1970

Lee W. Hobbs, As Administrator With Will Annexed of the Estate of Joseph Buhler, Deceased v. Ethel Jeanne Buhler Fenton And James E. Fenton : Brief of Appellant

In The Supreme Court of the State of Utah

LEE W. HOBBS, as Administrator with Will Annexed of the Estate of JOSEPH BUHLER, Deceased,

Plaintiff-Appellant,

vs.

ETHEL JEANNE BUHLER FENTON and JAMES E. FENTON,

Defendants-Respondents.

BRIEF OF APPELLANT

Appeal from the Judgment of the District Court for Salt Lake County
The Honorable Stewart M. Hanson

RICHARD
Gary A.
Edward
Attorneys
900 Walker
Salt Lake City

Edward W. Clyde
Attorney for Defendant-Respondent
351 South State Street
Salt Lake City, Utah 84111

TABLE OF CONTENTS

	Page
NATURE OF CASE	1
DISPOSITION OF CASE	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
CONCLUSION	16

ARGUMENT

POINT I:

A CONSTRUCTIVE TRUST IS CREATED IN FAVOR OF THE ESTATE OF THE DONOR WHEN A JOINT TENANCY ARRANGEMENT VEST NO RIGHT, INTEREST OR CLAIM IN THE OTHER JOINT TENANT AND THE PURPOSE OF THE ARRANGEMENT IS TO AVOID PROBATE OF THE DONOR'S ESTATE. 8

CASES CITED

Braedzer vs. Loveland, 12 Utah 2d 384, 367 P 2d 177 (1961) 9

Culley vs. Culley, 17 Utah 2d 62, 404 P 2d 657 (1965) 11

Hanks vs. Hales, 17 Utah 2d 344, 411 P 2d 836 (1966) .. 14

Jones vs. Allen, 7 Utah 2d 79, 318 P 2d 637 (1957) 15

Tangren vs. Ingells, 12 Utah 2d 388, 367 P 2d 179 (1961) 8, 9

AUTHORITIES CITED

20 Am. Jur. 2d, § 4, page 96 14

2 Jones on Evidence, § 356, p. 670 (1958) 15

In The Supreme Court of the State of Utah

LEE W. HOBBS, as Administrator with Will Annexed of the Estate of JOSEPH BUHLER, Deceased,

Plaintiff-Appellant,

vs.

ETHEL JEANNE BUHLER FENTON and JAMES E. FENTON,

Defendants-Respondents.

Case No. 12105

BRIEF OF APPELLANT

NATURE OF THE CASE

Appellant, as administrator with Will annexed of the estate of Joseph Buhler, deceased, seeks to have certain stock certificates and bank accounts which at the time of decedent's death were in the name of Joseph Buhler and respondent, as joint tenants, declared property of the estate of the deceased and further requiring respondent to account to the estate for any and all property in respondent's possession which was held in joint tenancy by respondent and decedent.

DISPOSITION OF CASE

The Third Judicial District Court in and for Salt Lake County, the Honorable Stewart M. Hanson presiding, entered a decree (R. 26) in favor of respondent and against appellant finding that respondent was the sole owner of the property, that appellant had no right, title, estate or interest in any of the property and that the complaint of appellant be dismissed with prejudice.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Decree dated the 13th day of April, 1970, and a direction from the Court that the properties were in fact held by respondent in trust for the deceased and his estate, or, in the alternative, for a new trial.

STATEMENT OF FACTS

Prior to the taking of testimony, the trial court accepted a stipulation of the parties which established for the record certain uncontested facts. The stipulation provided that Joseph Buhler, hereinafter referred to as decedent, died testate on the 3rd day of March, 1968, and at the time of his death was a resident of Salt Lake County, State of Utah (R. 40). That on the 4th day of December, 1968, a Will executed by the deceased on the 15th day of December, 1961, was admitted to probate and appellant was named as administrator with Will annexed (R.

41). That on the 13th day of December, 1968, appellant demanded from respondent certain itemized stock certificates together with a $400.00 checking account maintained with the Walker Bank & Trust Company. Appellant also demanded an accounting covering any other property that decedent had placed in decedent and respondent's name (R. 41). The stipulation further provided that all of decedent's property was so arranged that no property, other than an uncollected Judgment recovered by decedent against W. E. Maddison, existed to be probated should respondent prevail in the instant action (R. 42, 112).

Appellant does not desire to unduly burden this Court with an unnecessary recitation of the testimony as developed at the trial. However, because this case involves the difficult task of interpreting the intentions and desires of the decedent, and also requires a judgment as to the relationship that existed between a father and his children, appellant will briefly summarize the testimony.

The following witnesses testified on behalf of appellant. Mr. Ray George Buhler, a son of decedent, testified that the relationship between the witness and his father was close and typical of a father-son association (R. 44); that the witness observed no show of favoritism between his father and the children (R. 44-48); that his father advised him that the financial arrangement existing between decedent and respondent was for convenience and that respondent would settle decedent's affairs with the family after his death (R. 46); that Exhibits

1-P and 2-P were simultaneously sent to the witness by his father (R. 46, 47); that his father advised him that respondent had a "power of attorney" to handle decedent's affairs after he passed on, for the rest of the family (R. 50, 51).

Mr. Mac William Buhler, also a son of decedent, testified that he was very close to his father (R. 53); that the witnesse's adopted son was named after decedent (R. 54); that the decedent had executed a Will and forwarded a copy thereof to each child (R. 57, Exhibit 2P); that in 1963 decedent advised each child that they would receive equal shares of his estate, minus credits for previous loans advanced by decedent (R. 58, 59).

Norma Lorraine Buhler Reese, a daughter of decedent, testified that decedent lived with her for scbstantial periods of time after his divorce (R. 64); that she did his laundry (R. 64) and, for a certain period of time, donated her employment check to decedent (R. 66); that even after decedent had purchased a home, he would bathe at her home because his home was not equipped with adequate plumbing fixtures (R. 68); that decedent had suffered several physical ailments which prompted the joint tenancy arrangement between deceased and respondent (R. 73); that his estate was to be divided equally between the children (Exhibit 4-P, R. 73, 75).

Chester L. Reese, the husband of Norma Lorraine Buhler Reese, testified that deceased had ad-

vised him that if any child died, the children of the deceased child would share in the deceased child's portion of the estate R. 93).

Mr. James E. Fenton, husband of respondent, testified that, as a stock broker, he handled decedent's investments and that the investments were for the purposes of acquiring income and accumulating savings (R. 96); that decedent began putting his stock in joint tenancy with respondent in 1954 (R. 96); that decedent purchased the stock in his own name and thereafter issued or transferred the stocks to the joint tenancy arrangement (R. 97); that respondent never contributed to the funds which purchased the stock (R. 97); that the stock was the sole property of deceased (R. 97); that respondent never gained possession of the stock certificates, acknowledged receipt of delivery of the stock certificates or ever had possession of the bank account (R. 95, 97, 98 and 101); that decedent authorized respondent to sign the checks (R. 101); that all expenditures by respondent were for the benefit of decedent (R. 102); that respondent never exercised control or dominion over the stock certificates, the bank account or asserted any claim of ownership in the property (R. 102, 103 and 119).

The deposition of Irene Warr, a Salt Lake City attorney, was also published and made part of the record by appellant. According to the deposition, Miss Warr had a discussion with Mr. James E. Fenton on the 21st day of July, 1964, regarding decedent's financial condition and status (R. 128); that

Mr. Fenton advised Miss Warr that there was no need for the appointment of a guardian and that when decedent died, they (The Fentons) would make an accounting and distribution of the remaining estate to the family (R. 129, 130); that based on these representations, Miss Warr advised Mrs. Reese that there would be no need for a guardianship (R. 132); that at the time of this discussion with Mr. Fenton, there was no mention of any joint tenancy arrangement between decedent and respondent (R. 134).

The following witnesses testified on behalf of respondent. Mr. T. Quentin Cannon, a Salt Lake City attorney, testified that in 1955 he advised decedent to put the deed to decedent's home in joint tenancy (R. 87); hat he explained the cost of probate as against joint tenancy disposition of property to decedent (R. 86); that he didn't describe the effect joint tenancy as affectively disinheriting the other four children to decedent (R. 89); that decedent wanted respondent to have the property.

Francis L. Buhler, a brother of deceased, testified that on June 14, 1961, he caused to have certain stock certificates transferred into joint tenancy between decedent and respondent (R. 141); that at this time, decedent also advised the witness as to the existance of a Will executed by decedent (R. 141).

Mrs. Bonnie Routh, a sister of deceased, testified that approximately ten years ago, she had a discussion with decedent wherein he stated that

he wanted the property to go to respondent. However, there was no discussion as to the other four children (R. 143).

Helen H. Buhler, the former wife of decedent's eldest son, testified that decedent wanted the property to go to respondent (R. 148); that she knew nothing of any Will acually executed by decedent or with whom decedent lived after his divorce (R. 149).

The extent of the testimony given by respondent was that, with respect to a telephone call from Miss Irene Warr, she advised Miss Warr that she had no details about decedent's financial status and she would have to refer Miss Warr to her husband, Mr. Fenton (R. 152).

During his lifetime, decedent executed several Wills which were introduced into evidence as Exhibits 2-P, 4-P and 6-P. The last Will of decedent, Exhibit 6-P, was prepared by respondent's husband, Mr. Fenton, who also took decedent to his place of business where the Will was executed and witnessed (R. 104).

Appellant submits that while the above summary is necessary to understand the intent and desire of decedent, one Exhibit reflects this in decedent's own handwriting and words. A portion of a letter written by decedent to his son, Ray, dated the 5th day of June, 1961, reads as follows:

> **. . . and am sending you my will, so you will have it when I pass from this life to the be-on; now don't get upset about the claws, in the will, about the three hundred dollars, which**

> will be deducted from your inheritance, from my will; So you see, you have got that amount already and $60.00 dollars more, which is not taken off. Now you have got that amount of $360.00 dollars and have had the use of it for more than ten years; So you are not going to lose any thing of the Estate, you will be getting $60.00 more than the rest of your Brothers and Sister. (Exhibit 1-P)

Appellant respectfully submits that the above quoted letter accurately reflects the state-of-mind of decedent with respect to the distribution of his estate and also settles any question of his relationship with his children.

ARGUMENT

POINT I

A CONSTRUCTIVE TRUST IS CREATED IN FAVOR OF THE ESTATE OF THE DONOR WHEN A JOINT TENANCY ARRANGEMENT VESTS NO RIGHT, INTEREST OR CLAIM IN THE OTHER JOINT TENANT AND THE PURPOSE OF THE ARRANGEMENT IS TO AVOID PROBATE OF THE DONOR'S ESTATE.

Appellant immediately recognizes his burden of proof in attempting to impose on the property presently in respondent's possession a constructive trust for the benefit of decedent's estate. As stated by this Court in *Tangren vs. Ingells*, 12 Utah 2d 388, 394, 367 P. 2nd 179 (1961):

> . . . 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* . . . (Emphasis added.)

Appellant respectfully submits that the evidence adduced at the trial of the instant matter clearly and convincingly established that the decedent did not intend to create a legitimate joint tenancy between decedent and respondent and, further, that the acts and conduct of respondent dictate the conclusion that she understood decedent's intentions to be something other than the creation of a valid joint tenancy arrangement.

The rule pronounced in *Tangren vs. Ingells*, supra, with respect to the critical question being the intent of the parties, is consistant with the holding of *Braedzer vs. Loveland*, 12 Utah 2d 384, 367 P2d 177 (1961), wherein this court stated at 12 Utah 2d 385:

> In any contest over the owenrship of funds in such an account, the objective is to determine where the true ownership is, and this in turn often depends upon what the intent was in creating the account.

In assertaining the intent of the parties, all material factors should be considered. After a careful review of the evidence, it cannot be seriously said that decedent intended to vest in respondent a

right, interest or claim of ownership in either the stock certificates or the bank account.

Several witnesses testified that the creation of the joint tenancy arrangement was for decedent's convenience and to eliminate decedent's apprehension that, should he become incapacitated, he would also become dependent on others to merely exist. It was also clear from the evidence that decedent was not the type of individual to tolerate dependence on anyone, for any reason.

This conclusion is further supported by the testimony of respondent's husband, Mr. James E. Fenton, who candidly admitted that the investments made by decedent were for the purpose of acquiring an independent income and accumulating savings for decedent's future use and benefit (R. 96). At no time did decedent intend respondent to be on an equal parity with respect to the benefits produced by the investments. The immediate income through dividends and the cultivation of a substantial portfolio were strictly subject to decedent's control and direction. This is further borne out by the acts and conduct of respondent, which will be discussed in more detail at a subsequent point in this brief.

Continuing with an analysis of decedent's intent, it is obvious that the cost of probate of a remaining estate was a supreme concern to decedent. The previously referred to testimony of T. Quentin Cannon aptly substantiates this as illustrated by the

following exchange that occurred during cross-examination:

> Q. (By Mr. Frank) Was he (the deceased) concerned with what probate might entail?
>
> A. That is not with probate, the cost of it.
>
> Q. The cost of it?
>
> A. Yes.
>
> Q. And also the length of time involved in probate?
>
> A. No, sir, he was concerned about money. (R. 88)

In decedent's frame of mind, identical results would be reached whether his estate was probated or left to respondent, as a joint tenant, with the full although misplaced belief that respondent would make an accounting and distribution to the rest of the family after decedent's death. This is obviously what decedent intended.

However, this intent of decedent is in direct conflict with the rule announced by this court in *Culley vs. Culley,* 17 Utah 2d 62, 404 P2d 657 (1965), wherein this court stated at 17 Utah 2d 36:

> It is to be kept in mind that if the transfer of the ownership of this account, if any there was, was intended to vest only upon the father's death, that would be an attempted testimentary disposition which did not conform to the requisits for a Will, and would therefore be

invalid to transfer ownership as the trial court ruled.

Therefore, the attempted joint tenancy transfer in the instant matter must be held void and the property in respondent's possession deemed impressed with a constructive trust for the benefit of decedent's estate.

Further, the execution of Exhibits 2-P, 4-P and 6-P, by decedent would have no assertainable meaning if respondent's position was sustained. Decedent had been advised in 1955 by legal counsel that a will and a subsequent probate would be unnecessary if the joint tenancy arrangement was consummated. However, on several occasions after this date, decedent saw fit to indicate his intentions by and through the execution of these various wills. At the trial, respondent took the position that the only property to be disposed of by the referred to wills was an uncollected Judgment recovered by decedent against one W. E. Maddison. This argument is clearly facetious in light of the wording of the wills, which provide for the distribution of, ". . . all property, personal, real or mixed and including any settlement realized from the court judgment for $18,000.00 awarded to me against W. E. Maddison, to my children as follows . . . " (Exhibit 6-P).

Finally decedent in his own handwriting, and words expressed his intent as to the distribution of his esta,te in Exhibit 1-P, a portion of which has been previously quoted by appellant in this brief.

In considering the intent and understanding of respondent, several circumstances should be noted. It is admitted that at no time did respondent contribute to any of the funds utilized to make the stock purchases or which constituted the checking account with Walker Bank & Trust Company (R. 97).

Further, respondent asserted no claim of ownership to any of the property during the lifetime of decedent. Because of the importance of this fact, appellant would direct the court's attention to the following questions propounded to Mr. James E. Fenton, husband of respondent, and Mr. Fenton's responses thereto:

> Q. (By Mr. Frank) So what it boils down to, Mr. Fenton, is that although the stocks and the bank accounts were in the joint names of your father-in-law and your wife, your wife never assumed any control over them, did she, except for his use and benefit?
>
> A. That is correct.
>
> * * *
>
> Q. (Mr. Frank) I take it from what you have said, and the total scope of your testimony, your wife asserted no claim of ownership to either the bank accounts of stock until after the death of your father-in-law, is this correct?
>
> A. That is correct.

Respondent's total lack of any claim, interest or right in the joint tenancy property is further il-

lustrated by the fact that authority from decedent was obtained before checks on the joint checking account were executed by respondent (R. 101). Had the joint tenancy arrangement been legitimate and effective, no such authority would be needed. See Exhibit 11-D, which sets forth the joint tenancy agreement between the parties and the bank.

The evidence clearly indicates that the requirements necessary to create a joint tenancy were not present nor intended by the parties to this arrangement. As stated in 20 Am. Jur. 2d sec. 4, page 96:

> . . . the tenants must have one and the same interest; the interest must accrue by one and the same conveyance; they must commence at one and the same time; and the property must be held by one and the same underwrited possession. In other words, there must be the following four unities: (1) unity of interest, (2) unity of title, (3) unity of time, (4) unity of possession.

Although the above mentioned four unities are not requisits to joint tenancy bank accounts, *Hanks vs. Hales*, 17 Utah 2d 344, 411 P2d 836 (1966), the requirements obviously apply to the stock certificates in that the issuance or transfer of ownership in stock certificates is not a question of contract such as that involved in the creation of a joint tenancy bank account.

A further indication of the understanding of respondent of the joint tenancy arrangement is found

in the deposition of Miss Irene Warr which sets forth the discussion between Miss Warr and James E. Fenton, in July, 1964. At the trial and during the course of the deposition, respondent objected to this conversation on the grounds that it was hearsay evidence. However, appellant submits that the record clearly indicates that Mr. Fenton visited Miss Warr at respondent's direction and request. This is the substance of Mr. Fenton's testimony (R. 105, 106) and respondent also testified that she advised Miss Warr that she had no details concerning decedent's financial condition or status and that Miss Warr would have to talk to Mr. Fenton (R. 152).

As stated in 2 Jones on Evidence, sec. 356, page 670 (1958):

> If a party to a proceeding expressly refers to another person as being one whom he has impowered to answer on a particular subject in dispute, the answer given is in general evidence against him for the reason that he makes such third party his accredited agent for the purpose of giving the answer.

Also, this court states in *Jones vs. Allen*, 7 Utah 2d 79, 85, 318 P2d 637 (1957):

> If a party, instead of expressing his belief in his own words, names another person as one whose expected utterances he approves beforehand, this amounts to an anticipatory adoption of that person's statement; and it becomes, when made, the parties own.

As the record indicates, Mr. Fenton did not advise Miss Warr as to the existance of the joint tenancy arrangement and, further, states that on decedent's death, an accounting and distribution of the remaining estate would be made to the rest of the family (R. 129, 130 and 132). Based on this conversation, Miss Warr advised Mrs. Reese, a daughter of decedent, that a guardianship was not necessary, that decedent was financially secure and that distribution would be forthcoming.

CONCLUSION

It is apparent that the trial court disregarded the clear and convincing evidence. Neither party to the joint tenancy arrangement intended respondent to have any right, interest or claim of ownership in the subject property until decedent's death. The rational of *Culley vs. Culley*, supra, should be applied to render the transfer void and impress on the property presently in the possession of respondent a constructive trust for the use and benefit of decedent's estate.

Respectfully submitted:

RICHARDS & RICHARDS

Gary A. Frank
Edward F. Richards

Attorneys for Appellant

900 Walker Bank Building

Salt Lake City, Utah 84111