

2005

John E. Hoggan, a.k.a. Jack E. Hoggan v. William E. Hoggan, Trustee; William E. Hoggan, Individually, and Bonnie Jilene Weber Individually : Reply Brief

Utah Court of Appeals

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Matthew C. Barneck, Brian C. Webber; Richards, Brandt, Miller & Nelson; Steven W. Call; Ray, Quinney & Nebeker; attorney for appellees.

J. Jay Bullock, Clinton J. Bullock, Karen Bullock Kreeck; attorneys for appellant.

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Supreme Court
IN THE UTAH COURT OF APPEALS

JOHN E. HOGGAN, A.K.A. JACK E. HOGGAN,

Plaintiff / Counterclaim-Defendant /
and Appellant
v.

WILLIAM E. HOGGAN, TRUSTEE; WILLIAM
E. HOGGAN, INDIVIDUALLY, AND
BONNIE JILENE WEBER INDIVIDUALLY.

Defendants / Counterclaim-Plaintiffs
and Appellees

**REPLY BRIEF
OF THE APPELLANT**

Case No. 20051104-SC

APPEAL FROM THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY

THE HONORABLE GLENN K. IWASAKI

MATTHEW C. BARNECK
BRIAN C. WEBBER
RICHARDS, BRANDT, MILLER & NELSON
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: 801-531-2000
Telecopier: 801-532-5506
Attorney for William E. Hoggan, Trustee /
Appellee

STEVEN W. CALL
RAY QUINNEY & NEBEKER
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: 801-532-1500
Telecopier: 801-532-7543
Attorney for Jilene Weber and Bill Hoggan
/ Appellees

J. JAY BULLOCK (0484)
CLINTON J. BULLOCK (6368)
KAREN BULLOCK KREECK (6761)
BULLOCK LAW FIRM
353 East 300 South
Salt Lake City, Utah 84111
Telephone: 801-521-6660
Telecopier: 801-521-6689
Attorneys for Jack E. Hoggan /Appellant

FILED
UTAH APPELLATE COURT
JUL 21 2006

IN THE UTAH SUPREME COURT

FILED
UTAH APPELLATE COURT
JUL 27 2006

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and Appellant
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WILLIAM E. HOGGAN, TRUSTEE; WILLIAM
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Defendants / Counterclaim-Plaintiffs
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**ERRATA TO THE REPLY BRIEF
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MATTHEW C. BARNECK
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RICHARDS, BRANDT, MILLER & NELSON
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: 801-531-2000
Telecopier: 801-532-5506
Attorney for William E. Hoggan, Trustee /
Appellee

STEVEN W. CALL
RAY QUINNEY & NEBEKER
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: 801-532-1500
Telecopier: 801-532-7543
Attorney for Jilene Weber and Bill Hoggan
/ Appellees

J. JAY BULLOCK (0484)
CLINTON J. BULLOCK (6368)
KAREN BULLOCK KREECK (6761)
BULLOCK LAW FIRM
353 East 300 South
Salt Lake City, Utah 84111
Telephone: 801-521-6660
Telecopier: 801-521-6689
Attorneys for Jack E. Hoggan /Appellant

ERRATA TO THE REPLY BRIEF OF THE APPELLANT

Appellant, Jack E. Hoggan, by and through his counsel Bullock Law Firm, submits this *Errata to the Reply Brief of the Appellant* which was filed in this case on Friday, July 21, 2006.

The purpose of this *errata* is to correct mistakes in the printing of the Reply Brief of the Appellant.

First, the cover page states that this matter is “IN THE UTAH COURT OF APPEALS.” By order of the Court dated July 17, 2006, this matter has been recalled to the Utah Supreme Court. Therefore, the cover page should state that this matter is “IN THE UTAH SUPREME COURT.”

The second mistake is found on page i within the Table of Contents and on page 2 within the Argument of the brief. The title of argument point “II” incorrectly states the name of the Appellant, rather than those of the Appellees. Therefore the title incorrectly reads:

“II. JACK URGES THE COURT TO REFORM THE TRUST DOCUMENT BY APPLICATION OF THE AFFIRM ON ANY GROUND RULE. HOWEVER, ON TWO SEPARATE BASES, REFORMATION OF THE LEONA E. HOGGAN FAMILY TRUST IS NOT APPROPRIATE.” (Emphasis added under incorrect information)..

The title for the second section of the Reply Brief of the Appellant should read:

II. THE TRUSTEE, BILL AND JILENE URGE THE COURT TO REFORM THE TRUST DOCUMENT BY APPLICATION OF THE AFFIRM ON ANY GROUND RULE. HOWEVER, ON TWO SEPARATE BASES, REFORMATION OF THE LEONA E. HOGGAN FAMILY TRUST IS NOT APPROPRIATE. (Emphasis added under corrected information).

The argument of the second section correctly states the position of the Appellant.

The last mistake is found on the 9th line of page 7, where the word “hearing” was mistakenly printed as “h21earing.”

DATED this 27th day of July, 2006, and respectfully submitted,

A handwritten signature in cursive script, reading "Karen Bullock Kreeck", written over a horizontal line.

J. Jay Bullock

Clinton J. Bullock

Karen Bullock Kreeck

BULLOCK LAW FIRM

Counsel for Jack E. Hoggan

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the "ERRATA TO REPLY BRIEF OF THE APPELLANT" was mailed via first-class U.S. Postal Service mail, postage pre-paid, on July 27th, 2006 to:

MATTHEW C. BARNECK
RICHARDS, BRANDT, MILLER & NELSON
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: 801-531-2000
Telecopier: 801-532-5506
Attorney for William E. Hoggan, Trustee / Appellee

STEVEN W. CALL
RAY QUINNEY & NEBEKER
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: 801-532-1500
Telecopier: 801-532-7543
Attorney for Jilene Weber and Bill Hoggan / Appellees

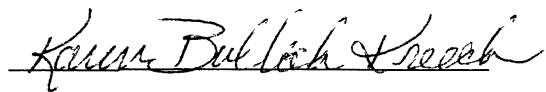


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ARGUMENT

I. JACK RELIES ON THE DISCUSSION CONTAINED IN THE BRIEF OF THE APPELLANT REGARDING THE PROPER APPLICATION OF THE RULINGS OF THE COURT IN *BANKS* AND *FLAKE*.

The Plaintiff/Appellant Jack E. Hoggan has set forth persuasive argument concerning the error of the trial court in interpreting the Hoggan trust document in the *Brief of the Appellant* at pages 16-25. Jack continues to rely on such argument and urges the Court to issue guidance on the application of the *Banks* decision and the *Flake* decision with respect to proper interpretation and drafting of trust documents with respect to changes to beneficial interests.¹

¹ Jack also contends that further guidance from the Court as to interpretation of trust documents is required also so that the trial and appellate courts do not encounter myriad cases regarding trust interpretation resulting from minute portions of text in the trust agreements. For example, in the agreement setting forth the terms and provisions of the Leona E. Hoggan Family Trust, Article XI provided in relevant part that:

“ As long as the Undersigned is alive, she reserves the right, [sic] to amend, modify, revoke, or remove from this Trust any and all property that she has contributed, in whole or in part, including the principal, and the present or past undisbursed income from such principal...” (Emphasis added).

One point of Jack’s argument to the trial court was that this language did not give Leona the right to amend, modify, revoke or remove *from the trust agreement* certain language setting forth the terms and provisions of the trust, but upon a *literal reading of the plain language* only could mean that Leona had the power to add to, substitute, change, remove ie. amend, modify, revoke, the *tangible and intangible property*, that is the corpus, of the trust. See, *Plaintiff’s Memorandum in Opposition and Reply*, pp. 15-71, R. 680-682, and *Plaintiff’s Memorandum on the Effect of the decision of the Utah Supreme Court in In the Matter of the Estate of Almon J. Flake*, pp. 6-8, R. 862-864.

The response of the Trustee, Bill and Jilene was to the effect that this argument was “strained” and “non-sensical” and pointed out that the document at issues in the *Flake* case had similar language. It was also noted that one does not “amend” or “modify” property. See, *Reply Memorandum in Support of Trustee’s Motion for*

II. JACK URGES THE COURT TO REFORM THE TRUST DOCUMENT BY APPLICATION OF THE AFFIRM ON ANY GROUND RULE. HOWEVER, ON TWO SEPARATE BASES, REFORMATION OF THE LEONA E. HOGGAN FAMILY TRUST IS NOT APPROPRIATE.

“In the limited circumstance that an appellate court chooses to affirm on an alternate ground, it may do so only where the alternate ground is apparent on the record. When an alternate theory is apparent on the record, the court of appeals must then determine whether the facts as found by the trial court are sufficient to sustain the decision of the trial court on the alternate ground. The court of appeals is limited to the findings of fact made by the trial court and may not find new facts or reweigh the evidence in light of the new legal theory or alternate ground.”

Bailey v. Bayles, 2002 UT 58, ¶ 20.

A. Both Utah statutory law and the Restatement (Second) of Trusts support the concept of reformation of a trust instrument, however no guidance has been given which would support reformation where the settlor is now deceased absent clear and convincing evidence of intent.

Jack, and Bill and Jilene, have both presented to the trial court their positions on whether or not reformation is an available remedy in the context of a trust. As both parties have acknowledged either before the trial court or in the *Brief of the Appellee at pp. 28-29*, this Court has applied the equitable reformation doctrine in three cases, however none of the cases involved a trust or other estate planning documentation, but

Partial Summary Judgment, pp. 5-6, R. 1030-1031, and Reply Memorandum in Support of Defendants’ Cross Motion for Summary Judgment and Declaratory Relief, pp. 4-5, R. 1042-1043.

The objections of Bill and Jilene to the effect that one does not “amend” or “modify,” help Jack to prove his point that by relying on interpretation of minute language, no trust agreement remains safe from attack and prolonged litigation if such minute differences are distinguished and the courts are called upon to interpret each document.

rather involved land sale contracts and deeds. See, *Thompson v. Smith*, 620 P.2d 520 (Utah 1980), *Peterson v. Eldredge*, 246 P.2d 886 (Utah 1952), and *Sine v. Harper*, 222 P.2d 571 (Utah 1950)(in each case there were two parties to the agreements which were sought to be reformed, and mistake occurred on the part of one or more of the parties.)²

The Utah legislature has recently enacted the Utah Uniform Trust Act, which provides in section 75-7-415: Reformation to correct mistakes, that “[t]he court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. (2004) This statute has not yet been interpreted by this Court or the Utah Court of Appeals.

² In each of the cases cited, *Thompson v. Smith*, 620 P.2d 520 (Utah 1980), *Peterson v. Eldredge*, 246 P.2d 886 (Utah 1952), and *Sine v. Harper*, 222 P.2d 571 (Utah 1950), there were two parties to the agreements which were sought to be reformed, and mistake occurred on the part of one or more of the parties. This a crucial difference in whether or not the doctrine of equitable reformation is available, inasmuch as courts have been hesitant to reform a document which was originally created as a voluntary instrument on the part of the one party, and there is no consideration on the part of any other party, and a “mere failure in bounty” occurs. See, 66 Am Jur 2d § 42, *citing*, *Smith v. Pattishall*, 176 So. 568 (Fla.1937); *Landreville v. Mero*, 281 P. 749 (Mont. 1929); *Dunn v. Dunn*, 87 SE2d 308 (NC 1955); *Gray v. Gary*, 344 SW2d 329 (Ark.1961).

“The mistake of only one party to an instrument, as occurred here, will not afford relief by reformation. Additionally, the party seeking reformation must establish the mistake by clear and convincing proof that “clinches what might be otherwise only probable to the mind.” *Briggs v. Liddell*, 699 P.2d 770: (Utah 1985), *citing*, *Greener v. Greener*, 212 P.2d 194, 204 (Utah 1949); *accord Bown v. Loveland*, 678 P.2d 292, 295 (Utah 1984). By extension, when there is only one party to an instrument, such relief does not lie at law or in equity.

Bill and Jilene in the *Brief of the Appellee*, direct the Court to the RESTATEMENT (SECOND) OF TRUSTS § 333, and comment a. to § 333 to support their position that on the facts at hand a trust may be equitably reformed. Section 333 is similar in content to the provisions of U.C.A. section 75-7-415. That is, due to a mistake in the drafting of the document, reformation would be equitable and allowable. Section 333 basically states that the grounds for reforming or rescinding a trust are the same which apply to a transfer of property not in trust apply. Bill and Jilene also point to comment a. to § 333 which states that “...The law governing the rescission or reformation of a transfer inter vivos is applicable to declarations of trust and to transfers inter vivos in trust...”

However, Bill and Jilene fail to advise the Court of the comment to § 333 which is most pertinent to the facts at hand, and that is comment e.

Comment e. to section 333 of the Restatement (Second) of Trusts illuminates the basis upon which the drafters of section 333 believe that mistake is a basis for reformation or rescission. Comment e. begins with the definitive statement that “[t]he *settlor* can rescind a trust created by him as a result of a material mistake.” (emphasis added). The authors go on to state that “[t]he settlor cannot rescind the trust if the beneficiary has so changed his position without notice of the grounds for rescission that it would be inequitable to permit the settlor to rescind.” Even under the interpretation of the law provided by the authors of the Restatement, the grounds of mistake do not give Bill and Jilene support for a decision ordering rescission or reformation of the trust agreement. Here it is not the settlor that seeks the reformation.

B. For the reasons shown below, there have not been adequate findings, nor can there be at this point, to provide clear and convincing evidence of Leona's intent in order to mandate reformation. Furthermore, reformation after the death of the grantor, settlor or testator will always be difficult and suspect due to the lack of first hand expressions of the grantor's settlor's or testator's intent.

To allow for the reformation of testamentary documents based on a showing of intent, effectively makes the existence of any testamentary document moot if anyone, at any time after the death of the decedent could challenge the document and persuade the court to reform the document to meet their own interests.

In the vast majority of situations where a party might seek the reformation of a will or testamentary trust, the grantor, settlor, or testator is deceased, and therefore any evidence as to the intent of the individual is second-hand at best. Intestacy statutes exist in order to provide a basis upon which a decedent's property should pass, as determined by the legislature in the best interest of the community, in the event that attempts at, or failures to, provide for the disposition of one's property fails. For these reasons, public policy must dictate against the reformation of trusts in the case of a unilateral mistake, except upon application by the settlor herself.

In addition, reformation of an instrument in the context of drafting attorney negligence, error or malpractice, could result in every instance where one or more beneficiaries of a testamentary document is dissatisfied with the document, and one or more persons bring an action for equitable reformation.

As discussed below, the trial court has not made findings of intent sufficient to support a determination that by clear and convincing evidence Leona's intent would

mandate reformation of the Leona E. Hoggan Family Trust.

III. THE FINDINGS AND CONCLUSIONS ENTERED BY THE TRIAL COURT ON JANUARY 12, 2004 SHOULD NOT BE ALLOWED TO STAND AND BE HELD TO ALLOW ADEQUATE GROUNDS FOR FINDINGS OF INTENT BY THIS COURT.

If the Court determines in its discretion that as a matter of law, equitable reformation is an available basis for awarding the relief sought by Bill and Jilene, reformation of the trust agreement must still be denied on the basis that Bill and Jilene have not met the standards for such relief as required by Utah law, and the findings of fact contained in the January 12, 2004 documents issued by the trial court are overly expansive and without adequate support in the record.

Jack has set forth persuasive argument concerning the error of the trial court in issuing the January 12, 2004 Findings of Fact and Conclusions of Law in the *Brief of the Appellant* at pages 25-38. Jack continues to rely on such argument and urges the Court to rule in agreement with the arguments set forth regarding the overly broad Findings and Conclusions prepared on behalf of Bill and Jilene, and regarding the fact that with a Rule 56(f) motion by Jack which was never waived nor ruled upon, and an agreement and representation to the trial court that at issue during oral argument was only the legal questions of 1) interpretation of the trust document, and 2) was equitable reformation a possible remedy under law, and therefore no finding of intent is possible.

It was an abuse of discretion for the trial court judge to expand the factual rulings from those necessary for the legal arguments made during the September 22, 2003 hearing when there was an outstanding Rule 56(f) Motion by Jack, seeking additional

time to conduct discovery in the event that such was necessary following the requested determinations of law by the trial court pursuant to the motions for summary judgment.

Jack did not “abandon or otherwise withdraw” his Rule 56(f) Motion during the September 22, 2003 hearing on the motions for summary judgment as Bill and Jilene suggest. Rather as the transcript of that proceeding shows, the parties understood that the purpose of the hearing was to discuss the legal issues of trust interpretation and equitable reformation of trusts, prior to the undertaking of further discovery. See, *Transcript of Proceeding, September 22, 2003, Motions for Summary Judgment, pp. 4-6*, R. 1445. In addition the last filing by Jack prior to this hearing, the *Plaintiff’s Memorandum on the Effect of the Decision of the Utah Supreme Court in In the Matter of Almon J. Flake*, contained an explicit statement that the Rule 56(f) had not been waived. R. 859.

The trial court never ruled on Plaintiff’s Rule 56(f) Motion, and indeed after the issuance of the January 12, 2004 Findings of Fact and Conclusions of Law, additional discovery was conducted by Jack which had as one of the purposes the gathering information regarding the intent of Leona Hoggan from William E. Hoggan and Bonnie J. Weber. See, *Certificates of Mailing, various deposition transcript pages included as exhibits*. RR. 1220-21, 1231-32, 1283-84.

Despite the allegations of Bill and Jilene, the additional discovery issue sought by Jack’s Rule 56(f) Motion did not become moot, and has not become moot simply because of the stipulation of dismissal of the remaining claims originally stated in the

complaint and the waiver of the right to appeal the dismissal. The additional discovery issue embodied in Jack's Rule 56(f) Motion goes not only to those other issues, but also to questions of intent embodied within Bill and Jilene's raising of the question of reformation.

In sum, the Findings of Fact entered by the trial court on January 12, 2004 are not valid because due to the outstanding Rule 56(f) motion, and the agreement among the parties to delay discovery on the intent issues until after the September 22, 2003 oral argument on the points of law, the trial court judge abused his discretion in entering the Findings of Fact. Jack was not allowed, nor denied for that matter the opportunity to present evidence regarding Leona's intent prior to the expansion of the trial judge's initial ruling on the law relating to trust interpretation, by the Trustee, Bill and Jilene, to include extensive findings of fact regarding intent.

For this reason, as stated in the *Brief of the Appellant*, all but six of the Findings of Fact entered on January 12, 2004 should be disregarded when the Court addresses the issues raised on appeal.

CONCLUSION

Leona E. Hoggan may have desired to be able to amend the terms and provisions of her Trust Agreement at any time, and in any manner she choose, however the Trust Agreement as drafted does not give her that power. Under a plain reading of the unambiguous language of the document, Leona could only 1) modify, amend, remove and/or revoke the property contributed by her to the Trust, and 2) revoke or terminate,

other than by death, any of the beneficial interests in the trust, including her own.

Therefore, the June 9, 2000 and May 24, 2002 documents which purport to amend the Trust are without any authority or validity inasmuch as Leona did not have the power to amend the beneficial interests under the Trust Agreement.

Bill and Jilene would have the Court apply the doctrine of equitable reformation to the facts at hand and reform the Trust Agreement and the June 9, 2000 and May 24, 2002 documents to fit what Bill and Jilene contend was Leona's intent for distribution of the trust assets upon her demise. As shown in the *Brief of the Appellant* and herein, adequate basis for such reformation does not exist either in law, or upon the less than clear and convincing evidence presented by Bill and Jilene.

Jack E. Hoggan, respectfully requests that the Court consider the arguments set forth herein and reverse the decision of the trial court, by holding that no valid amendments to the Leona E. Hoggan Family Trust existed, and therefore Jack E. Hoggan is entitled to a one-third distribution of the trust assets.

Respectfully submitted this 21st day of July, 2006.

A handwritten signature in cursive script, reading "Karen Bullock Kreeck", written over a horizontal line.

J. Jay Bullock

Clinton J. Bullock

Karen Bullock Kreeck

BULLOCK LAW FIRM

Counsel for Jack E. Hoggan

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the "REPLY BRIEF OF THE APPELLANT" was mailed via first-class U.S. Postal Service mail, postage pre-paid, on July 21st, 2006 to:

MATTHEW C. BARNECK
RICHARDS, BRANDT, MILLER & NELSON
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: 801-531-2000
Telecopier: 801-532-5506
Attorney for William E. Hoggan, Trustee / Appellee

STEVEN W. CALL
RAY QUINNEY & NEBEKER
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: 801-532-1500
Telecopier: 801-532-7543
Attorney for Jilene Weber and Bill Hoggan / Appellees

