1984

Woodruff Ashton v. Wilford Ashton And Virginia Ashton : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

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

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

WOODRUFF ASHTON, Plaintiff and Respondent, -vs- WILFROD ASHTON and VIRGINIA M. ASHTON, Defendants and Appellants.	Case No. 19129

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action brought by Respondent against Appellants asking the trial court to impress a Constructive Trust for his benefit upon certain real property standing in the name of the Appellants located in Washington County, Utah or in the alternative claiming adverse possession on the part of Respondent and against Appellants regarding said property.

DISPOSITION IN LOWER COURT

The case was tried to a jury. The Court submitted the matter to the jury on special interrogatories as follows and the jury answered as follows (R. 48):

INTERROGATORY NUMBER ONE: When Frank Ashton deeded the subject property to Wilford and Virginia M. Ashton, was his deeding conditional upon Wilford and Virginia deeding the East one-half of the property to Woodruff when Woodruff's marital problems had ended?

JURY'S ANSWER TO INTERROGATORY NUMBER ONE: Yes.

INTERROGATORY NUMBER TWO: Did a relationship of confidence and trust exist between Frank, Wilford and Virginia at the time of the deeding?

JURY'S ANSWER TO INTERROGATORY NUMBER TWO: Yes.

INTERROGATORY NUMBER THREE: Did Wilford and Virginia breach this relationship of trust, if any of you so find, by failing or refusing to deed to Woodruff following his divorce from Edith in 1980 with the result that Wilford and Virginia are thereby unjustly enriched?

JURY'S ANSWER TO INTERROGATORY NUMBER THREE: Yes.

Based upon the findings of the jury on the special interrogatories the Court entered Findings of Facts and Conclusions of Law in conformance therewith (R. 49-54) and entered its judgement ordering the Appellants to Quit Claim the East one-half of the subject property together with one-half of the water on the whole property to Respondent (R. 55-56). From a verdict and judgement for the Respondent the Appellants have appealed.

RELIEF SOUGHT ON APPEAL

Respondent requests that the Supreme Court affirm the verdict and judgement entered in the trial court.

STATEMENT OF FACTS

The Respondent is the brother and brother-in-law of the Appellants Woodruff and Virginia M. Ashton (T. 5). The Respondent and Appellant Wilford Ashton had an older brother named Frank Ashton who died December 10, 1968 (T. 5). Prior to the death of Frank Ashton he owned a forty acre tract of real estate with two shares of irrigation water in or about Hurricane, Washington County, State of Utah (T. 6), but sold twelve acres of that property to a third party leaving a balance of twenty-eight acres plus the two shares of water standing in his name (T. 6). Prior to the death of Frank Ashton the Respondent helped him farm and place improvements on the subject property (T. 31, 32). In Addition, Frank had told the brothers' sister Agnes Connell, that he planned to give the property to his younger brothers Wilford and Woodruff upon his death (T. 174, 175, 176).

On November 18, 1968 Frank Ashton executed his Warranty Deed conveying title to the property to the Appellants as joint tenants (EX. 14).

Frank Ashton was buried on December 13, 1968 (T. 32) and on the same day the Ashton family met for a family dinner at the home of Appellant Wilford Ashton (T. 32, EX. P-40, P-41). At that time and place a conversation took place wherein the Appellant Wilford Ashton advised the family that he had received a deed to the subject property from Frank a few days prior to his death and that he had promised Frank, in consideration of the conveyance, that as soon as the Respondent solved his marital problem with his wife Edith, that he (Wilford) would convey the East half of the subject property and one-half of the water rights to the Respondent (T. 33, 34, 35, 36, 37, 170, 171, 172, 173, 174, 175).

In addition, the Appellant Wilford Ashton stated that as long as the Respondent was to get one-half of the property he should pay half of Frank's burial fees (T. 37) which the Respondent subsequently did (T. 38, EX. P-22, P-20).

Subsequent to this meeting the Respondent Woodruff Ashton became actively involved in cultivating the subject property (T. 41, 42, 43, 44, 75, 76, 77, 78, EX. P-9, P-5, P-7, P-10, P-8, P-6) and placed improvements on the East half of the subject property which he considered to be his (T. 45, 46, In addition the two brothers Wilford and Woodruff met at one time and arrived at an agreement as to how the subject property would be divided in accordance with Frank's wishes (T. 49, 50, 52, 53, 54, 55, 56, 57, EX. P-30) and placed certain markings showing their proposed division (T. 54, 55, 56, 57, EX. P-3, P-4 P-11). In addition during the fourteen years between the death of Frank Ashton until the present law suit was filed the Respondent paid one-half of the property taxes on the subject property and one-half of the water assessment on the subject property (T. 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, EX. P-19, P-1, P-17, P-18, P-21). Also, he placed certain improvements on the property consisting of a new barn, a corral, a loading shute, storage house and shed (T. 81, 82, 83, 84, 85, 86) and a pond and reservoir (T. 87, 88).

During the passage of time the Respondent made request the Appellants to convey to him his share of the subject property but the Appellants refused to make such conveyance with the that the Respondent had not yet solved his marital problems.

his wife Edith (T. 94, 95)

In October of 1980 the marital relationship between Edith and the Respondent was terminated by a Decree of Divorce (T. 95, 96, EX. P-15). Subsequent thereto the Respondent made request upon his brother to convey to Respondent the subject property, but the Appellant failed and refused to do so (T. 97, 98, 99, 100, 101, 102, 103, 104). During all of the time herein mentioned one-half of the water originally belonging to Frank Ashton was used by the Respondent to irrigate his claimed half of the subject real property (T. 106, 107).

ARGUMENT

POINT I: RESPONDENT MET HIS BURDEN OF PROOF IN PROVING A CONSTRUCTIVE TRUST AGAINST APPELLANTS INVOLVING THE SUBJECT PROPERTY.

The doctrine of Constructive Trust has been recognized by the law for many years. The following is a statement of the doctrine set forth in the RESTATEMENT OF THE LAW OF TRUSTS at section 45:

> (1) Where the owner of an interest in land transfers it inter vivos to another in trust for a third person, but no memorandum properly evidencing the intention to create a trust is signed, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the third person, if, but only if,
>
> (a) the transferee by fraud, duress or undue influence prevented the transferor from creating an enforceable interest in the third person, or
>
> (b) the transferee at the time of the transfer was in a confidential relation to the transferor, or
>
> (c) the transfer was made by the transferor in contemplation of death.

In addition Utah, for many years, has recognized the law

dealing with Constructive Trusts and the Supreme Court has upheld Constructive Trusts imposed by the Court; CARNESECCA vs. CARNESECCA (utah 1977) 572 P. 2d 708; HAWS vs. JENSEN (Utah 1957) 209 P. 2d 229; MATTER OF ESTATE OF HOCK (Utah 1982) 655 P. 2d

To set up Constructive Trusts under the circumstances we are presently dealing with the following must exist:

a) a confidential relationship and arrangement between the parties to the arrangement must exist.

b) There must be a conveyance of real estate to the Defendants.

c) Facts showing breach of a confidence giving rise to unjust enrichment to the Defendants. 76 AM. JUR. 2d Sect. 221 et Seq Trust. HAWKINS vs. PERRY et al (Utah 1953) 253 P. 2d. 372 (see Haws vs. Jensen and Matter of Estate of Hock above); NIELSON vs RASMUSSEN (Utah 1976) P. 2d 511.

An examination of the record in this case shows without being controverted that the Appellant Wilford Ashton made an agreement with his brother Frank that as soon as Woodruff solved his marital problems with Edith that Wilford would convey to Woodruff the East half of the subject property together with the appurtenant water right. The testimony of Woodruff Ashton, of Agnes Connell and of Gary Ashton is uncontroverted in this re In addition the fact that a conveyance of the real estate fr Frank Ashton, the deceased brother, to Wilford and Virginia Ashton is uncontroverted. In addition it is uncontroverted Wilford and Virginia Ashton have failed to meet their duty a have failed to make the conveyance as agreed. Also, a confid

relationship existed in that the record is clear that Frank Ashton was the brother and brother-in-law of the Appellants Wilford and Virginia M. Ashton. Further the Respondent Woodruff Ashton is a brother and brother-in-law of Frank, Wilford and Virginia M. Ashton. There can be no question as to a confidential relationship.

In addition and as further support for the position of the Respondent the record clearly shows, without being controverted, that for a period of some fourteen years the Respondent went on the property, ciltivated it, improved it, and paid his share of the property tax and water assessments. In addition at one time Woodruff and Wilford entered into an agreement dividing the property. The record is uncontroverted as to this agreement and is further uncontroverted that the two brothers marked their division by a readily identifiable monument.

The cases are legion wherein the Utah Supreme Court has stated that it will not lightly over turn a jury verdict. In addition the Utah Supreme Court stated in the MATTER OF THE ESTATE OF HOCK, cited above as follows:

> "In our review of an equity case such as this, we will not disturb the trial courts findings of facts unless the evidence clearly preponderates against it. We apply this standard of review in cases involving trusts which arise by operation of law and in which the standard of proof is one of clear and convincing evidence." (see HOCK above at page 1114; see also JEWELL v. HORNER, 12 Utah 2d 328, 366 P. 2d 596 (1961).

It is clear that the Plaintiff has met his burden of proof and the Appellants must fail in their claim that he hasn't.

POINT II: THE TRIAL COURT DID NOT ERR IN APPLYING THE CONSTRUCTIVE TRUST AGAINST VIRGINIA M. ASHTON.

In point II of their argument the Appellants are again claiming that even if the Court were to find a Constructive T against Appellant Wilford Ashton that it could not find a Constructive Trust against Appellant Virginia M. Ashton as there is no evidence that she made any agreement with the decedent and transferor Frank Ashton. This premise does not conform to Utah law as set forth in the case of HAWKINS vs. PERRY (Utah 1953) 253 P. 2d 372. In the Hawkins case, Hawkins, then a boy of sixteen, gave his Uncle Alfred T. Perry money to purchase a home in Perry's name with the understanding that as soon as Hawkins reached the age of majority Perry would convey the home to Hawkins. Title to the home was taken in the name of Perry and his wife Lorene. Subsequent thereto Alred and Lorene Perry terminated their marriage by divorce and Lorene was awarded the subject home. Hawkins then sued Lorene to get the home back alleging Constructive Trust. Lorene defended on the basis that she was not a party to her husbands agreement with Hawkins and therefore was not bound by it. Justice Crockett in speaking for the Utah Supreme Court said in part as follows:

> "Any title which Lorene Perry could have acquired in this property, either by being named joint tenant purchaser in the contract or by the divorce decree awarding her Perry's interest must be derived through him. Thus his acts in connection with the acquisition of the property are binding on her; she can not reap the benefit of the favorable aspects of his conduct without being burdened by that which is unfavorable." (See Hawkins at page

Justice Crockett went on to state briefly the position of the Utah Court regarding Constructive Trust.

> Equity imposes a constructive trust to prevent one from unjustly profiting through fraud or the violation of a duty imposed under a fiduciary or confidential relationship. The Utah decision of Chadwick v. Arnold (34 Utah 84, 95 P. 572) declares "***that a trust ex maleficio (constructive trust) arises whenever a person acquired the legal title to property of another by means of an intentional false or fraudulent verbal promise to hold the same for a certain purpose, and, having thus obtained the title, retains and claims the property as his own." It is now well recognized that actual fraud is not necessary, but may be presumed where there is a relationship of confidence between the parties to a transaction and there are "other circumstances tending to show that some advantage had been taken by the dominant party with a consequent abuse of confidence."
>
> In Haws v. Jensen 209 P. 2d 229, he wrote:
>
> " A constructive trust will be imposed even though at the time of the transfer the transferee intended to perform the agreement, and even though he was not guilty of undue influence in procuring the conveyance. The abuse of the confidential relation consists merely in the failure of the transferee to perform his promise."
>
> To this may be added, the confidential relation can also be abused by the primisor's allowing himself to get into a position where he cannot perform his promise.

It is clear that the position of Appellant Virginia M. Ashton is the same as that of her husband Wilford and under the doctrine of the Hawkins case the Constructive Trust must be applied against her as well as her husband.

POINT III: THE COURT DID NOT ERR IN REFUSING TO ALLOW APPELLANTS' EXPERT WITNESS TO TESTIFY.

An examination of the transcript of the trial procedings commencing at page 403 of the transcript will show that Appellants called as Appellants' witness Mr. Lowry Snow, an attorney and abstractor. Respondent's attorney stipulated as to Mr. Snow's

qualifications as an expert attorney and abstractor. After it became apparent the direction of a line of questioning the Appellants were taking with Mr. Snow, the Court, sua sponte, refused to allow counsel to continue his line of questioning. Counsel for Appellants therefore asked for permission to ask for a profer of proof outside the hearing of the jury, which request was granted. As counsel for Respondent understands the profer of proof, Appellants were attempting to ask the witness to give his expert testimony as to the effects of the severance of a joint tenancy. Apparently the theory of Appellants' oounsel was that Wilford Ashton, by agreeing to the conditions imposed by Frank Ashton in making the subject conveyance had "severed" the joint tenancy prior to its creation and therefore Virginia M. Ashton, as a joint tenant, could not be bound by any agreement Wilford had made. Because of the Court's refusal to allow that line of testimony before the jury the Appellants claim reversable error.

It is the position of the Respondent that the Court acted correctly in refusing Mr. Snow's testimony as the same was irrelevant and immaterial in view of the fact that (1) you can not severe a joint tenancy prior to its creation and (2) the prevailing Utah law as ennunciated in Hawkins v. Perry et al, supra, renders such testimony irrelevant in any event. Under the law as set forth in Hawkins, Virginia Ashton is bound by the acts and promises of Wilford.

It is respectfully submitted to the Court that the trial court's refusal to allow the testimony of Mr. Snow does not

constitute reversable error and in fact constitutes no error at all.

POINT IV: THERE WAS NO INCAPACITY OF ANY MAJOR PARTY WITNESS AT TRIAL AND THEREFORE NO ERROR.

At the conclusion of the testimony, the Appellant Wilford Ashton apparently suffered some type of health problem and was taken to the hospital. He had already testified, and there was no further need for him at trial, nor was he re-called as a witness by any of the parties at trial. Counsel for Appellants requested the Court to explain to the jury what had happened, but the Court refused, and merely advised the jury that Mr. Wilford Ashton had been "excused". Appellants cite the Court's actions in this regard as reversable error.

Counsel for Respondent knows of no law supporting Appellants' contention. It would seem however, that the Court's actions in regard to this occurrence were proper in that it remained neutral regarding the same. If the Court had launched into a long explanation and dissertation regarding Mr. Wilford Ashton's health problems it could just as easily gotten the sympathy of the jury in favor of the Appellants and against the Respondent as the alternative of refusing to say anything could have worked the other way. It seems to the Respondent that the Court acted properly and that point IV of Appellants' claim of error is not worthy of serious consideration.

CONCLUSION

It is respectfully submitted by Respondent that the jury verdict and judgement of the trial court should be affirmed.

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