

1961

O. A. Tangren, etc. v. Adeline M. Ingalls et al :
Petition for Rehearing and Brief of Respondent in
Support Thereof

Utah Supreme Court

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Romney, Boyer and Ronnow; Attorneys for Respondent;

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

O. A. TANGREN, ETC.,

vs.

ADELINE M. INGALLS

124252

ADELINE M. INGALLS

vs.

AMERICAN SAVINGS & LOAN

ASS'N, et al

124797

ADELINE M. INGALLS

vs.

PRUDENTIAL FEDERAL SAV-

INGS & LOAN ASS'N, et al

124798

DEC 15 1961

Clerk Supreme Court, Utah

Case No.

9297

PETITION FOR RE-HEARING AND BRIEF OF
RESPONDENT IN SUPPORT THEREOF

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PETITION FOR RE-HEARING

Comes now Adeline M. Ingalls, the respondent herein, and respectfully moves this court for a re-hearing in this case upon the grounds hereinafter set forth.

RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent relies on no facts other than as set forth in the Opinion of the court, filed November 30, 1961.

STATEMENT OF POINTS RELIED UPON

POINT I

THE INTENT OF THE PARTIES TO A JOINT TENANCY AGREEMENT IS IN GREATER JEOPARDY UNDER THE RULE OF THE MAJORITY OPINION THAN IF THE RULE OF LONG STANDING WERE APPLIED.

POINT II

THE RULE OF THE MAJORITY OPINION HAS NO APPLICATION TO THE CASE AT BAR.

ARGUMENT

POINT I

THE INTENT OF THE PARTIES TO A JOINT TENANCY AGREEMENT IS IN GREATER JEOPARDY UNDER THE RULE OF THE MAJORITY OPINION THAN IF THE RULE OF LONG STANDING WERE APPLIED.

Unfortunately, an infallible method of determining intent has not been found. The majority opinion holds that the rebuttable rule is more desirable than the conclusive rule. With this we respectfully disagree and earnestly contend the opposite to be true.

The argument of the majority opinion in support of the rebuttable rule is three-fold: 1. Unlikelihood of contest if the agreement states the true intent. 2. High quality of evidence required to overcome the presumption. 3. Protection of the "Dead Man Statute." The fallacy of such argument is that the dead man statute

is more likely to defeat the intention of the parties than to protect it, for the statute precludes the "other party" to the agreement, as in the instant case, from testifying to matters equally within her knowledge and that of the deceased. Thus, the court is deprived of the testimony of the person who is most likely to know of the intent of the parties.

The quality of proof required to overcome the presumption is characterized by the majority opinion as a "defensive shield" but the "shield" loses much of its defensive character without the testimony of the "other party" to the agreement. Evidence produced to rebut the presumption might be considered sufficient in the absence of the testimony of the "other party," but insufficient when considered with evidence of the "other party," were he not prohibited from testifying by the dead man statute.

The majority states that if the intent was in fact to create a joint tenancy, a contest thereof would be rare. Obviously, such is not true under the rebuttable rule, for the rebuttable rule is tantamount to an open invitation for designing persons to contest the agreement.

The conclusive rule is criticized by the majority on the ground that it presupposes the intent of the deceased and in some instances may not give effect to true intent. In answer to this we submit that rather than to hazard defeat of the true intent of the deceased by reason of the inherent difficulties of the rebuttable rule, the court should be confined to the agreement itself to determine

intent. In order to correct the *rare* instance in which the joint tenancy agreement may not express true intent, the majority has set up a rule which by reason of its infirmities endangers the true intent of *all* such agreements. Justice is achieved under the conclusive rule, for in most cases the true intent of the parties will be carried out, and even the rare exception finds legal justification for it gives effect to the express intent. Evaluation of the two rules emphasizes the wisdom of retaining the conclusive rule which has been the law of this jurisdiction for many years.

POINT II

THE RULE OF THE MAJORITY OPINION HAS NO APPLICATION TO THE CASE AT BAR.

The rule of the case, as stated by the majority, is as follows:

. . . where there is a written agreement of joint tenancy with right of survivorship, there is a presumption of validity and it will be given effect unless it is successfully attacked for fraud, mistake, incapacity, or other infirmity, or unless it is shown by clear and convincing evidence that the parties intended otherwise; and further, that such rule is applicable whether the parties are living or where death has intervened.

If the majority of the court is determined to discard a rule of long standing, and, in its stead adopt the one quoted above with its attendant infirmities, such has no application to the case at bar and does not warrant a reversal of the judgment. The rule itself, indeed the entire

opinion of the majority, emphasizes the intention of the *parties*. On Page 5 of the Opinion allegations of the complaint are quoted, following which is the statement, "The foregoing allegations appear to be sufficient to provide a foundation to receive evidence as to what the intent of the *parties* was and their relationship to the fund at the time of the creation of the account." (Emphasis ours) The complaint is barren of allegations of intent of the *parties*. Allegations of intent therein are of *one* of the parties only. Allegations of ownership of the account, lack of contribution thereto by survivor, lack of any indebtedness owing by deceased to survivor, and subsequent gift of a portion of the fund by deceased to survivor are not allegations of intent. Although recognized to be in disrepute by the majority, *Holt v. Bayles*, 85 Utah 364, 39 Pac. 2d 715, contains a statement as follows: "We do not regard the questions of original ownership of the money as controlling under the particular facts of this case."

Appellant was afforded opportunity to amend in the lower court, but he elected to stand on the complaint as filed. Had facts other than those alleged existed, appellant would undoubtedly have amended the complaint. Although the right of a litigant to offer proof should be safeguarded, where a pleading is wholly lacking in allegation of fact, which if proved would entitle him to relief under the law, there is no injustice in granting summary judgment. Such is the case at bar.

CONCLUSION

The majority rule places the intent of the parties in jeopardy, invites litigation, tends to promote injustice, and has no application to the case at bar. We respectfully urge the court to re-affirm the rule of long standing in this State, or if the rule of the majority is retained, to determine it inapplicable to the case at bar and to affirm the judgment of the trial court.

Respectfully submitted,

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