

1990

In the matter of the estate of: Lyman W. Hemmert,
aka, L. W. Hemmert, deceased. Rose Nagy
Hemmert and Alonna Cook, Personal
Representative and Respondent : Brief of
Respondent

Utah Supreme Court

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MENT UTAH SUPREME COURT

BRIEF

ET NO.

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. : Case No. 900482

ROSE NAGY HEMMERT, : Priority No. 16

Appellant, :

and :

ALONNA COOK, :

Personal Representative :
and Respondent.

BRIEF OF RESPONDENT

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

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FILED

MAY 13 1991

CLERK SUPREME COURT,
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

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ESTATE OF: :
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	:	
and	:	
	:	
ALONNA COOK,	:	
	:	
Personal Representative	:	
and Respondent.	:	

BRIEF OF RESPONDENT

JURISDICTION

Jurisdiction of the Supreme Court is contested.

It is acknowledged that the Utah Supreme Court has jurisdiction over final orders, judgments and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction and if this matter were a final order,

the appropriate jurisdiction would be with the Utah Supreme Court pursuant to 78-2-2(j), Utah Code Annotated.

Respondent has previously filed a Motion for Summary Disposition claiming this appeal is not from a final order. The Court denied the Motion by Minute Entry dated February 13, 1991, but reserved ruling on the issue for plenary presentation and consideration of the case.

STATEMENT OF ISSUES

The issues to be considered on appeal are as follows:

1. The Judgment Notwithstanding the Jury Verdict did not end the controversy between the parties and, therefore, is not an appealable final judgment. The standard of review is whether it is apparent on the face of the record that the controversy between the parties has been concluded in all respects. See Salt Lake City Corp. v. Layton, 600 P.2d 538 (Utah 1979).

2. The District court was correct in setting aside the jury verdict by applying Florida law to the validity of the pre-nuptial agreement. The trial court standard must be based upon whether or not the

moving party (in this case the Respondent) is entitled to judgment as a matter of law. In reviewing this decision, the Appellate Court gives no deference to the trial Court's legal conclusions, but reviews them for correctness. See Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988).

3. The other issues presented in appellant's brief concern the Court's factual findings in connection with the application of Florida law. The standard for review is whether the findings of fact are clearly erroneous. See Barker v. Francis, 741 P.2d 548 (Utah Ct. App. 1987).

DETERMINATIVE STATE STATUTES

U.C.A. §75-2-201(2)

Right to elective share.

If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in the property in this state is governed by the law of the decedent's domicile at death except as to provided in Subsection (3).

F.S.A. 732.702

Waiver of right to elect and of other rights.

(1) The right of election of a surviving spouse, the rights of the surviving spouse as intestate successor or as a pretermitted spouse, and the rights of the surviving spouse to homestead, exempt property, and family allowance, or any of them, may be waived, wholly or partly, before

or after marriage, by a written contract, agreement, or waiver, signed by the waiving party. 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, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead property, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to either from the other by intestate succession or by the provisions of any will executed before the waiver or property settlement.

(2) Each spouse shall make a fair disclosure to the other of his or her estate if the agreement, contract, or waiver is executed after marriage. No disclosure shall be required for an agreement, contract, or waiver executed before marriage.

(3) No consideration other than the execution of the agreement, contract, or waiver shall be necessary to its validity, whether executed before or after marriage.

STATEMENT OF THE CASE

(This is a factual history of the case. It is presented here rather than under the Statement of Facts because it details the course of proceedings and nature of the case.)

On February 19, 1987, the heirs of

Lyman W. Hemmert filed a Petition for Formal Probate of Will and Formal Appointment of Personal Representative. (R15-20) On March 19, 1987, Alonna Cook was appointed to act as the Personal Representative of the estate without bond. (R29-31)

The Will, in essence, provided that appellant would take a one-ninth share of the deceased's estate, the other shares going to each of the deceased's eight children born from a prior marriage. (R2-7)

Appellant's share was also to take into account the social security benefits that she would receive by reason of Mr. Hemmert's death. The Will also provided that in the event any person entitled to take under the estate contested or disputed or questioned the validity of the Will, would forfeit any right to claim thereunder. (R7)

Appellant and the deceased had entered into a pre-nuptial agreement which claimed a full disclosure had been made, and in which appellant waived her right to an elective share, agreeing to take pursuant to the terms of Mr. Hemmert's Will. She also waived any and all statutory allowances. (R8-14)

On July 8, 1988, appellant, Rose Nagy Hemmert, Mr. Hemmert's second wife, filed her Petition

for Family Allowance. (R37,38) At the same time, she also filed a Notice of her intent, as the spouse of the deceased, to claim an elective share, thereby denouncing her right to take pursuant to the deceased's Will. (R45) In her supporting Memorandum, she claimed that the pre-nuptial agreement she signed was void because she did not receive fair disclosure.

On July 29, 1988, the Court granted appellant a \$600.00 monthly family allowance. (R78)

Thereafter, appellant petitioned the Court for additional expenses to cover the costs of emergency and serious dental problems. (R163,165) By Memorandum Decision dated October 11, 1989, the Court authorized the incurrence of extra-ordinary medical expenses on behalf of the appellant and ordered the estate to pay for the same, reserving however the decision as to whether or not the expenses were a legitimate family expense and whether or not a reimbursement or offset to the estate of any amounts expended would be appropriate. (R229-231)

On January 16, 1990, Attorney Michael J. Glasmann filed a Motion to Intervene claiming that he represented Michael L. Hemmert and Linda M. Hemmert, and that they possessed a special

interest relating to the property of the estate that was not adequately represented by the estate or other parties before the Court and that their claims involved issues of law and fact not common to the matters then pending. The supporting Memorandum filed with the Motion stated that Michael Hemmert claimed an interest in the estate of property which had been valued in the inventory in excess of \$290,000.00. Mr. Hemmert claimed that his interest in that part of the estate was separate from any claim for an elective share of the appellant or her distributive share under the terms of the Will. (R256-262)

By Minute Entry of March 13, 1990, the parties agreed that Mr. Glasmann's Motion to Intervene would be held until after the trial and that the issue of the trial would be limited to the validity of the pre-nuptial agreement. (R282) Although the trial had been scheduled to proceed on March 27 and 28, 1990 (R278), it was continued and rescheduled for July 12 and 13, 1990. (R289)

A jury trial was conducted in the First District Court in Brigham City on July 12 and 13, 1990, at the conclusion of which the jury returned its verdict indicating that appellant did not receive fair

disclosure and the pre-nuptial agreement was therefore invalid. (R355)

Respondent had made a motion at the beginning of the trial to apply Florida law as to the question of the validity of the pre-nuptial agreement. There was a conference in chambers which referred to a conference call that had occurred the preceding Monday when the motion was initially made.. This exchange occurred during the in-chambers conference:

MR. FLORENCE:

To the extent that a record needs to be protected in advance of today's jury trial and to the extent that Mr. Glasmann was not a party to that conference call and perhaps should have been, I wanted to restate and perhaps elaborate the motion that was made and the reasoning for it.

All of the parties, through their counsel, appeared before this Court on March 13, 1990 at a pre-trial and settlement conference. Mr. Glasmann was here at that time, having previously filed a motion to intervene on behalf of one of the heirs, Michael Hemmert. There was considerable discussion at that hearing concerning the interpretation of Utah's elective share formula. The Court indicated at that time that it tended to construe that formula in the same manner as Mr. Glasmann had suggested it should be construed.

As a result of that, the three of us once again appeared in front of this court on March 27th, 1990, two weeks later, in which there was a proposed settlement agreement entered into between all of the parties and which was going to comprise the respective claims based upon all of our various positions.

On April 22nd, I believe, -- strike that. Shortly thereafter Mr. Hadfield prepared and circulated to both Mr. Glasmann and myself a settlement agreement which incorporated in basic terms the agreement that was stated on the record on March 27th. On April the 22nd, I believe, Mr. Hadfield wrote to me and to Mr. Glasmann informing us that his client wouldn't accept that proposal and suggested that it was determined that Mr. Hemmert was not a domicile of Utah but in fact a domicile of Florida and Florida's elective share would then apply, which would provide to her a much greater amount of Mr. Hemmert's estate than provided for under Utah's elective share.

I asked Mr. Hadfield to send me not only the evidence that he had to suggest that Mr. Hemmert was a domicile of Florida, but also to help persuade me that Florida law was indeed different as it related to the elective share.

In May, and I have a letter here, but I think it was about May 15th, I received from Mr. Hadfield various documents which persuaded me that his argument that Mr. Hemmert was a domicile of Florida was strong.

I called him about the Florida statutes and he indicated that he

had not yet received those from the Florida lawyer whom he had been communicating with. Perhaps to my fault I waited too long before I undertook my own research on the Florida law, during which time it was discovered that if Florida law -- that under Florida law the standard for the validity of a pre-nuptial agreement is different. The Utah standard requires fair disclosure. The Florida standard requires no disclosure at all, it only requires an execution of the pre-nuptial agreement. That was the purpose of my phone call on Monday, to suggest that if the petitioner in this case, Mrs. Hemmert, was going to take the position that Mr. Hemmert was a Florida domicile, if that was her position then Florida law ought to apply as to the validity of the pre-nuptial agreement.

At that time Mr. Hadfield argued that Utah law should apply as to the validity of the pre-nuptial agreement since the pre-nuptial agreement was entered into in this state, the parties were married in this state, and most of the property was in this state. You expressed in that phone conference that you tended to agree with that and that would be your ruling.

Since that time, Your Honor, I've had an opportunity to do some additional research, and very frankly it is a little scarce, but I have prepared for submittal to you an annotation from ALR 2nd, Volume 18, and two cases out of the state of Ohio -- excuse me. One case out of the state of Ohio, 1966, and one out of Wisconsin from 1959, which suggest that the

place that the pre-nuptial agreement is prepared or executed is not a relevant -- is not the only relevant factor to consider in deciding which law should apply to its validity, but that the matrimonial domicile would be the law to determine the validity of the pre-nuptial agreement.

THE COURT:

By matrimonial, do you mean the place of residence or the place of marriage?

MR. FLORENCE:

The place of residence during their marriage. We are prepared to concede that the matrimonial domicile, for purposes of this argument, was in fact Florida. That's where they lived together for most of their married life, although they did visit here during some of the summers, but that's where they considered their home to be was in the state of Florida.

I would submit and urge the Court to once again reconsider its prior ruling and ask that the issue in this case be limited to whether or not Mrs. Hemmert executed the pre-nuptial agreement and if so rule as a matter of law that she is bound by the pre-nuptial agreement, because the Florida statute as to the fact that no disclosure is required would apply.

I will leave with the Court the two cases I've referred to, the ALR citation as well as the Florida statute on the pre-nuptial agreement and some Florida cases that have confirmed that that's what they really mean. (T5-9)

Respondent's motion became necessary because for the entire extent of the proceedings up to just a few weeks before the trial, appellant had taken the position that the deceased was domiciled in the State of Utah and, therefore, Utah's elective share would apply. After the discussion with the Court at the hearing on March 13, 1990 when it appeared to the appellant that the elective share formula under Utah law would not favor her, she subsequently changed her position and then claimed the decedent was a domicile of Florida because, according to her, the Florida elective share law would be more advantageous. Therefore, the motion to apply Florida law to the validity of the pre-nuptial agreement did not come up until just before trial. As a result, additional discussion occurred with the Court.

MR. FLORENCE:

The problem with that argument, it sounded pretty good at the time Ben made it, but if the jury comes back and says there was fair disclosure, it's true that issue, as far as we're concerned, is now resolved whether you apply Utah law or Florida law. But if they don't, in my view then it's not a final judgment. He will have all kinds of collateral issues that you yet will need to resolve before kicking it up to the Supreme Court. So you're going to have one or two

or perhaps three more trials or three more issues to be tried if we get to that posture.

THE COURT:

Such as you mean the family?

MR. FLORENCE:

Such as whether or not he was a domicile of Florida, if Florida law applies to the elective share. If it does not what was in the marital estate to apply the Utah elective share and what is Florida's elective share. I still haven't seen it. In due respect to Mr. Hadfield, I still haven't seen that authority.

THE COURT:

And then you have all the questions about the appropriate deductions which are being taken.

MR. FLORENCE:

And then the expenses of this estate. That's where Mr. Glasmann's primary concern comes in, whether or not half of it is in or half is out.

THE COURT:

It seems to me I'm being presented really with facts to determine that I don't have enough facts to determine as to the domicile.

MR. GLASMANN:

Could I interject. I agree completely with Your Honor. I was trying to put myself in your shoes as to how you get yourself in a position to even instruct the jury in this case. It seems to me that logically the domicile issue has to be determined first. Then secondly you have to determine the conflict of laws question and then you have

to instruct the jury. It is unfortunate that we're this far along with those issues unresolved.

THE COURT:

Since you called and since I was aware of the problem, I've been thinking, and it's catching me a little cold, too. I think you all recognize that. I have a jury sitting out there. I think I've got to, even taking your position, Ben, if we look at the most significant contacts and if we're applying Utah corporation law, I think, based on what I'm hearing today, there are some disputes about the significant contacts. If they're on a bus heading out of Utah and get married and that agreement is entered into ancillary to where they are really going to live, and plus they met in Florida and he lives in Florida, or at least arguably lives in Florida. (T16-18)

After further discussion, it was agreed that the trial would proceed only on the issue of the validity of the pre-nuptial agreement. This exchange then occurred:

THE COURT:

That will give me time to do a little work on this issue. I might indicate to you that I think there are legitimate questions here. I do have some struggle, Ben. I was under the impression that there were a whole lot more contact here than now I'm being aware of. Maybe preliminarily there were on his part, but if she didn't ever live here, if she just came here for the purpose of helping him move,

essentially, and while here they enter into this thing and enter into it here, and then leave and get married and are gone, then I really would want to read those cases and the law.

MR. HADFIELD:

And I think the evidence will show they did reside in Florida. They were back here every year to Utah together and they maintained an apartment 12 months a year here. So they still maintained significant contacts here.

THE COURT:

And I don't dispute that.

MR. FLORENCE:

I apologize about the lateness of this. I don't want to take all the blame because this thing has been pending for over two years and Mr. Hadfield didn't raise the issue of Florida law until three months ago.

THE COURT:

Nobody is affixing blame here, I'm only saying that we're all at a disadvantage now. I guess the buck stops here on the issue.

MR. HADFIELD:

I don't have any particular problem with Mr. Glasmann's participation in the argument here. You're not going to remain for the trial?

MR. GLASMANN:

There's just one other thing I want to say. Actually, when we withdrew the motion to intervene it was my understanding that the issues that would -- the issue that would be tried here would

be the issue of the validity of the pre-nuptial agreement only and that you would not be going into questions of what should be included in the estate or what should not.

My client may testify, and I've talked with Brian about this so I'm sure he'll be objecting if Ben tried to go into matters that would be evidence on the issue of what should be included in the estate. I won't be here to object and I just wanted Your Honor to be aware that I don't feel it's fair that if my client does testify that they venture into whether this contract involves the Bushnell Motel and should it be included in the estate or not.

MR. HADFIELD:
They see the issue coming because it's big as a locomotive. If his client has a huge bias or self-interest in the outcome of this lawsuit, the jury is entitled to know that.

MR. FLORENCE:
I'll stipulate he does.

MR. HADFIELD:
A \$290,000.00 interest.

MR. GLASMANN:
We agree that the jury is entitled to know there's that interest. I think the figures can be stated to the jury and we agree there's a bias, so that they are aware of that connection. But then to go into his testimony about the background on the contract, I would object to that happening without my being here.

MR. HADFIELD:
Maybe we can fashion some kind of stipulation.

MR. FLORENCE:
I think we can do that, yes.

THE COURT:
Okay. What I'd like you to do, then, is give me alternative instructions. The ones that I have are based on Utah law. If you'll just -- they're just a very small part. If you'll give me the alternative instructions and then I'll give you my ruling.

MR. FLORENCE:
It would be my position at this time, Your Honor, that if you apply Florida law you can do that as a matter of law. She is not contesting she did not sign a pre-nuptial agreement.

MR. HADFIELD:
You're saying in Florida if she speaks only Spanish and no English and puts her signature on that line?

MR. FLORENCE:
You have never alleged fraud or misrepresentation. You have alleged failure to disclose.

MR. HADFIELD:
If you look at our pleadings, all we've done is claim an elective share. I cited fraud in my memorandum, undue influence. I used both of those terms.

THE COURT:
I guess we'll just have to wait and see. If there's fraud in the procuring of the signature, then I suppose that's an issue that they'd have to rule on.

MR. HADFIELD:
Even in Florida.

MR. FLORENCE:
Let's go see what happens.
(T21-25)

After the trial, the parties were given additional time to brief their respective positions and on August 10, 1990, the Judge entered his Memorandum Decision setting aside the jury verdict and concluding that Florida law would apply. (R367-371)

Proposed Findings of Fact and Conclusions of Law and an Order were prepared by the estate's counsel and submitted to appellant's counsel for review. A hearing was conducted before the Court on September 14, 1990, at which time the Court signed the Findings and Order in open court. (R383-397)

STATEMENT OF FACTS

The factual setting of what was presented to the jury is not particularly relevant to these proceedings. The jury obviously made their decision based upon how they viewed the evidence presented. The primary factual aspect of this case that is relevant is contained in the Statement of the Case preceding this section.

SUMMARY OF ARGUMENTS

This case is clearly not ripe for appeal.

There are many issues yet to be decided. In any event, the Court was correct in applying Florida law in determining the validity of the pre-nuptial agreement.

ARGUMENT

I

THE JUDGMENT NOTWITHSTANDING THE JURY VERDICT DID NOT END THE CONTROVERSY BETWEEN THE PARTIES AND, THEREFORE, IS NOT AN APPEALABLE FINAL JUDGMENT.

It is clear from the recitation of the history of this case that there are still several issues to be resolved. Michael Glasmann, who attempted to intervene on behalf of Michael Hemmert, is asserting a claim that the single largest asset of the estate, a motel, should not be included in the estate by reason of an agreement that he had with his father, the deceased, and the rest of the heirs. (R256-262) The resolution of that dispute will obviously affect appellant's share of the estate irrespective of the outcome of this appeal. Appellant contests the validity of the agreement Michael Hemmert claims to have had with the deceased and the other heirs.

There is also the dispute as to whether or not the application of Florida's law will change the

amount available to appellant. She has claimed that Florida law prohibits a surviving spouse from receiving anything less than a fee interest in their residence. Mr. Hemmert's Will only gives her a life estate.

The deceased's Will contained a provision concerning the includability of his social security benefits and their deductibility from appellant's distributive share. Appellant has disputed the manner in which this would be included. The Will also contained a no-contest clause and since appellant contested the Will, its validity is yet to be resolved.

Based upon the resolution of the social security benefits, there is also an issue as to whether or not appellant has exceeded the amount to which she is entitled by reason of her having received a substantial widow's allowance since the death of Mr. Hemmert.

There is also the issue that the Court reserved earlier about the includability and the appropriateness of the amended widow's family allowance for the dental benefits paid to appellant.

Rule 3(a) of the Utah Rules of Appellate

Procedure permits appeals from District Court "final orders and judgments". The jury trial, its verdict and the subsequent judgment notwithstanding the verdict have only addressed one issue out of the many yet to be resolved in this probate. Irrespective of the outcome of this appeal, if it is permitted at this time, other issues will still remain unsolved and subject to future appeals. While a decision of this Court may limit the number of other issues to be resolved, it does not change the fact that this case is not completed.

For instance, if this Court concludes that the trial judge was correct in granting the judgment notwithstanding the verdict and that Florida law should have been applied to the validity of the pre-nuptial agreement and appellant is bound to take under the terms of the deceased's Will, there are all of the potential issues referred to above still to be decided.

On the other hand, if this Court should conclude that the Court erred in granting the judgment notwithstanding the verdict and that Utah law should be applied to the validity of the pre-nuptial agreement, then the jury verdict would be binding.

That would still leave the issues of Florida's law versus Utah's law as to the definition of appellant's elective share and the size of the estate by reason of the claim of Michael Hemmert and appellant's receipt of prior benefits.

II

THE DISTRICT COURT WAS CORRECT IN SETTING ASIDE THE JURY VERDICT AND APPLYING FLORIDA LAW AS TO THE VALIDITY OF THE PRE-NUPTIAL AGREEMENT.

Up until three months before trial, appellant had never suggested that the deceased was a domicile of Florida. She had always maintained her right to an elective share under Utah's elective share statute.

(R45) When she raised that issue, it was because she believed that Florida's formula for calculating her elective share would be more beneficial to her.

It then became apparent to the respondent that if Florida law were to be applied in determining an elective share, it should also be applied to the validity vel non of the pre-nuptial agreement. Since the issue was not raised until just before trial, the Court proceeded with the trial and reserved ruling on the "conflicts" question until the verdict was given. A different jury verdict would have made the issue moot.

When it became necessary to rule, the Court entered specific findings as to the issue of domicile, as follows:

3. That 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.

4. That the deceased was a resident of Box Elder County and was previously married for some thirty (30) 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.

5. That 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 deceased 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's death. (R385-386)

The Judge also found:

7. That it is uncontroverted that Florida law requires only that a pre-nuptial agreement be executed as contrasted with Utah law which requires adequate disclosure....
(R386)

The Court's Conclusions of Law provided:

1. That 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 indicated 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 house 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.

2. That 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 there was none. The petitioner's position is, essentially, that she was not informed sufficiently by virtue of the circumstances, including her language disabilities.

3. That one of the 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. seq. 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. This is a situation much like the instant case.

4. That 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], Utah Code Annotated, 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 decedent's domicile at death.....

5. That the surviving spouses' right to take an elective share,

which she is claiming, is dependent 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 decedent's domicile of 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, are consistent with the statutory directive previously quoted.

6. That the Court finds that Florida law is the applicable law and, as provided in Florida statute 732.702 [1988] sub. 2: "No disclosure shall be required for an agreement, contract or waiver executed before marriage".

7. That based on the foregoing, the Estate's Motion for Judgment Not Withstanding the Verdict be and is hereby granted. (R387-390)

As the judge has indicated, the conflict-of-laws resolution really starts with the application of Utah law. It provides that:

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 decedent's domicile at death . . ."
75-2-201(2), Utah Code Annotated.

Appellant acknowledges that the decedent was a domicile of Florida at his death, but wants the Court to apply a different conflict-of-laws standard

to this case and urges the significant contacts standard instead. This simply is not tenable in light of the Utah statute.

This Court has therefore correctly applied the law in concluding that the Florida statute was the governing statute on the pre-nuptial agreement and disclosure is not required.

III

THE DISTRICT COURT WAS FACTUALLY CORRECT IN THE MANNER IT APPLIED FLORIDA LAW TO THE PRE-NUPTIAL AGREEMENT.

Appellant argues that even if the Court was going to apply Florida law, it erred in finding a "meeting of the minds" during the creation of the pre-nuptial agreement or in failing to find fraud in the inducement.

In considering the extent to which the Florida courts would review pre-nuptial agreements in light of the absence of a disclosure requirement, it has been said that:

If a wife were able to show that her signature on such an agreement had been coerced or otherwise improperly obtained or that she was incompetent at the time she signed, Section 732.702(2) would not bar her challenge to the validity of the agreement. Estate of Roberts, 388 So.2d 216, 217 (Fla. 1980).

While these issues were not presented to the jury, the Court specifically found no evidence of fraud or misrepresentation. Indeed, the Court found that appellant's only claim was that she was not informed sufficiently by virtue of the circumstances, including her language disabilities. (See Conclusions of Law #2)

There were sufficient facts in this case to allow the Court to make that determination.

Although appellant claims that she did not understand what she was signing when she signed the pre-nuptial agreement, she acknowledged in Answers to Interrogatories tht when she signed the agreement, Lyman told her that "they would both sign an agreement and she would be treated as a member of his family, just like his children". (Interrogatory answer #62, Exhibit D-6) This was true and exactly what happened under the terms of Mr. Hemmert's Will.

Mr. Dorius, the attorney who prepared the pre-nuptial agreement and the Will, testified that prior to the time the agreement was signed, he had met with Mr. and Mrs. Hemmert and that she had brought in a paper that she had written out that she wanted to consider putting in the Will. "She was negotiating that she wanted put into the Will." (T170)

Defendant's Exhibit 1 was introduced which was the paper Mr. Dorius said appellant brought to him for inclusion in the Will. (T170)

Appellant acknowledged the document looked like her handwriting, but she did not remember when she made it. (T81)

Mr. Dorius stated that she had also made some handwritten notes on the draft of the Will before the final was prepared. (T171) (Defendant's Exhibit 2)

Appellant claimed she made those notes years after the pre-nuptial agreement was signed, but could not explain how she got an unsigned copy. (T83)

Mr. Dorius also claimed that appellant had attorneys call him during the preparation phase of the documents to assist her in understanding. (T174) Appellant denied this. (T80)

These issues and allegations were not necessarily conclusive, or even relevant, for the jury's consideration as to whether appellant received fair disclosure regarding Mr. Hemmert's assets. However, these facts could certainly be used by the Court in finding that there was no fraud or misrepresentation. Appellant cannot, by marshalling all of the evidence, demonstrate that despite this

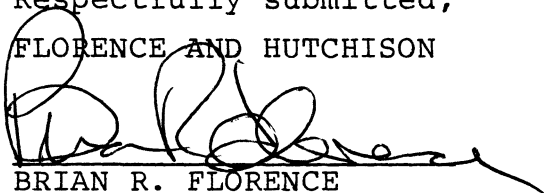
evidence, the Court's findings are so lacking in support as to be against the clear weight of the evidence and, therefore, clearly erroneous. Hagan v. Hagan, 158 UAR 66 (Utah App. 1991)

CONCLUSION

This case is not ripe for appeal. If reviewed, however, the trial Court was correct in its decision to set aside the jury verdict and apply Florida law on the validity of the pre-nuptial agreement.

DATED this 10th day of May, 1991.


Respectfully submitted,
FLORENCE AND HUTCHISON



BRIAN R. FLORENCE
Attorney for Respondent/
Personal Representative
818-26th Street
Ogden, UT 84401

MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing Brief of Respondent, postage prepaid, to Ben H. Hadfield, Attorney for Appellant, P.O. Box 876, Brigham City, UT 84302, on this 10th day of May, 1991.



BRIAN R. FLORENCE

ADDENDUM

PAGE

FINDINGS OF FACT AND CONCLUSIONS OF LAW
ORDER

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BRIGHAM DISTRICT

AUG 31 4 25 PM '90

Brian R. Florence #1091
of FLORENCE AND HUTCHISON
Attorney for Alonna Cook
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399-9291 - FAX 399-9333

IN THE DISTRICT COURT OF BOX ELDER COUNTY

STATE OF UTAH

In the Matter of the Estate of : FINDINGS OF FACT AND
LYMAN W. HEMMERT, aka, : CONCLUSIONS OF LAW
L. W. HEMMERT, :
Deceased. : Probate No. 873006067

The above-entitled matter came on for jury trial on the 12th and 13th days of July, 1990, before the Honorable F. L. Gunnell, Judge of the above-entitled Court. The Personal Representative of the above estate, Alonna Cook, was present and represented by counsel, Brian R. Florence. The widow of Lyman W. Hemmert and petitioner herein, Rose Nagy Hemmert, was present and represented by counsel, Ben H. Hadfield.

Immediately prior to trial, the Estate made a Motion for a Directed Verdict and/or Motion in Limine with the issue being the relevant law governing the determination of the validity of the pre-nuptial agreement. At that time, the Court 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

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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:

1. A signed Pre-Nuptial Agreement.
2. Fair disclosure prior to or incident to the signing of the Pre-Nuptial Agreement.

After deliberation, the jury found in favor of the petitioner finding that there was not adequate disclosure.

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 Estate's motion, hereby files its:

FINDINGS OF FACT

1. That the position of the Petitioner 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

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or the subject matter of the agreement should control.

2. That the Estate's position is that in the areas of interpretation of Pre-Nuptial Agreements, the law is that the marital citus of the parties should control in the interpretation of the document.

3. That 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.

4. That the deceased was a resident of Box Elder County and was previously married for some thirty (30) 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.

5. That the petitioner subsequently traveled to Utah for a period of time, maintaining her residence in

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Florida, but taking an apartment in Logan, Utah. She and the deceased 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's death.

6. That it is uncontroverted that the bulk of the decedent's 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.

7. That it is uncontroverted that Florida law requires only that a Pre-Nuptial Agreement be executed as contrasted with Utah law which requires adequate disclosure. There is no Utah case law directly addressing the conflict of laws question presented in this case, however, precedent has been supplied by both parties in

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support of their positions as previously outlined.

From the foregoing Facts, the Court now makes and
files its:

CONCLUSIONS OF LAW

1. That 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 ^MANJR,
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 house in another State in which
the husband is domiciled, the marital
rights of the parties in the personal
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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.

2. That 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 there was none. The petitioner's position is, essentially, that she was not informed sufficiently by virtue of the circumstances, including her language disabilities.

3. That one of the 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. seq. When faced with a similar questions, the Court there stated:

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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.

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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 residence of Ohio. The contract was executed in Massachusetts, but the parties subsequently resided in Ohio. This is a situation much like the instant case.

4. That 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], Utah Code Annotated, 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 decedent's domicile at death.....

5. That the surviving spouses' right to take an elective share, which she is claiming, is dependent upon the validity of the Pre-Nuptial Agreement. It appears to the Court that the intention of the Legislature of the

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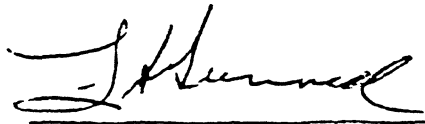
State of Utah is consistent with that of what the Court finds to be the majority of the cases in the domestic conflict of law area and directs that those rights be determined under the law of the place of the decedent's domicile at death, which is consistent with the marital domicile of the parties in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

6. That the Court finds that Florida Law is the applicable law and, as provided in Florida statute 732.702 [1988] sub. 2: "No disclosure shall be required for an agreement, contract or waiver executed before marriage".

7. That based on the foregoing, the Estate's Motion for Judgment Not Withstanding the Verdict be and is hereby granted.

DATED this 14th day of September, 1990.

BY THE COURT:


F. L. GUNNELL, Judge

FLORENCE
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HUTCHISON

APPROVED AS TO FORM:

ATTORNEYS AT
LAW

BEN H. HADFIELD
Attorney for Petitioner

COOK/Q

BRIGHAM DISTRICT

AUG 31 4 26 PM '90

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IN THE DISTRICT COURT OF BOX ELDER COUNTY

STATE OF UTAH

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

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Immediately prior to trial, the Estate made a Motion for a Directed Verdict and/or Motion in Limine with the issue being the relevant law governing the determination of the validity of the pre-nuptial agreement. At that time, the Court 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

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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 Estate's motion and having heretofore signed and filed its Findings of Fact and Conclusions of Law, now orders as follows:

IT IS HEREBY ORDERED that 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

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IT IS FURTHER ORDERED that the Court observes that there has been no claim, nor is there any evidence that there was fraud or misrepresentation in the initial

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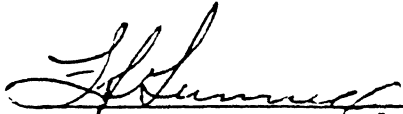
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IT IS FURTHER ORDERED that based on the foregoing, the Estate's Motion for Judgment Not Withstanding the Verdict be and is hereby granted.

DATED this 14th day of September, 1990.

BY THE COURT:


F. L. GUNNELL, Judge

APPROVED AS TO FORM:

BEN H. HADFIELD
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