1990

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

Utah Supreme Court

Brian R. Florence; Florence & Hutchison; attorneys for personal representative.
Ben H. Hadfield; Mann, Hadfield & Thorne; attorneys for appellant.

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,	)	Supreme Court No. 900482
Appellant,	)	Priority (16)

APPELLANT'S REPLY BRIEF

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

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FLORENCE & HUTCHISON
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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I.

THE DISTRICT COURT'S ORDER OF SEPTEMBER 14, 1990 IS A FINAL ORDER

The estate has taken the position that the judgment notwithstanding the verdict is not an appealable final judgment. A review of the pleadings in this case is helpful in determining whether the Order constitutes a final judgment. This action was instituted by the filing of a "Notice of Claim to an Elective Share." The Notice is filed pursuant to U.C.A. 75-2-201 and constitutes the only pleading presently before the court in behalf of Rose Hemmert. The District Court's Order conclusively denies Rose Hemmert's claim for an elective share. In determining an analogous situation in a 1980 case, the Utah Supreme Court stated:

> An Order which denies an application for intervention, with prejudice, does make final disposition of the claims and assertions of the applicant, and is therefore appealable . . . Where the denial of a motion to intervene, or any other final ruling or order of the trial court, goes unchallenged by appeal, such becomes the law of the case, and is not

thereafter subject to later challenge. Tracy v. University of Utah Hospital, 619 P.2d 340, 342 (Utah 1980)

Respondent claims there are other issues which should be litigated before this appeal. The alleged remaining issues as identified in the Respondent's Brief are identified and refuted as follows:

(1) The validity of a Real Estate Contract between the deceased, Lyman Hemmert and Michael Hemmert needs to be determined.

The single largest asset listed in the estate inventory is a Real Estate Contract whereby Michael Hemmert owes to Lyman Hemmert over $290,000.00 for the purchase of the Bushnell Motel in Brigham City. The validity of that Contract and the question as to amounts owing is a separate lawsuit, totally independent of Rose Hemmert's claim to elective share. While the determination of that question may affect the amount of money distributed to Rose Hemmert, it is clearly a separate lawsuit between the estate and the purchaser of the property.

(2) Florida law may prohibit Rose Hemmert from receiving anything less than a fee interest in the residence she and Lyman Hemmert occupied in Florida.

It is conceded that Florida statute appears to require that the surviving spouse receive fee title to the parties' residence. However, this is a determination totally independent of the claim for elective share. In order to convey any title to the real property located in Florida, it will be necessary to complete an ancillary proceeding through Florida's judicial system. The ancillary probate in Florida will distribute the Florida real

estate pursuant to Florida statute. Those proceedings will be totally independent of this appeal.

(3) The validity of provisions in the deceased's Will concerning a social security set-off against Rose Hemmert's portion and disinheriting anyone contesting the Will should be determined.

If the jury's verdict is upheld and Rose Hemmert is granted an elective share in the estate, then she takes independent of the Will. In that event both of these issues are moot. Judicial economy and a desire to limit the cost to the litigants argue that unnecessary litigation of these issues be avoided. There are no pleadings presently before the court concerning these two issues and, therefore, they do not affect the finality of the court's Order.

(4) Rose Hemmert's portion of the estate may have already been exceeded by the widow's allowance she has been receiving since Lyman Hemmert's death.

The fallacy of this argument is that the widow's allowance is not chargeable against any inheritance or portion of the estate ultimately distributed to Rose Hemmert. U.C.A. 75-2-403 conclusively states:

> (2) The family allowance is not chargeable against any benefit or share passing to the surviving spouse . . .

(5) The issue as to whether the dental benefits paid as widow's allowance to Rose Hemmert should be off-set against her portion has not been determined.

This argument fails for the same reason as argument number 4. Utah statute specifically excludes any type of family

allowance as an off-set against the widow's portion of the distributive estate.

The only issue plead by Rose Hemmert and currently pending before this court is the right to an elective share of the estate. The District Court's Order makes a final disposition of the claim of Rose Hemmert and is, therefore, appealable.

II.

THE ESTATE HAS TOTALLY FAILED TO ADDRESS THE CHOICE OF LAWS QUESTION RAISED IN THIS APPEAL

The estate's Brief ignores the issues as framed in Appellant's Brief. It appears the estate is conceding the choice of laws question as outlined by Appellant.

1. The estate has totally failed to respond to the prevailing legal approach which states that the validity of a contract is determined by the law of the location where it was made (**lex loci contractu**). The estate has made no explanation as to why this approach should not apply in the present case.

2. The estate has failed to address the **most significant contacts** theory.

Appellant's Brief noted that an emerging number of jurisdictions have adopted the most significant contacts test in determining the validity and interpretation of contracts. Respondent's Brief fails to even address this theory. At page 12 of its original Brief Appellant challenged the Respondent to compile a list of facts in the case which indicate the State of Florida has the most significant contacts with the Prenuptial

Agreement. Respondent has failed to accept that challenge. It is thus undisputed that Utah has the most significant contacts with this Prenuptial Agreement. Therefore, Utah law should apply as to questions concerning the validity of the Agreement.

III.

RESPONDENT HAS FAILED TO EVEN ASSERT THAT THERE IS A "MARITAL DOMICILE" THEORY

Respondent's Brief includes the following excerpt from the transcript of a hearing held in chambers immediately preceding the commencement of the trial. The speaker is Attorney Brian Florence, Attorney for the Respondent herein.

> . . . 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 suggests that the place that the Prenuptial 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 Prenuptial Agreement. (T8 L18-25, T9 L1-3)

Respondent's Brief fails to now even allege that there is such a theory of "matrimonial domicile." Respondent does not cite a case from Wisconsin and the only reference Respondent's Brief makes to the Ohio case is in reproducing a copy of the trial court's Conclusions of Law which cite the Ohio case. (Osborn). It appears the Respondent has conceded that there is no such theory as the "marital domicile" approach.

IV.

THE TRIAL COURT HAD RESPONSIBILITY IN THIS CASE TO DETERMINE ONLY THE LAW, NOT ISSUES OF FACT

Respondent contends that the trial court was correct in applying Florida law as to the validity of the Prenuptial Agreement. The only authorities cited by Respondent in support of this contention are five pages of Findings of Fact and Conclusions of Law entered by the District Court. One must conclude that the Respondent could find no higher authority to support the District Court's decision. Respondent is literally attempting to lift himself by his own boot straps. It is highly questionable whether the trial court's entry of Findings of Fact was even proper.

> As we have numerous times indicated the right of trial by jury is one that should be carefully safeguarded by the courts, and when a party had demanded such a trial, he is entitled to have the benefit of the jury's findings on issues of fact; and it is not the trial court's prerogative to disregard or nullify them by making findings of his own. Mel Hardman Productions, Inc. v. Robinson, 604 P.2d 913, 917 (Utah 1979).
>
> It was the jury's prerogative to determine which evidence was to be credited and to draw reasonable inferences from that evidence, . . . of course we view the evidence in the light most supportive of the verdict. Sintron v. Milkovich, 611 P.2d 730, 732 (Utah 1980).

Appellant concedes that Ceritos v. Utah Venture No. 1, 645 P.2d 608, 613 (Utah 1982) allows a trial court to make Findings following direction of a verdict. However, in order for those Findings to have any legitimacy, the legal basis for directing the verdict must be sound. In this case because the legal basis

for the trial court to apply Florida law in determining the validity of the Prenuptial Agreement was improper, the Findings of Fact entered by the court are absolutely worthless. They do not constitute any authority persuading an Appellate Court to uphold the September 14, 1990 Order. In reviewing questions of law, no deference is given to the trial court position. Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989).

CONCLUSION

Utah law should be applied in determining the validity of the Prenuptial Agreement. The jury has, therefore, returned a legitimate verdict ruling that the Prenuptial Agreement is not valid. The District Court's Order and judgment setting aside the verdict should be reversed with instruction to the trial court to reinstate the jury verdict.

DATED this _____ day of May, 1991.

BEN H. HADFIELD
MANN, HADFIELD & THORNE
Attorneys for Appellant

CERTIFICATE OF SERVICE

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

BEN H. HADFIELD

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