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Lakeside Lumber Products, Inc., an Arizona corporation v. Dan R. Evans, individually, Renee Evans, individually, Renee Evans, Trustee of the Revans Trust, Dan R. Evans, Co-Trustee of the Dare Family Trust, Renee Evans, Co-Trustee of the Dare Family Trust, and Dan R. Evans, Trustee of the Daymond Trust : Reply Brief of the appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LAKESIDE LUMBER PRODUCTS, INC.,
an Arizona corporation

Plaintiff/
Appellant,

v.

DAN R. EVANS, individually, RENEE
EVANS, individually, RENEE EVANS,
Trustee of the Revans Trust, DAN R.
EVANS, Co-Trustee of the Dare Family
Trust, RENEE EVANS, Co-Trustee of the
Dare Family Trust, and DAN R. EVANS,
Trustee of the Daymond Trust.

Defendants/
Appellee.

**REPLY BRIEF OF THE
APPELLANT**

Court of Appeals
Case No. 20010334-CA

**APPEAL FROM THE FINAL JUDGMENT OF THE
SECOND JUDICIAL DISTRICT COURT FOR DAVIS COUNTY
HONORABLE JON M. MEMMOTT, PRESIDING**

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ARGUMENT

1. **Defendants cannot dispute the clear ruling of the trial court that Defendant Dan R. Evans is a beneficiary of the Revans Trust by citation to the doctrine of merger or by incorrect statements of fact. In addition, Defendants did not properly raise the ruling by cross appeal.**

The doctrine of merger provides that when all legal and equitable interests in property transferred in trust are held by the same person, then merger of the legal and equitable interests has occurred resulting in the extinguishment of the previously existing trust. Plaintiff was not able to locate relevant Utah authority applying the doctrine of merger to an intervivos trust and thus causing an extinguishment of the intervivos trust, however, substantial, long standing case law exists which sets forth the doctrine of merger in this context. The Supreme Court of North Carolina opined:

“[W]here the holder of the legal title and the *cestui que trust* are one and the same person, the result is a merger of the legal and equitable title, defeating the trust and ordinarily conferring a fee simple title upon the person holding the legal title and beneficial interest. It is essential, however, that the equitable interest of no other person shall intervene. It is also stated as a condition of merger that the legal and equitable estates must be *coextensive* and *commensurate*; Lewin on Trusts (1939 Ed.), p. 12; or, as otherwise stated, the legal estate must be at least as extensive as the equitable. *Odom v. Morgan*, 177 N.C. 367, 369, 99 S.E. 195.”

Blades v. R. R., 224 N.C. 32, 37 (1944); See also, *Contella v. Contella*, 559 So.2d 1217, 1218 (Fla.App. 5 Dist. 1990) (no separation of legal and equitable interest invokes merger doctrine and trust is terminated); *Langley v. Conlan*, 212 Mass. 135, 138 (1912) (when legal and equitable title to real estate vest in same person, absolute ownership will ensue divested of the trust).

Recently, *In the Matter of Flake v. Flake*, 2003 UT 17, 71 P.3d 589 (2003) the Supreme Court of Utah referred to the doctrine of merger, but did not outline the doctrine or find an occurrence of merger to extinguish an intervivos trust. The

Supreme Court stated that certain provisions were placed in an intervivos trust agreement to prevent the operation of merger. *Id.* at 596.

The Defendants err in their advancement of the doctrine of merger to support the trial court's denial of Plaintiff's motion for summary judgment requesting imposition of a constructive trust. (*Brief of the Appellees*, p. 15). There was no merger in one person, Renee Evans, of all legal interests and equitable interests in the *res*/principal/property of the Revans Trust, more specifically identified as the Farmington Property.

The Defendants first err by failing to refute the clear and concise ruling of the trial court that Daniel R. Evans ("Dan Evans") was a beneficiary of the Revans Trust. (R. 1720 and 1726). Plaintiff argued this position in pleadings filed with the trial court and accepted in the trial court's ruling cited above. (R. 1417 to 1423)

Plaintiff continues to rely upon and directs the Court to the *Brief of the Appellant*, where in connection with the trial court's ruling Plaintiff clearly demonstrates that case law and Section 156 of the Restatement (Second) of Trusts (1959), permits the creditors of Dan Evans (including Plaintiff and/or the Nevada bankruptcy estate of *In re: Daniel R. Evans*) to reach the property of the Revans Trust (i.e. the Farmington Property) to satisfy the judgments/claims of such creditors. (*Brief of the Appellant*, p.21 to 32) The ruling of the trial court that Dan Evans is a beneficiary of the Revans Trust creates a substantial right for the Plaintiff for satisfaction of its claims.

The Defendant does not present any basis of support for the argument that Renee was the sole beneficiary and sole trustee of the Revans Trust other than an allegation of intent by Dan Evans to transfer his interest in the Farmington Property. In determining the intent of Dan Evans as Settlor of the Revans Trust his intention must be ascertained from the language of the Dare Trust and Revans Trust documents. See, *Makoff v. Makoff*, 528 P.2d 797, 798 (1974). The trial court in its Amended Memorandum Decision reviewed the Dare Trust document in detail, which was the only written trust

document executed in 1989, and found that Dan Evans' intent was that he was to be a beneficiary of the Revans Trust. (R. 1719 and 1720). In reviewing the ruling of the trial court, Defendants in the *Brief of the Appellees* cited this Court to the ruling of the trial court that Dan Evans was a beneficiary of the Dare Trust, Revans Trust and Daymond Trust. (*Brief of the Appellees*, p.7).

Dan Evans is a beneficiary of the Revans Trust, therefore he holds an equitable interest in the *res/principal/property* of the Revans Trust, more specifically identified as the Farmington Property, and there can be no merger of all interests in Renee Evans.

The Defendants err further in attempting to convince this Court that Renee Evans solely held the legal interests of the *res/principal/property* of the Revans Trust by stating eight (8) times in the *Brief of the Appellees* that Renee Evans holds sole legal title to the *res/principal/property* of the Revans Trust. (*Brief of the Appellees*, p.13 ¶ 38, 15, 17, 19, 20 and 22). However, the Defendants clearly contradict themselves by stating five (5) times that from 1989 through June 20, 1997, Dan Evans and Renee Evans were both trustees of the Revans Trust. (*Brief of the Appellees*, p.14 ¶ 43, 14 to 15 ¶ 45, 17, 24 and 25). Plaintiff presented clear evidence that Dan Evans was a trustee of the Revans Trust. (R. 41, 42, 101, 102, 894, 1340, 1341 and 1342) (Addendum 4 and Addendum 5 to *Brief of the Appellant*). The trial court specifically found that Dan Evans was a trustee of the Revans Trust. (R. 1715). The fact, admitted to by Defendants, that Dan Evans was a trustee of the Revans Trust prevents the imposition of the doctrine of merger.

As argued by Plaintiff in the *Brief of the Appellant*, under the doctrine of Langnes v. Green, 282 U.S. 531, 538-39, 51 S.Ct. 243, 246, 75 L.Ed. 520 (1931) as adopted by the Supreme Court of Utah in State v. South, 924 P.2d 354, 356 (Utah 1996), the Defendants may not attempt to argue for the overturning of the trial court's ruling that Dan Evans was a beneficiary of the Revans Trust. (*Brief of the Appellant*, p. 29 to 31). While stating that a party is only required to file an appeal based on the outcome of the lower court's decision, the Supreme Court also identified the balance to be maintained

by stating “[n]or should a party be allowed to employ its adversary’s appeal or petition as a vehicle to gain a greater benefit than that granted below.” *South* at 356. For this Court to rule that Defendants need not have filed an appeal on the issue of whether Dan Evans was a beneficiary and to find that Dan Evans was not a beneficiary would work to create a greater benefit for Dan Evans than granted below by restricting Dan Evans’ creditors’ (including Plaintiff) satisfaction of claims through execution on the Farmington Property and/or potential exclusion of the Farmington Property from the Nevada bankruptcy estate of *In re: Daniel R. Evans*. (*Brief of the Appellant*, p. 19, 20 and 21).

2. **Plaintiff’s reply to Defendants’ other points as set forth in the *Brief of the Appellees* is not required as Plaintiff’s arguments are set forth in the *Brief of the Appellant*.**

a. **Plaintiff’s argument concerning the concealment of the 1997 transfer of Farmington Property.**

The Plaintiff’s argument concerning the issue the concealment of the transfer of the Farmington Property is set forth in the *Brief of the Appellant* at page 43.

b. **Plaintiff’s argument concerning the existence of a transfer of Dan Evans legal interest as trustee in 1997.**

The Plaintiff’s argument concerning the execution of a deed in 1997 and Dan Evans removal of himself as trustee of the Revans Trust as triggering a transfer is set forth in the *Brief of the Appellant* at pages 41 and 42.

CONCLUSION

The doctrine of merger is inapplicable to the case at bar based on: 1) the clear ruling of the trial court and as argued by Plaintiff below that Defendant Dan Evans is a beneficiary of the Revans Trust, and 2) incorrect statements concerning the trustees of the Revans Trust. By failing to file a cross appeal, Defendants are barred from raising issues relating to Dan Evans’ status as a beneficiary. To find otherwise would be a modification of the trial court’s ruling and result in using Plaintiff’s appeal as a vehicle to gain a greater benefits for the Defendants while lessening the rights of Plaintiff granted by the trial court.

As shown by Plaintiff in the *Brief of the Appellant*, the trial court's determination not to impose a constructive trust on the current trustee of the Revans Trust was in error. A determination in favor of the Plaintiff allows the creditors (including Plaintiff) of Dan Evans to reach the *res/principal/property* of the Revans Trust, more specifically identified as the Farmington Property, to satisfy their claims by execution on such property or by administration of the equitable interest of Dan Evans in the *res/principal/property* of the Revans Trust by the trustee of the Nevada bankruptcy estate of *In re: Daniel R. Evans* was in error. The use of the equitable remedy of a constructive trust will accomplish satisfaction of such claims or administration of such estate in the most efficient manner.

As shown by Plaintiff in the *Brief of the Appellant*, the trial court's determination that Dan Evans did not retain the power to revoke the Revans Trust and regain fee simple interest in the Farmington Property should be reversed by this Court based on the language of the Dare Trust and Amended Dare Trust concerning the ability of a Grantor to reacquire the property which he contributed to the trust.

As shown by Plaintiff in the *Brief of the Appellant*, undisputed facts, i.e. badges of fraud, exist concerning Dan Evans' fraudulent conveyance of the Farmington Property to Dan Evans and Renee Evans as trustees of the Revans Trust in 1989 or by Dan Evans' transfer of record title to Renee Evans as the sole trustee of the Revans Trust in 1997. Based on such badges of fraud, this Court should either: 1) grant Plaintiff's motion that the transfer of the Farmington Property by Dan Evans is voidable under the Uniform Fraudulent Transfer Act, Utah Code Ann. § 25-6-1, et. seq. (1995), or 2) find in the alternative that genuine issues of material fact exist concerning the transfer of the Farmington Property by Dan Evans and therefore reverse the trial court's granting of Defendants' Motion - Dan Evans and refer this matter back to the trial court for further proceedings.

Respectfully submitted this 17th day of September, 2004.

A handwritten signature in black ink, appearing to read "J. Bullock", positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the "REPLY BRIEF OF THE APPELLANT" was mailed via first-class U.S. Postal Service mail, postage pre-paid, on September 17, 2004, to:

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A handwritten signature in black ink, appearing to read "Shelley D. Bomer", with a horizontal line extending from the end of the signature.