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 Respondent

N THE SUPREME COURT
F THE STATE OF UTA

W. HOBBS, as Administrator with
Annexed of the Estate of JOSE
LER, deceased,

Plaintiff-Appella

vs.

EL JEANNE BUHLER FE
JAMES E. FENTON,

Defendants-Respo

BRIEF OF RES

Appeal from the
rd Judicial District Co
The Honorable Stewart

A. Frank
ard F. Richards
neys for Appellant
Walker Bank Building
Lake City, Utah 84111

F I L E

Clerk, Supreme Court, Utah

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STATUTES CITED

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 RESPONDENT

STATEMENT OF FACTS

The Statement of Facts by Appellant does not include the very substantial evidence on which the trial court based its decision. However, we believe that we can best detail that evidence in connection with our Argument.

I. *The Trial Court Found that Mr. Buhler (the Deceased) Placed the Property in Question in Joint Tenancy With His Daughter Ethel; That He Fully Understood that this Would Automatically Result in the Full Title Vesting in the Defendant at his Death, and that He Desired and*

Intended For Her to Have the Property. The Evidence Fully Supports The Finding.

The trial court by its Findings Nos. 4, 5 and 6 (Tr. 30) found: That the decedent began to transfer various stocks and other properties owned by him into his name and the name of his daughter Ethel (the defendant) as joint tenants, with full rights of survivorship. That these transfers began in 1954, and continued from time to time over a period of approximately eleven years. The court then found that the deceased fully understood that by so placing title to his property in joint tenancy, with full rights of survivorship, the same would automatically vest full title to all of said property in the defendant on his death; "the said deceased desired and intended to so vest title to all of said joint tenancy property in the defendant, and legally and effectively did so."

The court also found that plaintiff had made no claim, and that there was no evidence to show fraud, mistake, or undue influence. The court also found that the complaint does not seek reformation of any of the contracts or documents placing any of the properties in joint tenancy, and that the evidence does not show any basis for reformation, nor any basis for determining that the defendant holds said properties in trust. (Finding 6, Tr. 30).

Before proceeding to detail the evidence, we first direct the court's attention to three recent Utah cases.

THE LAW

In *Beehive State Bank v. Rosquist,* 21 Ut. 2d 17, 439 P. 2d 468, (1968) the court reviewed all of its recent decisions, and said:

> "It seems to us that what all of the recent cases have been trying to say is this:
>
> > "If the contract between the parties ostensibly creates a joint tenancy relationship with full right of survivorship, there arises a presumption that such is the case unless and until some interested party shows under equitable rules that the contract should be reformed to show some other agreement of the parties or that the contract is not enforceable because of fraud, mistake, incapacity, or other infirmity.
> >
> > "We hold that the law is as above stated."

This holding was reaffirmed by the Utah Supreme Court on July 13, 1970, in *In the Matter of the Estate of Frank J. Spitters, Deceased v. Frances M. Newbold,* No. 12012.

We also direct the court's attention to the case of *Continental Bank & Trust Co. v. Kimball,* 21 Ut. 2d 152, 442 P. 2d 472 (1968). In this case an effort was made to bring savings accounts in various savings and loan institutions into the estate. The accounts were joint accounts with rights of survivorship, and the court said that the "*sole*" issue on appeal is whether the appellant (the estate) can introduce evidence to alter the apparent contractual relationship in connection with the joint accounts. Only one of the joint accounts had been opened

after January 1, 1962, the effective date of Chapter 17, § 38, Laws of Utah, 1961, dealing with joint savings accounts. This statute provided that the opening of a joint tenancy account "in the absence of fraud or undue influence (shall) be conclusive evidence" of the intention of all of the parties to vest title in such accounts in the survivor. The Supreme Court held that as to the one account opened after the effective date of this statute, the mere opening of the account was conclusive as to the intent, and that in the absence of fraud or undue influence, no evidence of a contrary intent could be introduced in evidence. The court went on to hold that the statute did not apply to the accounts which had been opened prior to the statute. The older accounts, said the court, were controlled by the principles announced in *Beehive State Bank v. Rosquist,* supra. The court quoted its holding from the *Beehive State Bank* case (as quoted above) and then went on to hold that since the estate is not trying to reform the contract, and is not claiming fraud, mistake, incapacity or other infirmity,

> "we think that it is conclusively bound by the contract as made, and cannot show that the parties intended a result contrary to that which the law of joint tenancy relationship imposes."

The Supreme Court thereupon affirmed the order of the trial court dismissing the estate's complaint with prejudice, thus holding that where there is no assertion of fraud, undue influence, etc., the court should not even hear evidence to contradict the presumption which arises out of the jointly tenancy contractual relationship.

In this case the complaint did not seek to reform any of the joint tenancy relationships, nor did it claim fraud, mistake, undue influence or incapacity. The court expressly found:

> "6. That there has been no claim made and there is no evidence to show fraud, mistake or undue influence. The complaint does not seek reformation of any of the contracts or documents placing any of the properties listed above in joint tenancy and the evidence does not show any basis for reformation, nor any basis for determining that defendant holds said properties in trust." (Finding No. 6, Tr. 30)

Under the holding of this court in *Continental Bank & Trust Co. v. Kimball,* supra, that in and of itself should have disposed of the matter. However, the court admitted testimony, subject to the objection of the defendant, and then expressly found, as noted, that the deceased fully understood the nature of the joint tenancy relationship, that he intended his daughter Ethel to have the property. We now proceed to detail that evidence.

THE EVIDENCE

The process of transferring the properties into joint tenancy commenced in 1954 (Ex. 9-D Tr. 113). In 1955 Mr. Buhler (the decedent) consulted Attorney T. Quentin Cannon about preparing a will. (Tr. 85) Mr. Cannon inquired about Mr. Buhler's property, and whom he wanted to have the property on his death. Mr. Buhler advised him that he had a home, some bank accounts and an automobile. He also told him that he had some stocks and bonds, that were in his name and

the name of one of his children. (Tr. 85) Mr. Buhler told Mr. Cannon he wanted the home to go to his daughter Ethel. (Tr. 85) Mr. Cannon explained two alternatives: One would be to put the home in joint tenancy in Mr. Buhler's name and the name of his daughter Ethel, and the other would be to convey the home to Ethel and reserve a life estate. (Tr. 86) Mr. Cannon explained to Mr. Buhler the effect of holding property in joint tenancy. Mr. Buhler concluded that that is the way he wanted to do it. A deed was prepared, (Tr. 86) Mr. Buhler executed it on January 28, 1955, and the deed is in evidence as Ex. 5-P.

On cross-examination Mr. Cannon stated again and again that he had advised Mr. Buhler about the legal effect of holding property in joint tenancy — that if he put property in his name and the name of his daughter, Ethel, as joint tenants, she would get it on his death. He told him: "That is just the same as making it where she can go down to the bank and take out all your money, and she can acquiesce in any of these things." (Tr. 89) He was asked if he told Mr. Buhler that this would effectively disinherit his four other children, and Mr. Cannon said that he didn't expressly say that, but that he did say that Ethel would get the property, and that this is the way Mr. Buhler wanted it. (Tr. 89) He was asked if he is sure that he told Mr. Buhler this, or if he was merely testifying this way because such would be his normal advice. Mr. Cannon testified that he was sure that he had advised Mr. Buhler, that he recalled the conversation, and then he was asked:

"Q. And it was his intent to disinherit his four children?

"A. It was his full intent to give it all to her (referring to Ethel)." (Tr. 90)

He was also asked:

"Q. It was his desire that he was disinheriting his other children?

"A. It was his desire that his daughter should have the property.

"Q. In exclusion to all his other children, or did he say that?

"A. I am sure I told him if he did it this way she would be the only one. She would have any of his properties." (Tr. 88-89)

Mr. Francis L. Buhler, who is a brother of the deceased, testified that on June 14, 1961, the deceased came to the home of Francis to transfer certain stock into the name of the deceased and his daughter Ethel "with joint tenancy and survivorship." (Tr. 141) Francis said:

"'Joe, do you really want to do this?' I said, 'What about the other children?' He said, 'No, that is the way I want it.'"

Mrs. Bonnie Routh, a sister of decedent, testified that she had visited with the decedent and talked with him about his property. He told her that he was investing in stock; that he knew that his daughter Ethel and her husband Jim "will take care of me," and "what is left is their's because I wouldn't have the stock if it wasn't for them." (Tr. 143)

Helen H. Buhler was married to LeGrande Joseph Buhler, one of the other children. (Tr. 144, 148) The deceased had been divorced in 1944. (Tr. 43) He told Helen that the only two people who stood by him after his divorce and really helped him were Jim and Ethel, and he said that the property he held was in joint tenancy, and was to remain in the name of Ethel. (Tr. 146) She testified that when the deceased came back from visits with his daughter Lorraine he frequently would have a document in the form of a will, and on several occasions he requested her to "throw them in the garbage can, and that is what I did." (Tr. 146) He told her that he didn't want to make any provision for his other four children, and that the only time they ever came to see him was to borrow money. (Tr. 147)

The record thus clearly shows that the decedent understood the legal consequences of placing his property in joint tenancy with his daughter Ethel. It had been explained to him in detail in 1955 by his attorney. His brother had questioned the wisdom of doing this in 1961, and asked: "What about the other children?", but he unequivocally told his attorney, his brother, his sister, and the wife of one of his sons that this was the way he wanted it, and that he wanted Ethel to have the property. The court expressly so found (Tr. 30) and this evidence abundantly supports that finding.

There also is no dispute in the evidence concerning the formal transfer of all of the property into joint tenancy. The home was transferred by a deed prepared

by T. Quentin Cannon in 1955. The deed is in evidence as Ex. 5-P.

The bank account was transferred into joint tenancy in December of 1962. This was after the effective date of Section 38, Chapter 17, Laws of Utah, 1961. Ex. 11-D shows that in November 1962 the bank account was in the sole name of "Joe Buhler." The December bank statement shows the account to be in the joint names of "Joe Buhler and Mrs. Ethel Buhler Fenton." It was stipulated that Ex. 11-D is a xerox copy of the front of the joint tenancy bank card, and the printed orange colored card is the back. (Tr. 114) The card recites that the signers agree with each other and the bank that all sums credited to this joint account shall be owned by them jointly with right of survivorship, etc.

Mr. Fenton testified that when Mr. Buhler purchased the stocks he made the purchase in his individual account. (Tr. 116) However, with each purchase he would instruct the broker how he wanted the certificate issued. (Tr. 1-16, 119) Ex. 13-D is an example of the type of written instructions given with the purchase through Edward L. Burton Co. (Tr. 116) This exhibit shows the account to be in the name of "Mr. Joseph Buhler." The exhibit shows the security purchased, and then there is a blank for transfer instructions. In this blank is written, "Joseph Buhler and Mrs. Ethel Buhler Fenton, as joint tenants, etc." and it is signed by Mr. Buhler. (Ex. 13-D, Tr. 117) Later purchases were made through Dempsey Tegler & Co. Its procedure was to require specific instructions from the individual over

his signature, and if it is to be placed in joint tenancy, a joint tenancy card signed by both joint tenants was required. Mr. Fenton obtained these cards for the three purchases made through Dempsey-Tegler Co. (Tr. 119)

Ex. 9-D shows a list of all the stock, when it was purchased, and when it was placed in joint tenancy. (Tr. 113) There is no evidence at all to the effect that any of these joint tenancies were not properly created. There is no doubt concerning the fact that Mr. Buhler was fully aware for more than fourteen years that his daughter appeared as a joint tenant with him. The dividend checks came in their joint names. He always took the trouble to bring the check over to Ethel for her to sign. (Tr. 98, 152) He personally went to an attorney, and followed the attorney's advice in regard to placing the house and lot in joint tenancy. (Tr. 87-90) When he discovered some Mountain Fuel Supply stock which had been purchased in 1951 (Ex. 9-D) and not transferred into the joint names, he had this done in 1964. (Tr. 96) We thus have a situation where he perfected the transfer into joint tenancy, and did so with considerable formality, and in strict accordance with legal requirements. The trial court expressly so found. (Finding No. 5, Tr. 30)

No contention was made, that Mr. Buhler was ever incompetent. The pleadings do not assert it, and there was no testimony to this effect. It was not an issue at the trial. There is a reference on page 16 of Appellant's Brief that Mrs. Reese was induced not to have a guardian appointed, because of a conversation between Attorney

Irene Warr and Mr. Fenton. This suggests that there were grounds for appointment of a guardian. Since this was not an issue raised in the pleadings, nor during the trial, no evidence was directed to this point. However, to the extent that there are references, they show that Mr. Buhler was competent. For example, he executed a will on December 15, 1961 (Ex. 6-P), and on the 4th of December, 1968, this will was admitted to probate at the request of the appellant, (Tr. 41) Mr. Fenton testified that he was of sound mind when he executed it. (Tr. 105) A year later in December of 1962, Mr. Buhler himself secured a bank joint tenancy card, and arranged the transfer of his bank account to joint tenancy. (Tr. 98, 114, 152) On June 14, 1961, he personally took his stock certificates in the Big Four Mining Co. to his brother Francis for transfer. (Tr. 102) On September 3, 1963, one of his sons wrote a letter to Mr. Buhler in an effort to borrow $1,500 or 2,000, (Ex. 3-D) but the father refused to make the loan. (Tr. 70) This son also testified that in 1963 he telephoned his father for a loan, (Tr. 59) and that his father turned him down on the loan also. He went into the rest home in the Summer of 1964. (Tr. 76) It appears that Mr. Buhler was conducting his own affairs from the rest home, for he sold his residence while he was there, and approved stock purchases. (Tr. 119) We state unequivocally that nobody in the entire record made any statement of any kind even to suggest that Mr. Buhler was ever an incompetent before his death, and there is no basis for the statement that a guardian could have been appointed for him.

Appellant relies on an incomplete will dated in April of 1959 (Ex. 2-P); on a letter to a son dated June 5, 1961, enclosing that will (Ex. 1-P); on another incomplete will dated in November of 1959 (Ex. 4-P); and on an executed will which was admitted to probate (Ex. 6, Tr. 40), in support of his contention that the evidence "clearly and convincingly establishes that decedent did not intend to create a legitimate joint tenancy."

We submit that these documents do not rebut, nor do they even contradict the positive and direct testimony outlined above. The 1959 incomplete wills were dated nearly nine years before Mr. Buhler died in March of 1968. (Tr. 40) The fact that he did not complete either of these wills suggests that his intent was not fully formulated. However, even if we were to assume that these incomplete wills and the letter evidenced a state of mind in 1959 and in June of 1961 to divide the property equally among his five children, it is, nevertheless, conclusively shown that he changed his mind. We say this, because the will he executed in December, 1961 (Ex. 6-P) effectively disinherited his three sons. It gave each of them only $100, and the remainder of the property he owned at his death was to be divided equally between the two daughters. We will discuss this 1961 will later, but first we desire to comment on the two incomplete wills of April and November 1959.

The April, 1959, will enumerates certain specific properties, and the evidence indicates that he owned such properties, and that they were not in joint tenancy. For example, Ex. 2-P mentions an automobile, and his

daughter Ethel testified that in 1959, when Ex. 2-P is dated, Mr. Buhler owned an automobile. (Tr. 154) There is nothing to show that he had placed it in anyone else's name. The April will mentions an $18,000 judgment against Dr. W. E. Maddison. The record also shows without contradiction that he had such a judgment, that it was unpaid, that he had been advised that a joint tenancy probably could not be set up for the judgment, and that he should dispose of it by will. (Tr. 110) He had in 1959 some stocks which were not yet in joint tenancy. For example, the Big Four Mining Co. stock was not transferred into joint tenancy until June 14, 1961. (Tr. 141) He also had some Mountain Fuel stock which he bought in 1951 (Ex. 9-D) and that was not transferred into joint tenancy until 1964. (Tr. 96) The April, 1959, will mentions a bank account and money. The record, without dispute, shows that Mr. Buhler had a bank account with Walker Bank & Trust Company. (Ex. 11-D) However, it was in his sole name until December of 1962, at which time it was placed in joint tenancy with his daughter Ethel. (Tr. 114) This April 1959 will refers to a joint account with Ethel but Ethel testified that there absolutely was not any joint account prior to 1962, (Tr. 154) and no one contradicts this. Lorraine was asked if she knew of any joint bank accounts in April of 1959, and she answered that she knew Mr. Buhler had bank accounts, but that she didn't know of any of them being joint. (Tr. 83) Thus all of the properties that he does mention specifically in the April, 1959, will, which were to be disposed of by that will were properties that he owned, and as far as the record shows, he had made no prior disposition of them.

We think it also is significant that while the incomplete will of April, 1959, enumerated a number of properties which were in his name alone, and for which no arrangements had been made, it did not mention the house and lot which he had placed in joint tenancy in 1955 (Ex. 5-D). He did not sell it until after he went in the rest home. (Tr. 96) If in 1959 he intended to ignore the joint tenancy arrangements and dispose of everything by will, it seems that he almost certainly would have mentioned the home, but he did not. In 1961, when he wrote the letter (Ex. 1-P) to his son Ray, he sent the April, 1959, will, (Tr. 47) and ignored the one he had signed in November of 1959. (Ex. 4-P) The letter (Ex. 1-P) does express an intent to treat his children equally, but only six months later, in December of 1961, he completed a will (Ex. 6-P), which in effect disinherited his three sons.

In December, 1961, when he completed the will, he still had property he had not otherwise arranged for. He had an automobile in 1961. (Tr. 154) He still had the $18,000 judgment against Dr. Maddison, and this was the thing that initiated the making of the 1961 will. (Tr. 109, 110) The only bank account mentioned in the evidence was still in his name alone. (Ex. 11-D, Tr. 114 and 83) It was not until one year later, in December of 1962, that he placed this bank account in joint tenancy with his daughter Ethel. (Tr. 114, 154).

It also seems to us to be significant that the discussions between Mr. Buhler and his other four children all occurred several years before he died. His son Mac

testified that the last time he saw his father or discussed his estate with him was in 1961 or 1962. (Tr. 58) His son Ray testified about some conversations in 1955. (Tr. 45) He received the letter (Ex. P-1) in 1961, nearly seven years before Mr. Buhler died. Ray also testified that during the three years and eight months while his father was in the rest home (Tr. 76) Ray never did visit his father. (Tr. 51) He also testified that he did not correspond with him (Tr. 51) and that he did not attend his funeral. (Tr. 62) His son LeGrande Joseph Buhler did not testify. His daughter Lorraine testified that Mr. Buhler was in the rest home for three years and eight months: (Tr. 76) that she visited him the first week, but did not thereafter see him during his long stay in the rest home. (Tr. 76) She also testified that she did not attend his funeral. (Tr. 76)

We thus submit that statements made to his other children several years before he died, and the incomplete wills made nine years before he died do not rebut the positive and direct testimony that he knew exactly what he was doing and intended that Ethel would have his property. The 1961 will, which was completed, dealt expressly with only one property, to-wit, the $18,000 judgment against W. E. Maddison. No other specific property was mentioned therein. He did have the judgment against Dr. Maddison; he had been told that it could not be handled in joint tenancy. (Tr. 110) Mr. Fenton testified that the problem of arranging for this judgment really initiated the making of the 1961 will. (Tr. 109) The will provided for each of his sons to get $100, and at this time December, 1961, the only

bank account mentioned in the record was in his name alone. (Tr. 114, 154). One year later in December, 1962, he placed this account in joint tenancy with Ethel. (Tr. 114, 154) He later completed the transfer of his stocks into joint tenancy (Ex. 9-D) and throughout the 14 year period from 1954 until he died in 1968 he suffered the inconvenience of having to take the documents and the dividend checks to Ethel to get her signature. (Tr. 98) We respectfully submit that the trial court correctly found that he intended Ethel to get the property.

Finally, we direct the court's attention to the fact that Mr. Fenton was originally named as a defendant. He filed an affidavit disclaiming any interest in the property (Tr. 11) and a motion to dismiss the action as to him, (Tr. 12) and by stipulation he was dismissed from the action. (Tr. 19) Irene Warr's deposition relates to a conversation she had with Mr. Fenton. She did testify that she had had a telephone conversation with Mrs. Fenton, but she clearly stated that she could not recall what was said. (Tr. 136) Mrs. Fenton, who was the other party to that phone call, did recall what she said, and her answer was: "She (Irene Warr) said that she was calling on behalf of my sister, and that she wanted to know something about how my father was being taken care of, and I said to her that I didn't have the details, and I would have to refer her to my husband." (Tr. 152) This was the "complete conversation." (Tr. 152) Mr. Fenton testified that he had given Mr. Buhler advice as a broker on stocks from 1951 on. (Tr. 91) He also testified that from 1961 until Mr. Buhler's death Mr. Fenton kept Mr. Buhler's books, posted al-

deposits and receipts, listed all of the checks paid out for expenses, and reconciled the bank account. (Tr. 107) He knew the financial details of Mr. Buhler's accounts, and his wife did not. (Tr. 106) When Irene Warr asked for financial details, Mrs. Fenton referred her to Mr. Fenton. This could not have made Mr. Fenton her agent to make agreements or disclaimers about property. It was on this ground that we objected to the admission in evidence of her deposition. The trial court did not rule on the objection, but it did find that there was no evidence of fraud, mistake or undue influence, that the complaint does not seek reformation, that the evidence does not show any basis for reformation, nor any basis for determining that defendant holds said properties in trust. (Finding No. 6, Tr. 60)

CONCLUSION

Under the uncontraverted evidence, Mr. Buhler placed all of the property which is involved in this action in his name and the name of his daughter Ethel, as joint tenants, with rights of survivorship. He accomplished this through a number of transactions during a period covering more than eleven years. One of the other sons (Tr. 46) and his other daughter (Tr. 71) knew of this as early as 1955, which is 13 years before he died. His attorney had advised him in 1955 about the legal effect of the joint tenancy arrangements, and he told his attorney, his brother, his sister and the wife of one of his sons that he wanted his daughter Ethel to have the property. The trial court so found.

There is no claim in the pleadings and no showing in the evidence of any basis for reformation of any of the joint tenancy arrangements, and no claim nor any basis in the evidence for setting the arrangements aside because of fraud, undue influence or incapacity, and the trial court expressly so found.

The trial court correctly held that the property in question is the property of Respondent.

Respectfully submitted,

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