1972

Lucile Buckley Hall v. First Security Bank of Utah, Administrator of the EState of George Buckley : Brief of Respondent

In The Supreme Court of the State of Utah

LUCILLE BUCKLEY HALL,
Defendant-Appellant,
vs.
FIRST SECURITY BANK OF UTAH, NA, Administrator of the estates of George Hatton Buckley and Pearl Murdock Buckley,
Plaintiff-Respondent.

Case No. 12[illegible]

BRIEF OF RESPONDE[illegible]

Appeal from the Judgment of [illegible]
Fourth Judicial District Court [illegible]
Utah County, State of Utah, [illegible]
Honorable George E. Ballif, [illegible]

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASE CITATION:

TABLE OF CONTENTS—Continued

In The Supreme Court of the State of Utah

LUCILLE BUCKLEY HALL,
Defendant-Appellant,
vs.
FIRST SECURITY BANK OF UTAH, NA, Administrator of the estates of George Hatton Buckley and Pearl Murdock Buckley,
Plaintiff-Respondent.

Case No. 12837

BRIEF OF RESPONDENT

NATURE OF THE CASE

The administrator of an estate brought suit for conversion and unlawful sale of certain stock certificates by a daughter of the deceased who was one of three heirs of the estate, the daughter claiming ownership of the stock certificates by virtue of two separate intervivos gifts.

DISPOSITION BELOW

The Court below granted judgment in favor of the Administrator for the net amount of the proceeds of the sale of the stock certificates in the sum of

$25,501.52, plus 500 shares of stock in a successor corporation to the original stock company. The Court below, as part of the pretrial, considered motions for summary judgment made by both parties and pursuant thereto determined that the sole issues to be resolved in the trial of the case, was whether or not a valid gift intervivos had been made of the Father's stock certificates, first, from the Father to the Mother and then from the Mother to the Daughter who is appellant herein. It is basically from the pretrial order, which puts the burden of proof of the gift on the Appellant and the requirements that that proof be made by "clear and convincing evidence" that this appeal is made. Appellant made no objection to the pretrial order prior to this appeal.

STATEMENT OF FACTS

In approximately 1937 George Hatton Buckley acquired 5500 shares of capitol stock of Mercur Dome Goldmining Company, the five share certificates were issued in his sole name and were kept by him throughout his life in a small black box containing, along with the share certificates, other important papers belonging to himself and his wife Pearl Murdock Buckley.

Mr. Buckley, after many years of ill health died in 1950, he was at death seized of no real property and after his demise, a few items of personal property were distributed among his three children by his wife. The stock certificates were never endorsed and remained in

the same box which after Mr. Buckley's death was in the sole possession of the widow until shortly before her demise in 1963. She likewise owned no real property but after her death, her daughter, the Appellant herein and two older brothers Bert and Gerald, informally divided the Mother's personal property. In neither of these informal proceedings was any mention made of the stock certificates which still stood in their Father's name, the stock being considered valueless at the time. In 1969, the stock apparently took on some inflated value for a short period of time, which information was communicated to the Appellant by her brother Gerald. She took the stock to a stock broker, sold 5,000 shares for a net return of $25,501.52, and converted the remaining 500 shares to 500 shares of stock in the successor corporation, S.A.S.I.

When the appellant declined to divide the money and the stock with her two brothers, the brothers filed for probate of the estate of their parents and the respondent herein was appointed as Administrator of that estate. Respondent filed this civil action on behalf of the estate for conversion of the property of the estate by the appellant herein.

ARGUMENT

POINT I: IN A CONTEST BETWEEN THE ADMINISTRATOR OF THE ESTATE AND AN HEIR WHO CLAIMS PROPERTY OF THE DE-

CEASED BY VIRTUE OF AN INTER-VIVOS GIFT ADVERSELY TO THE ADMINISTRATOR, WHICH PARTY HAS THE BURDEN OF PROOF?

A succinct and universally accepted statement as to ultimate burden of proof as between the Plaintiff and Defendant in a civil suit is set forth in 29 AMJUR 2(d) EVIDENCE, Section 128 at page 161 as follows:

> "The party upon whom the ultimate burden of proof lies is determined by the pleadings, not by who is plaintiff or defendant. Whether this burden rests with the Plaintiff or the defendant may be determined by ascertaining which party, without evidence, would be compelled to submit to an adverse judgment on the pleadings. This fact is determined from the pleadings before the introduction of any evidence.
>
> Ordinarily the burden of proof is in the first instance with the party who initiates the action or proceeding that is, the Plaintiff. In other words, a plaintiff, by ascertaining in his complaint, petition or declaration, facts which proved, established a liability due him on the part of the defendant, has the burden of proving these facts. But there is no strict and rigid rule that the primary burden of proof

ıe party who brings the suit; . . ."

case before the Court, it is alleged by the hat the stock was the property of George ckley and that it contained to be his prop- til the time of his death. Numerous plead- ing sworn affidavits by the appellant here- ıat the stock did in fact belong to her father, ɛrts as an affirmative defense to the claim her by the complaint, that she was the re- an intervivos gift of the stock from her o in turn appellant claimed to have been a an intervivos gift from the Father. This an affirmative defense in respect to which es:

urden of proof is upon the defendant ll affirmative defenses which he sets nswer to the Plaintiff's claim or cause on upon which issue is joined, whether late to the whole case or only to certain n the case. As sometimes expressed, the is on the defendant to provide new mat- ged as a defense. This rule does not a shifting of the burden of proof, but means that each party must establish case. When the Defendant comes in nits facts stated by the Plaintiff to be d sets up matters in avoidance, he is ty who asserts the truth of the matter t up and the burden is upon him to

establish the facts on which that matter is predicated. If he fails to do so, the Plaintiff is entitled to a verdict or decision in his favor." (29 AMJUR 2 (d) EVIDENCE Section 129, at page 162, 163. Also, see *Rees* vs. *Archibald*, 6 Utah 2(d) 264, 311 P. 2(d) 788, headnote 9.)

The Rules of Pleading in the State of Utah which are applicable are as follows:

"URCP 8(c) AFFIRMATIVE DEFENSES. In pleading to a preceeding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense . . ."

"URCP 9 (c) CONDITIONS PRECEDENT. In pleading the performance or occurrance of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occured. A denial of performance or occurance shall be made with particularity and *when so made the party pleading the performance or occurance shall on the trial establish the facts showing such performance or occurance.*" (Emphasis added)

The administrator of an estate has a statutory duty and authority to claim possession of any property be-

longing to the decedent (See 75-11-3 and 75-11-5, UCA, 1953 as amended.)

In exerting such possessory rights he stands in the same position as the decedent would have assumed had he still been alive. It appears time and again in the pleadings of both parties that the stock was in the name of George Hatton Buckley and was his property during his lifetime, and it would be pointless to require the putting on of any evidence to prove a fact so patently admitted by the appellant. A pretrial was had on the matter by the terms of which pretrial order, dated the 28th day of September, 1971, and denominated "Decision", the Court determined that:

1. There was no competent evidence before the Court to enable it to make a finding as to whether there had been a valid intervivos gift from George Hatton Buckley to his wife Pearl Murdock Buckley.

2. That there was no competent evidence before the Court to enable it to make a findings in respect to whether there had been a valid intervivos gift from Pearl Murdock Buckley to Lucille Buckley Hall.

3. That the Defendant (appellant) would have the burden of going forward with the evidence.

This decision was entirely consistent with the posture of the case at the pretrial, and inasmuch as both issues were raised by the affirmative defense asserted

by the Appellant, it was right and proper that she be required to bear the burden of proving the factual issues.

The Court in its final decision and judgment on the matter determined that the appellant had failed to bear the burden of proving the facts which she alleged and judgment was therefore rightly granted against her.

POINT II: DID THE TRIAL COURT ERR IN IMPOSING UPON THE APPELLANT THE BURDEN OF PROVING AN INTERVIVOS GIFT IN TWO INSTANCES BY CLEAR AND CONVINCING EVIDENCE?

The weight and sufficiency of evidence necessary to prove a valid intervivos gift such as would be sufficient to cut off the claims of an administrator to stock still held in the name of the deceased at the time of his death has generally been held to be more than the mere preponderance of the evidence.

Am Jur discusss the matter in two separate sections as follows:

30 AMJUR 2(d) EVIDENCE, Section 1167, at 344 and 345:

> "Proof of those issues as to which a stricter degree of proof than by a proponderance of

the evidence is required by the Courts is generally satisfied by 'clear and convincing' evidence, or evidence that is 'clear and satisfactory', or evidence described by similar terms for example . . . this degree of proof has been required in order to prove a gift . . ."

The commentary also quotes the Utah case of *Burningham* vs. *Burke,* 67 Utah 90, 245 P. 977, 46 ALR 466.

Also, 38 AM JUR 2(d) GIFTS, Section 103: "It has generally been held, in most jurisdictions, that in order to sustain a gift intervivos or a gift causa mortis the evidence must be clear and convincing. It has accordingly been stated that a mere preponderance of the evidence is not sufficient to establish the fact of a gift.

Especially does this 'clear and convincing' degree of proof apply where the gift, either intervivos or causa mortis is not asserted until after the death of the alleged donor, in which respect it is settled that, in view of the possibility of fraud or pretense in such a case, the claim of gift must be sustained by clear, convincing and satisfactory evidence of every element which is requisite to constitute a gift." (As to the requisite elements of a valid gift,

see 38 AM JUR 2(d) Gifts, Section 16, at Page 818.)

The Supreme Court of our State has ruled man times as to the degree of proof required to prove a gif for instances *Jones et al* vs. *Cook,* 118 Utah 562, 22 P. 2(d), 423 where it states, commencing at Page 42

> "There is no presumption in favor of a gift inter vivos. One who asserts title by gift inter vivos has the burden of proving that a gift was made, including the existence of all of the elements essential to its validity." 24 AMJUR GIFTS Page 790; *Spencer* vs. *Barlow,* 319 Mo. 835, 5 SW 2(d) 28. The Rule is that: "a clear and unmistakable intention on the part of the donor to make a gift of his property is an essential requisite of the gift inter vivos." 38 C.J.S. Gifts, Section 15, page 790: This Court held in *Christensen* vs. *Ogden State Bank,* 75 Utah 478, 286 P. 638 and *Holman* vs. *Deseret Savings Bank,* 41 Utah 340, 124 P. 765, that proof that the decedent intended title to pass to the claimant during the lifetime of the decedent must be clear and convincing. In *Raleigh* vs. *Wells,* 29 Utah 217, 81 P. 908, 910, this court also declared: "courts watch gifts inter vivos with caution, especially as when their enforcement would result in inequitable distribution of the decedent's property."

The appellants' brief cites the case of *In Re Hill's Estate,* 8 Ill. Opp. 2(d) 243, 174 NE 2(d) 233, where at Page 235, the Supreme Court of Illinois set the stand of proof as "clear and convincing". The case itself is otherwise easily discernable from the one before the Court at this time, inasmuch as it had reference to a *citation* proceedings under the Illinois Probate Act which provides that the party claiming adverse to the estate be required to testify (contrary to the Dead Man's Statute 78-24-2, UCA, 1953 as amended, which we have in the State of Utah.) Counsel also quotes extensively in his statement, "facts" from the testimony of the appellant given at the trial as to conversations between appellant and her deceased Father, all of those conversations were correctly ruled by the trial court as stricken from the records, that particular evidence being contrary to Utah's Dead Man's Statute, 78-24-2 UCA 1953.

The trial court was clearly in error in relying on the case of *Harrington* vs. *Interstate Fidelity Building and Loan Association,* 91 Utah 74, 63 P. 2(d) 577 as authority that it was not necessary for a completed gift that the certificate be endorsed by the owner at the time of its delivery. It is respectfully submitted that the Court erred in the law in that the *Harrington* case dealt not with stock certificates, but merely with a subscription certificate in a savings and loan institution, which was for all intents and purposes merely a savings account subscription agreement. The *Harrington* case is

discussed in full in 143 ALR 1154 and that annotation points out correctly, that stock certificates, as differentiated from savings and loan subscription certificates, are subject to the Uniform Stock Transfer Act which was in effect in the State of Utah at the time of both purported gifts. Under the Uniform Stock Transfer Act, 16-3-1, UCA, 1953, execution of the stock certificate or by separate written documentation, was a prerequisite to a valid transfer of stock, the Uniform Stock Act was repealed by Sections 70a-10-102, but not until years after the purported transfers claimed by the appellant.

Notwithstanding the error made by the trial court in misconstruing the *Harrington* case, the Court still held that as a matter of fact the appellant had failed to adduce creditable evidence to show the purported transfers by clear and convincing evidence.

The Court having correctly placed the burden of proof and correctly set the burden of proof "clear and convincing evidence" it is unnecessary to reply to Point II of the appellant's argument, since it deals only with appellants' disagreement with the trial court as to what the facts were and that is not a matter which can be reviewed in this case, but should be left to the determination of the finder of fact on the trial court level.

Counsel for appellant relies on *Arizona Title Guarantee and Trust Company vs. Wagner,* 251 P. 2(d) 897, in respect to a gift between Mr. and Mrs.

Buckley. The facts in the Buckley case indicate without equivocation, however, that the stock certificates owned by Mr. Buckley were kept in the *same place* after the purported gift, that they were before; that it was *equally within the control* of both spouses and that Mr. Buckley actually *exercised dominion* and control over the stock and on at least one occasion got it out and showed it to his son Gerald, (see trial transcript page 189.) these facts are not in anyway similar to the Arizona case. For the law on delivery of gifts please see *Foster vs. Reiss* 48 ALR 2(d) 1391.

Appellants contention that there was a distribution de facto of the estates of either of the parties is in conflict with the facts claimed even by the Appellant.

There was in fact no defacto distribution with respect to the stock certificates and no written agreement such as could be recognized as a de facto distribution in respect to either estate. (See trial transcript pages 209, 210.)

How counsel can assume that such a distribution without administration and with the appellant collecting the whole estate valued at approximately $30,000, could be "fair" is a little hard to understand.

In the third point of argument the appellant intimates that since appellant obtained a bond that the Plaintiff herein ought not pursue her for the money which she has converted, but instead go after the bond-

ing company. This theory is patently without any legal basis, in the event that it is not possible to recover from the appellant that which the Court has decreed in judgment against her it may be necessary for the estate to proceed against the bonding company and transfer agent, but that it is not an issue which need be considered by the Court on appeal.

CONCLUSION

The matter before the Court is really not as complicated as appellant attempts to make it, it was simply a case of property of an estate not having ever been properly disposed of through probate proceedings, because it was at the time considered economically unfeasible. An inflated value of certain stock certificates years later, give rise to a sizeable estate, recognizable as such for the first time 19 years after the death of the owner of the certificates. None of the heirs had asserted any control or ownership of the stock certificates until 1969, at which time the appellant converted all of the proceeds of the stock to her own use, through an unlawful conversion and sale of the stock, without probate.

The trial court, at pretrial decided that the disputed propertly belonged to the estates, unless appellant could prove two successive intervivos gifts of stock by clear and convincing evidence. This she failed to do, the Court therefore correctly held the contested property to have been converted by appellant and awarded judg-

ment in favor of the administrator of the two estates.

Respectfully submitted this 11th day of July, 1972.

GLEN J. ELLIS,

Attorney for the Respondent