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IN THE SUPREME COURT OF THE STATE OF UTAH

WOODRUFF ASHTON, Plaintiff/Respondent, vs WILFORD ASHTON and VIRGINIA ASHTON, Defendants/Appellants.	BRIEF OF APPELLANTS Case No. 19129

Appeal from Judgment of the Fifth Judicial District Court of Washington County, State of Utah, the Honorable Christian Ronnow, Judge Pro Temporare, Presiding.

* * * * * * * * * * * * * * * * * * * *

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FILED

DEC 4 1980

Clerk, Supreme Court, Utah

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STATEMENT OF THE KIND OF CASE

On 18 November 1968, Frank Ashton, now deceased, conveyed inter vivos real property to his brother, Defendant Wilford Ashton and his sister-in-law, Virginia Ashton, as joint tenants.

Plaintiff/Respondent filed an action, alleging, among other things, that the inter-vivos conveyance had been made with the intent of the grantor, Decedent Frank Ashton, that one-half (1/2) of the subject property was to be held in trust, for his benefit, until his marital difficulties were resolved.

Plaintiff/Respondent, in his action to compel Wilford and Virginia Ashton to convey the subject property, i.e., the east half of the property conveyed in an alleged inter alia, that at the time Frank Ashton conveyed the property to

Wilford and Virginia Ashton, that Defendant Wilford Ashton promised decedent Frank Ashton that he would convey the east half of the property after Woodruff's "marital difficulty had been straightenes out." (TT: 36, 10-13). Woodruff Ashton further alleged that a constructive trust was created in his favor. Woodruff Ashton pleaded that failing a court imposed constructive trust, he would be entitled to the east half of the subject property by way of adverse possession.

Defendants/Appellants, advanced affirmative defenses, such as the statute of frauds, dead man's statutes, statute of limitations and the fact that the statutory requirements of adverse possession had not been met.

On 1 February 1983, trial was held in the Fifth Judicial District Court, the Honorable Christian Ronnow, Judge Pro Temporare presiding. It is from the errors of trial that Defendants/Appellants advance the instant appeal.

ARGUMENT

POINT I

PLAINTIFF/RESPONDENT DID NOT MEET HIS BURDEN OF PROOF ON ANY LEGAL OR FACTUAL ISSUE OF THE CASE.

A. The evidence does not warrant creating a property interest by a constructive trust, by virtue of failure of the Respondent to meet the elements of a resulting or constructive trust.

B. Interest in real property is for good reason,

carefully created and preserved. Respondent's evidence in this case does not rise to the level of creating resulting or constructive trust, by its burden of clear and convincing evidence as articulated in this Court's case of Carnesecca v Carnesecca, 752 P.2d 708.

There is, of course, the intervention of equity, where the legal elements are lacking, but in the instant action, the quantum of respondent's proof falls far short of that which is required to sustain an equitable remedy.

There can be little disagreement that "real estate is presumed to be owned by the one in whose name the record title stands." Ward v Ward, 172 p.2d 978, 987 (Okla. 1946), Jacobson v Jacobson, 557 P.2d 156, 158 (Utah 1976).

At trial, Plaintiff/Respondent Woodruff Ashton relied in chief, as to his evidence that a constructive or resulting trust was created in his favor, essentially upon the admissions of his brother, Wilford Ashton, which purportedly took place during a family gathering on December 13, 1968.

Plaintiff/Respondent Woodruff Ashton testified that on the day of his brother Frank's funeral, while the family was gathered for a family meal, that his brother Wilford stated in the kitchen of Wilford's home, "I promised Frank that I would give Cub (nickname for Plaintiff/Respondent Woodruff) the east half of the field" (referring to the east half of the property held in joint tenancy by Wilford and Virginia

Ashton as was conveyed by Frank Ashton on 18 November 1965 (TT: 35, 25 Ibid - 36, 1)

In substance, Plaintiff/Respondent's sister, Agnes Connell, his nephew Robert Connell, and his nephew Gary Ashton confirm that in substance Wilford Ashton had made the statement. Defendant/Appellant Wilford Ashton has no particular memory or recollection of the date in question or the facts and circumstances surrounding his alleged statement, but did deny promising any conveyance of said property. (TT: 277, 19).

Defendants/Appellants admit that due to the passage of some fourteen (14) years, that they are unable to recall the facts and circumstances at the time of the purported statement, but both Wilford Ashton and Virginia Ashton deny that such a statement was made. (TT: 277, 19 and 364, 12-16).

If, however, this court was to view the alleged admission by a party opponent, in its most favorable light to Respondent, there would simply not be enough evidence of a clear and convincing nature that would warrant a jury finding of a resulting trust in favor of Plaintiff/Respondent.

If this court views the transcript, it is just as possible to conclude that the statement, if any statement was made, which is denied by Defendants/Appellants, such a statement would be nothing more than a mere gratuitous offer

on the part of Defendant/Appellant Wilford Ashton. There is no evidence that the decedent, Frank Ashton, required or solicited a promise or detrimentally relied thereon from Wilford Ashton as a condition of conveying the property in joint tenancy to Wilford and Virginia Ashton in 1968.

Presumably, evidence at the time of the execution of the Deed would have shed light upon whether or not Frank Ashton, decedent and grantor, required some type of promise or precondition in the conveyance of said deed.

Ironically, the attorney who drafted and notarized the deed of joint tenancy from Frank Ashton to Wilford and Virginia Ashton, was Phillip L. Foremaster, now Attorney for Plaintiff/Respondent. At trial, Defendants/Appellants specifically waived any potential conflict of interest and called Phillip L. Foremaster as a defense witness.

Mr. Foremaster testified, under oath, and understandably so, that he had no independent recollection of the conveyance of 18 November 1968. Defendant/Appellant Wilford Ashton testified with particular clarity that the deed was drafted by Attorney Phillip L. Foremaster, that his brother Frank signed the deed in the presence of Mr. Foremaster, as is evidenced by Mr. Foremaster's notary seal. (TT: 277, where Mr. Ashton testified that the decedent, Frank Ashton, Grantor, did not place any preconditions upon the execution of said

deed.

Mr. Foremaster, while denying any independent recollection, does concede, on page 271 of the trial transcript, that he may very well have drafted the deed and notarized the signature of the decedent, Grantor Frank Ashton.

It would stretch the imagination to believe that an attorney of the caliber, competency, and experience of Phillip L. Foremaster would have drafted and executed a deed in his presence that was preconditioned to be conveyed to a third party. It would follow, therefore, that since the only evidence of the resulting or constructive trust at the time of the making of the deed is the evidence rendered by Defendant/Appellant Wilford Ashton that the burden of proof of clear and convincing evidence simply fell far short as required by law.

The Honorable Justice Wolfe, in the case of Greener v Greener, 212 p.2d 194 (Utah 1949), eloquently defines the clear and convincing standards, and explains the legal confusion which will result when it is abandoned:

> That proof is convincing which carries with it, not only the power to persuade the mind as to the probable truth or correctness of the fact it purports to prove, but has the element of clinching such truth or correctness. Clear and convincing proof clinches what might be otherwise only probably to mind.
>
> We have no measuring rod to lay alongside of the proof to ascertain whether it meets the various tests signified by the terms, "barely" or "merely" or "slightly" preponderating" or "fairly", "greatly" or "overwhelmingly prepondering ", nor can we measure the content of such terms as clear and convincing

measure the content of such terms as clear and convincing "beyond a reasonable doubt" (which we take to mean the same as free from reasonable doubt), "unquestionably convincing." These terms deal with states of mind and to a degree vary as to the content put into them as minds vary. They all have implicit in them the idea of comparativeness, each with another's standards, signify more or less degrees of proof.

But for a matter to be clear and convincing to a particular mind, it must at least have reached the point where there remains no serious or substantial doubt as to correctness of the conclusion. A mind which was of the opinion that it was convinced and yet which entertained, not a slight, but reasonable doubt as to the correctness of its conclusion, would seem to be in a state of confusion. This means that more than the usual modicum of evidence is required to meet the clear and convincing evidence standard of Jewell v Horner, 366 P.2d 594 (Utah 1961).

POINT II

THE TRIAL COURT ERRED WHEN IT RENDERED JUDGMENT IN FAVOR OF PLAINTIFF/RESPONDENT AS TO ANY CONVEYANCE, OR, IN THE ALTERNATIVE, AS TO THE CONVEYANCE OF THE WHOLE PARCEL OF PROPERTY CONVEYED BY THE DECEDENT, THE COURT THEREBY CONVEYING PROPERTY BELONGING TO VIRGINIA ASHTON AS WELL.

The property was conveyed in joint tenancy to Wilford and Virginia Ashton, husband and wife, as joint tenants.

It is well settled in Utah that a spouse who holds a deed in joint tenancy with his or her spouse, only has right as to one-half of the subject property.

Section 30-2-1 Utah Code Annotated as Amended 1953, WIFE'S RIGHT TO PROPERTY -- LIABILITY FOR HUSBAND'S DEBT states.

> Real and personal estate of every female acquired before marriage, and all property to which she may afterwards become entitled to by purchase, gift, grant, inheritance, bequest or devise, shall be and remain the estate and property of such female and not be liable for the debts, obligations, or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.

Since on November 18, 1968. she was given property by the decedent, Frank Ashton, her brother-in-law, as a gift, her husband unilaterally does not have the right to give away her vested interest.

The record is totally void of any evidence in any shape or form, that shows that Virginia Ashton did anything that would remotely create a constructive or resulting trust in favor of the Respondent. (TT: 364, 12-16).

Not only does Utah's statutory authority hold the proposition that the independent rights of a joint tenant spouse but the same is well settled on the subject by Utah cases.

Where a husband and wife hold property so acquired as joint owners, either may transfer his interests in the property so held without affecting the interest of the other. Since the rights of each spouse are alienable, any purchaser or encumbrancer does not become a joint tenant in the property, but becomes a tenant in common with the remaining spouse. Clearfield State Bank v J. G. Contos, 562 P.2d 62[illegible]

The law in Utah clearly states that a joint tenant

cannot dispose of more than his interest in joint tenancy property, i.e., one-half (1/2) thereof. Tracy-Collins Trust Company v Goeltz, 5 Utah 2d 350, 301 P.2d 1086 (1956). Appellants do not concede that there is a quantum of evidence to find clear and convincing evidence as against Defendants/Appellants, but would advance totally that the trial court erred in finding that the whole of the subject property conveyed by the grantor, decedent Frank Ashton, would be subject to the alleged promise or precondition creating a resulting trust in favor of Plaintiff/Respondent.

To follow the legal analysis in joint tenancy, based upon the sheer weight of authority, both in the State of Utah and elsewhere had Defendant/Appellant Wilford Ashton died at any point prior to the instigation of this action, then it would follow that she would have taken, under the rights of survivorship of joint tenancy, her fee simple interest in the subject property, not subject to the claims of the instant action.

POINT III

THE TRIAL COURT ERRED WHEN IT SUA SPONTE. THE COURT DID NOT ALLOW THE TESTIMONY OF AN EXPERT WITNESS, STIPULATED AS TO QUALIFICATION BY PLAINTIFF/RESPONDENT'S COUNSEL.

Mr. Lowry Snow, an attorney, and President of a title company, was called by Defendants/Appellants as a witness to

explain as to technical matters of conveyance by deed. The Court Sua Sponte, cut off Mr. Snow's testimony. (TT 404-407).

Defendants/Appellants' counsel then used the questions and answers method to attempt to get the Court to allow the testimony to come in. It is advanced by Defendants/ Appellants that Mr. Snow's testimony was absolutely vital as to the technical matters so that the jury could well understand the effects of the various deeds and conveyances that were pertinent to the instant action.

Defendants/Appellants counsel attempted to inform the court as to the net effect of a subsequent conveyance, would have terminated the joint tenancy relationship (i.e., when, if at all, respondents interest vested), that Defendant/Appellant Virginia Ashton would not have given up her rights but that the joint tenancy would have terminated and a tenancy in common would have materialized.

It would seem that the authorities are well settled that any attempt at conveyancing to a third party by a co-tenancy destroys the joint tenancy relationship.

Attempt was made during trial for Defendants/Appellants counsel to explain to the Court the net effect counsel was summarily cut off from his arguments and it appeared from the record that the Court failed to understand what Defendants would advance is the status of the law as to a conveyance or an attempt to do so by one of the co-tenants. (TT. 409-410

Section 95 of Volume 20 of Am Jur, 2d., articulates the well-settled law. "Since there is, merely by reason of the existence of a co-tenancy, no agency relationship between co-tenants, the courts are agreed that one co-tenant cannot ordinarily transfer or dispoae of the interest of another co-tenant in such a manner as to be binding, unless duly authorized to do so. Nor can a co-tenant, as a rule, bind his co-tenants by any unauthorized attempt to alienate or encumber the entire estate or any specific portion thereof, or any undivided interest in any such portion. In the absence of authorization or ratification on the part of his co-tenants, any dealings on the part of one co-tenant in relation to the common property is mere nullity insofar as their interests are concerned. On the other hand, and in accordance with well-settled rules stated elsewhere in this work, it is clear that an unauthorized act of the kind under consideration may be affirmed or ratified by the other co-tenants, or they may estop themselves by their conduct from questioning its validity, in which case it becomes as binding upon them as though they had joint therein. Mere failure to object to a transaction of this kind, however, does not necessarily preclude the non-consenting tenants from asserting their rights, and unless they have acquiesced therein in one

way or the other, there can be no basis for estoppel in pais.

Section 97 (supra) states under the heading of Sales and Conveyances "Since the sale of a common property can be affected only by the joint or concurrent action of several co-owners, it is clear that in the absence of authorization ratification any attempt at conveyancy thereof by one tenant is not binding upon his co-tenants, and operates to pass title to nothing more than the sellers' own interest This does not mean, however, that such a conveyance can safely be ignored; entry under a deed of this character and assertion of exclusive ownership thereunder, constitute an ouster, and the grantee, may, in time, acquire good title by adverse possession. In the case of real estate, the non-asserting co-tenant may, if he chooses not to ratify the sale, maintain an action of rejectment against the purchaser to recover the property . . . " (Emphasis added).

Since no evidence was ever presented indicating that Defendant/Appellant Virginia Ashton ever ratified any purported conveyance by her husband, her portion of the joint tenancy estate would be free from any adverse claim since her husband did not have the power to convey any ownership interest to anything other than that which he owned at the time.

POINT IV

JUSTICE WOULD DEMAND A NEW TRIAL DUE TO THE PHYSICAL INCAPACITY OF A MAJOR

PARTY WITNESS.

At the time of trial and during the time that he was testifying, Defendant/Appellant Wilford Ashton was under extreme physical duress. At the conclusion of his testimony, he was taken that very evening, by ambulance, to the Dixie Medical Center, where he was hospitalized and placed in the intensive care unit. Since neither Defendants were available at the time of final argument, Counsel for Defendants/Appellants, requests of the trial court that the court explain to the jury the absence of Defendants/Appellants. The Court simply stated to the jury that the Defendants were "Excused", thus creating the prejudicial inference that their absence was a mere excuse for not being present.

Counsel for Defendants/Appellants further request that the Court inform the jury of the physical nature of the illness, so as to preclude the prejudicial effect of the jury drawing any wrong conclusions. Defendants/Appellants candidly admit that they do not know what conclusions, if any, were drawn by any member of the jury, but it would seem logical that they could infer that Defendants/Appellants had so little interest in the case that they were conspicuously absent at the conclusion of the trial. Defendants/Appellants acknowledge that it is not the duty of the Supreme Court to weigh and consider the evidence at trial. However, it is noteworthy that the evidence in this case did not meet in any way its burden of proof.

Counsel for Defendants/Appellants requested a "Mistrial" due to the inability of the Honorable Christian Kennedy to understand the concept of the case. At several points during trial, the Court would state that it had been lost (TT: 371, 9-19; 376, 21; 406-409; 382, 11-25)

Counsel for Defendants/Appellants requested a Motion to Dismiss based on the lack of evidence, but such was overruled and denied. (TT: 387, 13-22).

CONCLUSION

I. FOR ALL THE REASONS SET FORTH ABOVE, THIS COURT SHOULD REVERSE THE JUDGMENT OF THE LOWER COURT, AWARDING JUDGMENT AGAINST PLAINTIFF/RESPONDENT, FOR FAILURE TO HAVE CARRIED THE BURDEN OF PROOF.

II. ALTERNATIVELY, TO STRIKE ALL AWARDS IN FAVOR OF RESPONDENT AND REMAND TO THE LOWER COURT FOR A NEW TRIAL, WITH SPECIFIC INSTRUCTIONS AS TO THAT PORTION OF THE PROPERTY OWNED BY VIRGINIA ASHTON.

III. ALTERNATIVELY, FOR A NEW TRIAL ON ALL ISSUES.

IV. TO AWARD APPELLANTS' SUCH OTHER RELIEF AS THIS SUPREME COURT DEEMS APPROPRIATE.

RESPECTFULLY SUBMITTED THIS 15th day of December 1

ALAN D. BOYACK

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of December 1983, I mailed two (2) copies of the within and foregoing document, first class postage fully prepaid to:

Mr. Phillip L. Foremaster
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165 N. 100 E.
St. George, Utah