1974

Jenny Johanson Norling v. Joseph Anderson, June J. Anderson And Esther J. Finich : Brief of Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

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JENNY JOHANSON NORLING,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	Case No.
	)	
JOSEPH ANDERSON, JUNE J. ANDERSON, and ESTHER J. FINCH,	)	13769
	)	
	)	
Defendants-Appellants.	)	

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BRIEF OF RESPONDENT

* * * * *

Appeal from the Judgment of the Third Judicial District Court for Salt Lake County, Utah
The Honorable Bryant H. Croft, Judge

* * * * *

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* * * * *

BRIEF OF RESPONDENT

* * * * *

NATURE OF CASE

An action by Plaintiff-Respondent, hereinafter referred to as "Mrs. Norling", to set aside conveyance of her home to Appellants June J. Anderson (Mrs. Norling's daughter) and Joseph Anderson, her husband; [illegible] names on savings certificates [illegible] account from the joint names of

the Defendants and Appellants June J. Anderson and Esther J. Finch (another daughter of Mrs. Norling) back to the name of Mrs. Norling; to cancel and void a power of attorney from Mrs. Norling to her daughter, June; and to recover from her daughters Mrs. Norling's key to her safety deposit box.

DISPOSITION OF CASE IN LOWER COURT

The Lower Court granted all the relief sought by Mrs. Norling.

This case was set for trial and trial commenced on Monday, June 3, 1974; but on the Friday before, May 31, 1974, a Guardianship Petition was filed by the daughter, Esther J. Finch, pertaining to the competency of Mrs. Norling notwithstanding that there had been no allegations made by the Defendants pertaining to the competency of Mrs. Norling either in the plead-

ings of this case or during the trial of this case at which Mrs. Norling testified. The Guardianship Matter, upon hearing, was dismissed, but that matter is also before this Court on appeal and is known as IN THE MATTER OF THE ESTATE AND GUARDIANSHIP OF JENNY JOHANSON NORLING, AN ELDERLY PERSON, CASE NO. 13764. The Honorable Bryant H. Croft, Judge, heard this case, and the Honorable Peter F. Leary, Judge, heard the Guardianship Matter. This case and the Guardianship Matter which is really collateral to this case have been joined for the purpose of argument before the Court.

RELIEF SOUGHT ON APPEAL

Appellants appeal only that portion of the Lower Court's judgment relating to the granting [illegible] of the deed, and seek a [illegible].

STATEMENT OF FACTS

Mrs. Norling at the time of trial was an 83-year old woman, twice widowed, and hard of hearing. She was born in Sweden and 28 years old when she came to this country.

On August 2, 1973, Mrs. Norling signed a deed of her home to her daughter, June J. Anderson, and Joseph Anderson, her husband, in accordance with the provisions of a codicil to her will executed on the same date; after it was executed, it was initialed by June to indicate delivery, but it was returned to Mrs. Norling in an envelope which Mrs. Norling then sealed up and put tape on. Mrs. Norling took it to her home, opened the envelope, looked it over, and then put it back in an envelope, sealed it and put tape on it, and wrote her name, "Jenny Norling" on it, and thereafter Mrs. Norling deposited the envelope in her safety deposit box, which

Mrs. Norling had maintained for a period of 15 years. Mrs. Norling testified that if her daughter, June, took care of her until her death, her daughter was to receive the home, but not before.

Mrs. Norling, on at least two earlier occasions, had made a new will or codicil and in accord with the provisions of the same executed a new deed each time as well.

June had never had a key to Mrs. Norling's safety deposit box, but on or about January 10, 1974, while Mrs. Norling was seriously ill, June went to her sister, Esther, and obtained a key to the safety deposit box. On the following day she removed the deed, together with the savings certificates and savings passbook, from Mrs. Norling's safety deposit box, and had the deed recorded the same day, namely, January 11, 1974. At or about that time,

Mrs. Norling was recovering from pneumonia and a bladder operation, was under sedation, did not recognize some of her children and at times was not lucid due to her physical condition, and consequently was not mentally capable of authorizing a delivery and recording of the deed. She had no memory of a conversation authorizing removal of the deed from her safety deposit box.

The Andersons had been living with Mrs. Norling at her home for approximately 20 months until February 5, 1974, at which time Mrs. Norling went to stay with her daughter, Alice Farrimond. Shortly thereafter, Mrs. Norling found out that the deed had been recorded and that her name had been removed from her savings certificates and account, and she immediately brought this action against her two daughters and Mr. Wilson, the husband of her daughter, June.

ARGUMENT

THERE WAS NOT AN IRREVOCABLE DELIVERY OF THE DEED ON AUGUST 2, 1973, AND THERE WAS NOT AN AUTHORIZED DELIVERY OF THE DEED IN JANUARY, 1974, AND THE DEED WAS PROPERLY SET ASIDE AND VOIDED.

This Court has been called on many times to determine the validity of the delivery of a deed. First, let us consider the claimed delivery of the deed on August 2, 1973.

In the case of Stanley vs. Stanley, 97 Utah 520, 94 P. 2d 465 (1939), it was held that the presumption of delivery arising from grantee's possession of a deed is not conclusive; it was further pointed out that words spoken by the grantor in favor of the grantee accompanying the delivery of the deed to the grantee would justify an inference that

the deed was delivered, but the inference is not conclusive.

Justice Crockett speaking for a unanimous Court (Justice Henroid not participating) in Losee vs. Jones, 120 Utah 385, 235 P. 2d 132 (1951) quoted from Mower vs. Mower, 64 Utah 260, 228 P. 911, wherein it is said, ". . . delivery is essentially a matter of intent, which intent is to be arrived at from all the facts and surrounding circumstances" and then added that the following in the Losee case at Page 394 of the Utah Report:

> ". . . that is, from the situation and relation of the parties, the kind and character of the property and what is done and said in connection with the preparation, execution and delivery of the deeds."

It was noted in the Losee case that the grantor exercised no further "dominion" over the deeds, a fact altogether dif-

ferent from the positive evidence of exercise of dominion by Mrs. Norling in the present case.

In another deed-delivery case a unanimous Court this time speaking through Justice Henroid noted that each case must be decided on its own facts and also at Page 140 of the Utah Report, it stated:

> "The only basic problem here is whether the documents irrevocably were delivered, vesting title in deceased's brother. . . ." (underscoring added) First Security Bank of Utah, N.A. vs. Bates, 15 Utah 2d 146, 389 P. 2d 63 (1964)

Here, as there, the question is whether the deed was irrevocably delivered. The basic facts and circumstances surrounding the revocable delivery of the deed are set forth in the facts. However, the testimony of the daughter, June, as to why she recorded the deed sheds some additional

light on her understanding and intention of the parties at the time the deed was signed. Under cross-examination June stated she recorded the deed in the best interests of her mother, Mrs. Norling. June acknowledged that Mrs. Norling wanted to stay in her own home until her dying day. But, more importantly, June acknowledged that Mrs. Norling had the right to sell the house and that would have been all right with June. (R. 330)

Thus, there was no irrevocable delivery of the deed by Mrs. Norling to her daughter, June, or anyone else. That is borne out in several ways including the exercise of dominion over the deed by Mrs. Norling as well as the acknowledgment that Mrs. Norling had the right to sell the home.

The Appellant insists that to uphold

the Lower Court in this case would be to overrule the case of Jordan vs. Jordan, 21 Utah 2d 318, 445 P. 2d 765 (1968). This is not so. In that case it is true, as Appellant contends, that there was a delivery of the deed, but there was no evidence of "irrevocable delivery" of the deed. The question before the Court was the mental competency of the grantor at the time of the delivery. This Court characterized the evidence pertaining thereto as being "somewhat nebulous". Where the competency of the grantor is involved, the question is really whether there was a valid delivery of the deed which depends upon the mental competency of the grantor at the time of the delivery. This brings us to the second aspect of this case, and that is that there was no delivery of the deed on or about January

10, 1974. It is difficult to tell from the Appellant's brief whether there is reliance upon this claimed delivery in January. However, in the event there is, that claim of delivery in January should be met.

The Trial Court found that due to her physical disabilities, Mrs. Norling was not competent on or about January 10 to make a delivery of the deed as asserted by testimony of the daughter, Esther. (R.353 and 357) In addition to Mrs. Norling's condition as set forth in the facts, Esther admitted that on the 9th, 10th, 11th and 12th of January, 1974, Mrs. Norling was blabbering a bit, and not always making good sense. She heard her mother talk as though she were speaking with her deceased husband. (R. 356) Mrs. Norling was so desperately ill on January

7th, that on that date her daughter, Signe Wall, called another daughter, Alice Farrimond, who had left Salt Lake City to visit a daughter and son-in-law in Michigan. (R. 309) Mrs. Farrimond arrived back in Salt Lake City the following evening and saw her mother on January 10, but was not immediately recognized by her mother. (R. 256, 299).

We have, therefore, two aspects of delivery of a deed, the first being one of "revocable" delivery on August 2, 1973, and second, the absence of delivery on January 10, 1974, due to the condition of Mrs. Norling on that date. The Court found both of these aspects in favor of Mrs. Norling, and set aside and cancelled the deed.

In the case of O'Gara vs. Findlay, 6 Utah 2d 102, 306 P. 2d 1073 (1957),

another deed-delivery case, this Court stated at Page 104 of the Utah Report:

> "The main contention upon appeal is that there was no valid delivery of the deed in question. In reviewing this contention, we will keep in mind the fact that the trial court found a valid delivery. Since this is true, we will not overturn its decision unless it is manifest that the trial court has misapplied proven facts or made findings clearly against the weight of the evidence."

The Court's reluctance to overturn the Lower Court has been set forth in many cases and it will not reverse the trial Court's judgment unless it clearly appears that the trial Court abused his prerogatives. Stanley vs. Stanley, 97 Utah 520, 94 P. 2d 465; Stone vs. Stone, 19 Utah 2d 378, 431 P. 2d 802; Erickson vs. Beardall, 20 Utah 2d 287, 437 P. 2d 210; King vs. King, 25 Utah 2d 163, 178

P. 2d 492; and Jensen vs. Nielson, 26 Utah 2d 96, 485 P. 2d 673, just to cite a few.

SUMMARY

It is respectfully submitted that the Lower Court was correct in its judgment, and that the judgment be affirmed.

Respectfully submitted,

BELL & BELL, by

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