1983

Floyd E. Harmston v. T. R. Harmston : Brief of Plaintiff

IN THE SUPREME COURT

OF THE STATE OF UTAH

FLOYD E. HARMSTON,	:	
	:	
Plaintiff/appellant,	:	
	:	Supreme Court No. 19297
	:	
vs.	:	
	:	
T. R. HARMSTON,	:	
	:	
Defendant/respondent.	:	

BRIEF OF PLAINTIFF

APPEAL FROM THE JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT FOR UINTAH COUNTY

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BRIEF OF PLAINTIFF

NATURE OF THE CASE

This is an action brought by plaintiff Floyd E. Harmston to set aside deeds granting a remainding interest in certain oil rights to his brother, T. R. Harmston.

DISPOSITION IN LOWER COURT

The case was tried to the court on January 17, 1983. From judgment for defendant, plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and cancellation of the deeds in question as a matter of law, or in the alternative, a new trial.

STATEMENT OF FACTS

Mr. Floyd Harmston (plaintiff-appellant herein) was originally from Roosevelt, but spent most of his life in Provo, Utah. Following his wife's death in 1979, he left Provo and returned to Roosevelt to live. Plaintiff's brother, Mr. T. Harmston (respondent herein), also lived in Roosevelt (R. 45). the Summer and into the Fall of 1980, the plaintiff was in the regular company of his brother, the respondent. (R. 138, tr. 4[illegible]). During August and September of 1980, plaintiff developed an obsess[illegible] belief that his adopted son was stealing from him (R. 138, tr. [illegible]). Respondent played a role in this mistaken belief (R. 126) and [illegible] certain extent encouraged the misunderstanding (R. 138, tr. 17-[illegible]). During August and September, 1980, plaintiff was also very confused about his assets (R. 138).

On October 2, 1980, the plaintiff executed the will and deeds at issue. Attorney Dennis L. Draney helped plaintiff prepare a new will as well as the conveying instruments (R. 113). Attorney Draney recalled that the plaintiff was confused during the period of time he wished to make the conveyance to respondent, and for this reason Mr. Draney required plaintiff to return several times before he allowed the execution of the will and deeds to take place (R. 138, tr. 169, 181-182). The plaintiff intended both before and after October 2, 1980, that his estate and inheritance naturally pass to his adopted son Howard Blumer and then to his grandchildren (R. 5). Only for a short two month period did plaintiff mistakenly believe his adopted son was stealing from him, and that therefore his adopted son should receive no inheritance. The conveyance deeds in question had the effect of depriving plaintiff's [illegible]

his adopted son and grandchildren, of a substantial portion of his estate. When shortly thereafter plaintiff asked respondent to return the deeds, respondent refused. Plaintiff then directed Attorney Jim Hall to prepare an affidavit for him. Eleven days later, on October 13, plaintiff executed the affidavit, recanting the October 2, 1980 deed (R. 5).

In March, 1981, this action was brought by the plaintiff to set aside the inadvertant conveyance to respondent. In May, 1982, First Security Bank was appointed conservator for plaintiff's estate.

ARGUMENT

I. RESPONDENT'S MISREPRESENTATION THAT PLAINTIFF'S ADOPTED SON WAS TAKING PLAINTIFF'S ASSETS CREATED A MATERIAL MISTAKE OF FACT IN THE MIND OF PLAINTIFF AND REQUIRES THAT THE DEEDS CONVEYED TO RESPONDENT BE CANCELLED.

The reason given by the respondent for plaintiff's reconveyance of deeds originally held for his adopted son, Howard Blumer, is plaintiff's apparent belief during August and September of 1980, that Mr. Blumer was stealing monthly payments being paid into trust by the purchaser of the petitioner's former residence. Yet respondent actively encouraged plaintiff in this mistaken belief by making such comments as "Howard has jumped the gun. Hell, it all belonged to him anyway" and "I don't know why he'd want to do that" (R. 138, Respondent's testimony at 17-18).

Plaintiff's deposition, republished as part of the record in lieu of plaintiff's testimony at trial (R. 126), indicates the respondent did persuade the plaintiff to mistakenly believe that Howard Blumer was stealing from the petitioner:

> Q. What if anything did he (the respondent) tell you about reasons for signing the mineral interests to him?

> A. Well, as I told you, he (respondent) called and told me that Howard was going to steal everything that I had. So I got to thinking about it, and I thought, well, that's what he's (Howard's) thinking.

(R. 126, Plaintiff's deposition at 8).

In spite of this evidence of respondents overreaching and misrepresentations to the plaintiff, the trial court failed find that the respondent in any way attempted to persuade plaintiff that his adopted son was not acting in plaintiff's best interest.

No Utah Courts have addressed the issue whether a conveyance based on a unilateral mistake of fact may be set aside. The general rule, however, is clear: courts have authority to cancel a conveyance if it is occassioned by a unilateral and material mistake of fact in the grantor. As stated in 23 Am Jur 2d Deeds, § 157: "A court of equity will cancel a deed for material mistake of fact made by the grantor"; and in 23 Am Jur 2d Deeds, § 155: "Mistake of fact is, however, a well recognized ground for interposition of a court of equity."

Courts of Oklahoma and Colorado have set aside conveyances when the Grantor was acting upon a unilateral and material mistake of fact. In Womble v. Mahoney, 383 P.2d 26, 29 (Okla. 1963), a conveyance was cancelled because it was based upon a unilateral mistake of fact going to the essence. The Oklahoma court went on to state that a case for recission and cancellation was made stronger where the unilateral mistake of fact was a result of misrepresentation (even an innocent misrepresentation) by the other party. The Colorado rule was reaffirmed in Tilbury v. Osmundson, 352 P.2d [illegible] (Colo. 1964) as follows:

> Equitable relief will be granted in cases of mistake when the fact concerning which the mistake is made is material to the transaction, affecting the

substance and not merely its incidence, and the mistake itself is so important that it determines the conduct of the mistaken parties.

Like Womble, even if respondent's comments to the plaintiff regarding plaintiff's stepson were innocently made, the conveyance to respondent should be cancelled because the ensuing mistake of fact upon which plaintiff acted went to the essence of the transaction. Like Tilbury, plaintiff was so misled that his mistaken belief determined his conduct. Plaintiff actually was convinced his stepson was stealing from him. This belief was the sole reason for the plaintiff's actions to change the disposition of his property upon his death. This belief was either initiated by respondent or at least encouraged by respondent.

In Dreyer v. Dreyer, 617 P.2d 955 (Oregon 1980), the court said fraud, duress, undue influence and misrepresentation are concepts used to void conveyances, especially where lack of consideration given by the grantee supports a finding that the transaction is unconscionable. In the instant matter, plaintiff made the conveyance only because he was mistaken in believing his stepson was stealing from him. This alone is grounds for recission, but is strengthened by the fact that respondent encouraged this belief through his actions and therefore perpetuated the misconception and took the deeds without giving consideration.

For these reasons, plaintiff was seriously mistaken and misled as to a material fact, at the time of the conveyance to respondent. His mistake went to the very essence of the transaction and determined plaintiff's conduct on October 2, 1980, and has resulted in a partial disinheritance of plaintiff's adopted son and grandchildren.

II. RESPONDENT'S CONFIDENTIAL RELATIONSHIP WITH PLAINTIFF AND RESPONDENT'S DOMINANT SPIRIT AT THE TIME THE DEEDS WERE EXECUTED SUPPORT A PRESUMPTION OF UNDUE INFLUENCE.

When the deeds in question were executed on October 2, 1980, plaintiff and respondent had recently been spending an unprecedented amount of time together. Prior to the summer of 1980, respondent testified he had visited the plaintiff in Provo 5 or 6 times in 30 years (R. 138, tr. 24). The apparent estrangement between the parties prior to August, 1980 finds support in the plaintiff's sworn testimony as follows:

> Q. What was the relationship with your brother, let's say for a one-year period before the signing of these mineral deeds? How did you get along with him?
>
> A. Well, I got along with him all right. Because we never saw one another. I didn't give a damn for him.

(R. 126 Plaintiff's Deposition at 6-7)

By September of 1980, however, the respondent was even accompanying plaintiff on errands which were within walking distance of plaintiff's Roosevelt residence. For example, on at least one occassion they visited a bank within walking distance from plaintiff's residence, to have respondent's name entered in place of plaintiff's stepson's name on plaintiff's bank account (R. 138, Respondent's testimony at 46-47).

While these events were taking place, plaintiff continued to be in a delicate state of mental health as a result of aging. During August and September of 1980, respondent established a relationship with plaintiff which enabled respondent to exercise superiority and influence over plaintiff by accompanying plaintiff everywhere, where respondent was able to make misrepresentations to plaintiff in confidence and to encouraging misunderstandings.

The general rule as to when the law raises a presumption of undue influence is as follows:

> Where a confidential relation is shown to exist between the parties to a deed and where the grantee . . . is the dominant spirit in the transaction, the law raises a presumtion of undue influence. . .

23 Am Jur 2d Deeds, § 149.

The Utah Supreme Court has applied a similar rule. In Seequist v. Seequist, 524 P.2d 598 (Utah 1974), the Utah court found that a confidential relationship existed between a mother and son, and went on to rule that a conveyance of property for a sum not approximating fair market value was a breach of the relationship and required that the conveyance be set aside. And in Blankenship v. Christensen, 622 P.2d 806 (Utah 1981), the Utah Supreme Court found that a husband and wife relationship and a grantor's mental incapacity supported a finding that the conveyance was procurred by undue influence. The Blankenship court also found that a grantor with a delicate mental condition was more susceptable to undue influence from a person in whom he placed confidence. In other words, once a confidential relation is established, the likelihood of finding that the grantee is a dominant spirit is increased, especially where, as in the instant case, the grantor has a delicate mental condition.

Plaintiff obviously reposed great confidence in the respondent just prior to the conveyance on October 2, 1980. The facts indicate plaintiff was constantly asking respondent to take him on errands and even on long trips (R. 138, Respondent's testimony at 41-42). Plaintiff even displayed his personal assets before the respondent (R. 138, Respondent's testimony at 13-14). Based on Seequist and Blankenship, a confidential relationship existed between plaintiff and respondent. Respondent was able to easily influence

and persuade the plaintiff, who was the respondent's older brother by nearly 13 years. Indeed, a sibling relationship alone has been enough for some courts to find that a confidential relationship existed between the parties. See Roberts v. Humphreys, 356 P.2d 270 (Okla. 1960).

The trial court, however, refused to find either that a confidential relationship existed between the parties or that the respondent was the dominant spirit. The court ignored plaintiff's testimony, evidence of his delicate mental condition, and the fact that his property was conveyed to the respondent for no consideration. The lower court incorrectly required the plaintiff, rather than the respondent, to bear the burden of proof. The burden should have been placed on respondent, by virtue of his confidential relation to plaintiff and the complete lack of consideration given for the deed. Had the burden been placed on the respondent, the circumstantial evidence introduced by plaintiff in the lower court would not have needed to show respondent's overreaching by clear and convincing evidence; rather, plaintiff only would have been required to raise an inference of overreaching and undue influence on the respondent's part. Against this standard, plaintiff's evidence raises a presumption in the respondent. Respondent should be made to rebut this presumption.

Other courts have reversed decisions grounded upon improperly placing the burden of proof upon the grantor. In McNabb v. Brewster, 272 P.2d 298 (Idaho 1954), the Idaho Supreme Court followed Sparks v. Mendoza, 83 Cal App. 2d 511, 189 P.2d 43, 45 (1948) and reversed the lower court's upholding of a conveyance because the burden of proof was not properly placed upon the grantee

once a confidential relation and lack of consideration were proven by the grantor:

> If a confidential relationship exists between a grantor and grantee and there is no consideration, a presumption of fraud and undue influence arises shifting the burden of proof to the grantee to show fairness and good faith in the transaction, and upon his failure to (rebut,) the presumption of fraud and undue influence prevails and will support a finding that there was not a delivery of a deed.

272 P.2d at 301.

Plaintiff herein has alleged facts and circumstances sufficient to allow the court to find that a confidential relationship existed. And, of course, respondent gave no consideration for the conveyance. In Roberts v. Humphreys, supra, the court said where a confidential relation and lack of consideration were found, the burden shifted onto "the one occupying . . . the position of confidence" requiring him "to go forward and make a full and complete disclosure showing absolute good faith and that there was no fraud or undue influence practiced in the transaction . . ." 356 P.2d at 374.

The Supreme Court of Alabama, in Gosa v. Willas, 341 So.2d 699 (Ala. 1977), recently affirmed the setting aside of a deed for undue influence upon finding a confidential relation and a dominant spirit. The Alabama court also noted that no consideration had been given, and that:

> For the presumption to be raised, it is not necessary that the confidential relation be a fiduciary relation; it is sufficient that confidence is reposed and accepted in any of the relations in which dominion may be exercised by one person over another.

Id. at 701.

The only time the grantor has the burden of proving, by clear and convincing evidence, that the grantee practiced undue

[illegible] the bond. In so finding, the court stated:

> "[T]he influence will may be an honest, over-zealousness engendered by good motives but [illegible] to determine the rights of [illegible]."

[illegible], 17 Utah 2d at 392.

Peterson v. Christensen, 622 P.2d 806 (Utah 1981), is another case wherein the Utah Court set aside a conveyance largely because of the grantor's delicate mental condition and confidential relationship with the grantee. This combination consistently requires setting aside of conveyances, even though the grantee's exercise of undue influence is limited to an "honest, over-zealousness engendered by good motives," where a conveyance is obtained in spite of a lack of consideration. A presumption of bad faith is an equitable burden to be borne by the grantee in such a case, because a grantor in a delicate state of mind is easily pursuaded by a person in whom confidence is reposed. For these reasons, the plaintiff's previous intentions and the fairness of the transaction itself should be considered if the plaintiff's rights are to be fairly protected.

In Gmeiner v. Yacte, 592 P.2d 57 (Idaho 1979), the Idaho Supreme Court perhaps summarized the elements applied in Utah cases to measure a grantee's bad faith. Gmeiner, holds that a conveyance will be set aside as being induced by undue influence where there is evidence of:

a. some diminution and mental capacity;

b. some degree of confidence placed in the grantee; and

c. a lack of consideration.

In the instant matter, these elements are all present. There was significant confusion on the part of plaintiff at the time he conveyed the deeds to respondent. The respondent initiated and in fact perpetuated the plaintiff's delusion that his stepson

was stealing from him. During the period in which the conveyance made, respondent was in regular company with the plaintiff, accompanied plaintiff on visits to attorneys office to prepare and sign the and assisted and encouraged plaintiff to change banks and sign on accounts. During this period in which plaintiff was relying on respondent's recommendations, respondent received valuable remainder interests in the oil producing properties and admittedly gave no consideration in exchange. Before plaintiffs moved back to Roosevelt in 1980, he and respondent had very little contact and plaintiff's adopted son and grandchildren were the intended beneficiaries and natural objects of his bounty. Within two weeks of the execution of the deeds to respondent, plaintiff executed an affidavit reaffirming his prior will giving his property to his adopted son and disallowing the deeds to respondent.

The above facts clearly establish that bad faith and undue influence were practiced in the transaction between respondent and his older brother, and require that the conveyance of the deeds in question be set aside.

CONCLUSION

The court should find that plaintiff was laboring under a mistake of material fact in executing the deed to respondent, and that the conveyance should be rescinded. The court should also find that the burden of proof in this case properly rests upon respondent to rebut the presumption of undue influence created by virtue of the confidential relationship between the parties and lack of consideration given for the deed. When the facts are examined in this light, respondent's failure to show by clear and convincing evidence

absence of any undue influence or overreaching and failure to show absolute good faith require the deeds to be cancelled.

DATED THIS 9 Day of August, 1983.

BLACK & MOORE

BY James R. Black
JAMES R. BLACK

BY Fred R. Silvester
FRED R. SILVESTER

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing BRIEF was sent this 10th day of August, 1983, to the following:

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