile a listing of the facts in this case which indicate the State of Florida has the most significant contacts with this Prenuptial Agreement. The list will be both short and anemic.

The District Court's judgment notwithstanding the verdict should be reversed. Inasmuch as the jury was instructed according to Utah law, the jury's verdict should be reinstated.

III. EVEN UNDER FLORIDA LAW A "MEETING OF THE MINDS" IS A PREREQUISITE TO THE CREATION OF A VALID CONTRACT. THE COURT ERRED IN DIRECTING JUDGMENT FOR THE ESTATE.

Appellant's requested Jury Instruction No. 6 reads:

A condition precedent to the enforcement of any contract is that there must be a meeting of the minds of the parties. That is, an agreement as to what constitute the terms or provisions of the contract. This mutual assent of both parties is essential to create a valid contract. The party who claims there is a contract, in this case the estate of Lyman W. Hemmert, has the burden of proving that there was a meeting of the minds and a mutual assent at the time the prenuptial agreement was signed.

The trial court refused to include this instruction in its charge to the jury and it was, therefore, unaware of any such legal requirement. Even if this court determines that Florida law should apply in determining the validity of the Prenuptial Agreement, Florida law dictates that Appellant's requested Instruction No. 6 should have been given to the jury.

Opposing counsel and the lower court seem to have placed an unwarranted amount of emphasis on Florida Statute §732.702(2) which states that no disclosure shall be required for a prenuptial agreement. In interpreting this statute the Florida High Court has stated that the statute does not abolish the wife's right to sue to have a prenuptial agreement set aside, but only alters one of the elements that the court may consider in determining the validity of the Prenuptial Agreement. Estate of Roberts, 388 So.2d 216 (Fla. 1980).

In Florida an essential component to creation of a valid agreement is a "meeting of the minds."

It is essential to the creation of a contract that there be a mutual or reciprocal assent to a certain and definite proposition. Until the terms of an agreement have received the assent of both parties the negotiation is open and imposes no obligation upon either. Without a **meeting of the minds** of the parties on an essential element there can be no enforceable contract. Goff v. Indian Lake Estates, 178 So.2d 910 (Fla. 1965). (emphasis added)

The following transcript excerpts demonstrate that there was no meeting of the minds because Rose Hemmert had no idea what the Prenuptial Agreement said or did.

- Q. Let's back up for a minute, the papers that Mr. Dorius prepared, did Lyman tell you what those papers were?
- A. I didn't know who Dorius was. Lyman said we sign papers and we go to the meeting. I figure I just sign it.
- Q. Did he tell you why you were signing the papers?
- A. No.
- Q. Did he tell you what the papers were?
- A. No.
- Q. Did you know what they were?
- A. I told him, what is this? He said don't worry I take care of you. We signed and later got married." (T. 55 L. 6-20.)
- Q. Did Mr. Dorius tell you anything about the papers?
- A. No.
- Q. Did Mr. Dorius ask you if you spoke and understood English?
- A. No. We did not talk about anything.
- Q. Did anyone translate the papers or help you by speaking Hungarian to understand the papers?
- A. No.
- Q. Did you ever talk with your own attorney, an attorney separate from Mr. Dorius before you signed the papers?
- A. No. I had no attorney. I didn't know.
- Q. When you signed that paper did you know what the paper meant or what it said?
- A. No. I had no idea. (T. 56 L. 2-14 and 23-25)

After being qualified as a linguistics expert and explaining a standardized test used by the United States State Department in

evaluating an individual's skills in a foreign language, Dr. Robert Belka testified that he had examined a 49 page deposition transcript from Rose Hemmert and also examined the Prenuptial Agreement. Dr. Belka testified that the Prenuptial Agreement was written at a Level 5 language level, which is the most sophisticated classification.

Q. Would a person with Rose Hemmert's 1989 English language skills be able to read and understand and comprehend Exhibit 5 which you have in your possession?

A. No. As I said, as a general rule you can say your productive skills are one level lower than the receptive skills. She's Level 1. She could read and listen and hear at Level 1, but Level 5 would be beyond her linguistically." (T. 138 L. 1-9)

The personal representative of the estate, Alonna Cook, testified:

Q. Rose Hemmert had a hard time with the English language when you met her, didn't she?

A. Yes.

Q. And that would have been back in 76?

A. Yes.

In the State of Florida an essential component to an agreement is a meeting of the minds. Inasmuch as Rose Hemmert had no idea what she had signed nor what the document accomplished, there was no meeting of the minds. The lower court's directed judgment in favor of the estate must be reversed.

IV. **THERE WAS EVIDENCE OF FRAUD WHICH MIGHT VOID THE PRENUPTIAL AGREEMENT, EVEN UNDER FLORIDA LAW. THE COURT ERRED IN DIRECTING JUDGMENT FOR THE ESTATE.**

Appellant's requested Instructions 8 and 9 read as follows:

INSTRUCTION NO. 8

Fraudulent misrepresentations as to the legal effect of an instrument will void it, even if made to one who has actually read the document, if that individual is unable to judge the document's true construction; the fraud must be contemporaneous with the execution of the instrument and must consist in obtaining the assent of the party defrauded by inducing a false impression as to its legal or literal nature and operation.

INSTRUCTION NO. 9

An agreement obtained by misrepresentation, fraud, or mistake is generally voidable.

The lower court refused to give either of the above requested instructions. Apparently the court forgot that the instructions were vigorously requested. In its August 10, 1990 Memorandum Decision the lower court wrote:

The court observes that **there has been no claim, nor is there any evidence that there was fraud or misrepresentation** in the initial entering into of the agreement and the court specifically finds that there was none. (emphasis added)

Although Appellant did not understand nor comprehend the Prenuptial Agreement, she was told by the deceased that he "would take care of her." She was instructed to sign the papers so that the deceased and Appellant could hurry to a dinner to meet his family. T. 55, L. 6-20. Appellant had never had any classes in English. T. 52, L. 12-15. There was no translation of the

documents, nor Hungarian explanation. T. 56, L. 2-14 and 23-25. Appellant could neither read nor comprehend the document. T. 138, L. 1-9, T. 150, L. 15-19.

Attorney Dorius testified that there had been a full disclosure of all information and that he had, in fact, conversed with an attorney who represented Rose and who spoke Hungarian. Mr. Dorius' testimony is in stark contrast to Rose Hemmert's. Obviously the jury believed Rose and did not believe Dorius. The fraud involved here is representing the document as helpful to Rose Hemmert when it was clearly detrimental to her. The Florida Supreme Court has said:

The rule that fraud cannot be predicated on a failure to disclose facts where the information is as accessible to one party as to the other, and the truth may be ascertained by the exercise of reasonable diligence, does not justify a resort to active deceit or fraud, and hence, does not apply where a party in addition to non-disclosure uses any artifice . . . to lull him (her) into a false security . . . The concealment becomes a fraud where it is effected by misleading and deceptive talk . . . or to a covering up or disguising of the truth, or to a withdrawal or distraction of a party's attention from the real facts; thence the line is overstepped and the concealment becomes a fraud. Joiner v. McCullers, 28 So.2d 823, 825 (Fla. 1947).

There was significant evidence of fraud in the creation of this agreement and the inducement of Rose to sign the agreement. The lower court's judgment directed in favor of the estate should be reversed as a matter of law.

CONCLUSION

The traditional rule in determining the validity of a contract is that the validity of the contract should be

determined by the law of the jurisdiction where the contract was made. There is an emerging trend indicating that the validity and interpretation of contracts should be determined according to the law of the jurisdiction having the "most significant contacts" with the agreement. Application of either of these approaches to the present case mandates that Utah Law should be applied in determining the validity of the Prenuptial Agreement. The Memorandum Decision and Judgment of the District Court should be reversed and this matter remanded to the District Court with instructions to reinstate the jury's verdict.

In the alternative, in the event the court determines that no disclosure was required in the creation of the Prenuptial Agreement, this case should still be remanded to the District Court for retrial. The District Court erred in refusing to instruct the jury concerning the contractual requirement of a meeting of the minds and the effect of fraud.

DATED this 17 day of April, 1991.

/s/
BEN H. HADFIELD
MANN, HADFIELD & THORNE
ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of April, 1991, I mailed four copies of the foregoing Brief of Appellant to Brian R. Florence at Florence & Hutchison, 818 - 26th Street, Ogden, Utah 84401.

BEN H. HADFIELD

tr/1:hemmert.brf

IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY
STATE OF UTAH

| | | |
|---------------------------------|---|-----------------------|
| In the Matter of the Estate of: | (| |
| | (| <u>VERDICT</u> |
| | (| |
| LYMAN W. HEMMERT, aka; | (| Probate No. 873006067 |
| L.W. HEMMERT, | (| |
| Deceased. | (| |

We the jury in the above-entitled matter find by a
preponderance of the evidence that the plaintiff did not receive
fair discolsure and the pre-nuptial agreement is therefore invalid.

DATED this 13th day of July, 1990.


FOREPERSON


DISTRICT JUDGE

In the Matter of the Estate of: :
: :
LYMAN W. HEMMERT, aka, :
L.W. HEMMERT, :
Deceased : MEMORANDUM DECISION
: :
: Probate No. 873006067

The court at that time, denied the Motion because there was insufficient time to address the issue appropriately and the Estate was given the right to renew the Motion at the conclusion of the Trial. The instruction given to the Jury by the Court, essentially incorporated the law of the State of Utah as being the applicable law with reference to the interpretation of the Pre-nuptial Agreement and that Utah law (UCA 75-2-204) required two (2) elements:

- At the conclusion of the Trial the Estate renewed their Motion in the form of a Motion for Judgment not Withstanding the Verdict. The Court now having had an opportunity to review all of the material submitted in support and opposition to the Estates Motion, issues the following Memorandum Opinion:

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MEMORANDUM DECISION

The Petitioners Petition is essentially that the matter is one of contract and that the principles of contract law apply and that the law of the jurisdiction where the contract was made controls; or the law where there were significant contacts with the parties or the subject matter of the agreement should control.

The Estates' position is that in the areas of interpretation of Pre-nuptial Agreements the law is that the marital situs of the parties should control in the interpretation of the document.

After the presentation of the evidence, it is clear that the following are the essential facts of the case:

The Petitioner is an immigrant from Hungary having been previously married and divorced, she moved to the United States, having worked in Hungary as a secretary, including a secretary for a lawyer. She had lived in the United States for some period of time prior to meeting the Deceased. She met the Deceased who was vacationing in Florida and after a rather brief courtship the two were married.

The Deceased was a resident of Box Elder County and was previously married for some (30) thirty years having had a family, his wife died and he began to travel. In the course of his travel, he met the Petitioner in Florida where she resided. He subsequently returned to Florida where a brief courtship took place and then he returned to Utah.

The Petitioner subsequently traveled to Utah for a period of time, maintaining her residence in Florida but, taking an apartment in Logan, Utah. She and the Petitioner received a marriage license in Cache County. A Pre-nuptial Agreement was prepared in Box Elder County and subsequently executed and notarized as were accompanying wills of the parties. The parties then traveled back to Florida to reside and were married in transit in Central/Southern Utah. The parties set up the marital domicile and resided in Florida until the Deceased death.

It is uncontroverted that the bulk of the Decedents' property is in Utah with the exception of a condominium unit in Florida and that during the course of the marriage he frequently returned for periods of time to the state of Utah, County of Box Elder, to look after his business interests and holdings here while maintaining his domicile in Florida.

The Court is presented, by Petitioners' Motion, with the determination of the applicable law in the interpretation of the Pre-nuptial Agreement. It is uncontroverted that Florida Law requires only that a Pre-nuptial Agreement be executed as contrasted with Utah Law which requires adequate disclosure as previously indicated in this opinion. The parties concede that there is no Utah Law directly addressing the conflict of laws question presented in this case, however, precedent has been supplied by both parties in support of their positions as previously outlined.

A review of the precedent submitted indicates that there is a differing approach established by many of the cases in the interpretation of marital contracts. This approach, is essentially that the matrimonial domicile is a better indication of the intention of the parties as to the interpretation and enforcement of contracts and relationships, in 11 ANJR, Conflicts of Laws, Section 86; Page 273, it states in part that;

"Where the marriage takes place in the State in which the woman has been domiciled but, with the intention of the parties, which is carried out within a reasonable time, of establishing their common home in another State in which the husband is domiciled, the marital rights of the parties in the personal property of each other owned at the time of the marriage is governed, as a general rule, by the law of the State of their contemplated and subsequently established matrimonial domicile; such State is to be deemed their initial matrimonial domicile."

This approach has been taken by the Supreme Court of Wisconsin, Florida, Alabama, Illinois, Louisiana, Ohio and New York, although it is conceded that there is a difference of opinion among many

Courts as to whether the validity of these agreements is to be determined by the law of the place where they are made or by the law of the matrimonial domicile.

The Court observes that there has been no claim, nor is there any evidence that there was fraud or misrepresentation in the initial entering into of the agreement and the Court specifically finds that there was none. The Petitioners' position essentially is that she was not informed sufficiently by virtue of the circumstances including her language disabilities.

One of closer cases that the Court could find bearing on this situation is the case of OSBORN V. OSBORN, (226 North Eastern Reporter, 2d Page 814 et sequence) when faced with a similar question, the Court there stated;

"The State is concerned in seeing that its concepts of public safety are enforced in this area because marriage is a status exclusively regulated and controlled by laws of the State of the parties matrimonial domicile." The Court later stated, "There can be little question that Ohio has the most significant contacts with and paramount interest in the parties, in the agreement, and in questions concerning its validity. In view of this conclusion it is incumbent upon the Court to determine the validity of the antenuptial agreement under Ohio law dealing with this subject."

In the Ohio case, there was a resident of Massachusetts and a resident of Ohio, the contract was executed in Massachusetts but the parties subsequently resided in Ohio. A situation much like the instant case.

In determining the application of the law of the State of Utah to the facts of this case, it is helpful to the Court to refer to Section 75-2-201 [2] U.C.A. wherein it provides;

"If a married person not domiciled in this State dies, the right, if any, of the surviving spouse to take an elective share in property in this State is governed by the law of the decedents' domicile at death.....".

Since the surviving spouses' right to take an elective share, which she is claiming, is dependant upon the validity of the Pre-nuptial Agreement. It appears to the Court that the intention of the

Legislature of the State of Utah is consistent with that of what the Court finds to be the majority of the cases in the domestic conflict of law area and directs that those rights be determined under the law of the place of the decedents domicile at death, which is consistent with the marital domicile of the parties in this case and that the public interests as stated in the Ohio case, is consistent with the statutory directive previously quoted.

Accordingly, the Court finds that Florida Law is the applicable law and that as provided in Florida statute 732.702 [1988] sub 2;

"No disclosure shall be required for an agreement, contract or waiver executed before marriage."

This being the case, Judgment notwithstanding the verdict should and is Granted in favor of the Estate Respondent in this case.

Counsel for the Estate to prepare an Order in conformance with this opinion.

DATED this 10 day of August, 1990.

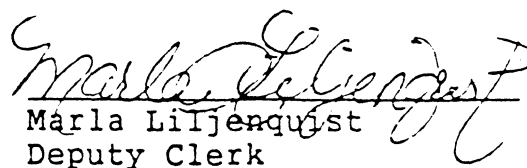


F.L. GUNNELL
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION, postage prepaid, to the following:
Ben Hadfield, MANN, HADFIELD & THORNE, Attorney at Law, P.O. Box F, Brigham City, UT 84302, Brian R. Florence, Attorney at Law, 818 26th Street , Ogden, UT 84401 and Michael J. Glasmann and Douglas B. Thomas, VANCOTT, BAGLEY, CORNWALL & MCCARTHY, Attorneys at Law, 2404 Washington Blvd., Suite 900, Ogden, UT 84401.

DATED this 14th day of August, 1990.


Marla Liljenquist
Deputy Clerk