

1995

Estate of Marion Howes v. : Reply Brief

Utah Court of Appeals

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Bruce H. Shapiro; Jeffrey W. Wilkinson; Attorneys for Appellee.

Wendell P. Ables; Attorney for Appellant; Lynn Poulsen; Pro Se; Appellant, Petitioner and Plaintiff.

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IN THE UTAH COURT OF APPEALS

In the Matter of the Estate

of

MARION CATHERINE HOWES,

Deceased.

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Case No. 950133-CA

Priority 10

REPLY BRIEF OF APPELLANT

Interlocutory Appeal from Findings of Fact, Conclusions of Law and Judgment.

Honorable Frank G. Noel, Judge

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REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT THE SUBJECT REAL PROPERTY KNOWN AS THE STEVENSON HOUSE WAS OWNED BY DECEDENT AND C. LEO HOWES AS JOINT TENANTS AS OF THE TIME OF DECEDENT'S DEATH AND OWNERSHIP OF THE STEVENSON HOUSE DEVOLVED ON C. LEO HOWES BY OPERATION OF LAW.

A.

There Are No Stipulations Of The Parties As To Any Deed.

Appellee Howes' Brief states at page 8 as follows:

As was stipulated by the parties and decided by a prior court, the title to the home was held by Defendant (Howes) and his wife (Decedent) as joint tenants at the time of her death. (R. 76, 941, 1499, 1522) Asserting the stipulation of the parties for the record, Defendant's counsel states without objection as follows:

As far as the joint tenancy, the title of the deed [Quit Claim Deed dated March 10, 1989] as stipulated by counsel, was in joint tenancy at her death. Nothing evidences the intent of the decedent

more than the deed. The deed is not ambiguous on its face. The deed is clear and it evidences her intent to transfer that property to her husband upon her death.

The quotation cited by Howes' attorney, Mr. Shapiro, as being the unobjected to stipulation is from Mr. Shapiro's opening statement telling the judge what he was going to prove during the course of trial. (R. 941) The opening argument statement itself refers to "as stipulated by counsel" which stipulation is not in the record nor was there ever any stipulation to this effect. And even this purported stipulation has to be supplemented by Mr. Shapiro by inserting in brackets "Quit Claim Deed dated March 10, 1989."

(R. 1499) cited by Howes as being a stipulation relating to the purported deed contains a reference to an unidentified deed during the cross-examination of Howes.

(R. 1522) cited by Howes as being a stipulation is a reference to an unidentified deed in the closing argument by Mr. Bybee, attorney for Greg Griffiths, who did not represent Appellant Poulsen in the trial court.

B.

Prior Court Proceeding.

(R. 76) cited by Howes as a decision by a prior court that title to the subject property was held by Howes and Decedent as joint tenants is a reference to Civil No. 930900838 where Appellant Poulsen and Gregory Griffiths as Plaintiffs, Pro Se, brought an action against Howes for Injunctive Relief.

An initial Order to Show Cause hearing of approximately 10 minutes duration was held on April 2, 1993 on Plaintiffs' Motion to Strike Answer and for a Restraining Order or Preliminary Injunction at the close of which the matter was to be dismissed by Plaintiffs pursuant

to Rule 41, Utah Rules of Civil Procedure, and that Mr. Shapiro was to prepare the Order. (Docket of this case is available on Court Exchange.)

Notwithstanding the direction of the Court, Howes' attorney prepared detailed Findings of Fact and Conclusions of Law and Order which appears in the Record on Appeal at (R. 72-78). It should be noted that the Order, (R. 72, 73) does not make an order concerning the state of the title of the subject property.

There are several problems with Howes reliance on this proceeding as evidence "that the title to home was held by Defendant (Howes) and his wife (Decedent) as joint tenants at the time of her death."

1. There was no final judgment on the merits as required by Mackintosh v Hampshire, 832 P.2d 1298 (Utah App. 1992).

2. The issue in this proceeding was not completely, fully and fairly litigated. Mackintosh, supra.

3. Howes failed to assert collateral estoppel, issue preclusion or obtain judicial notice of this proceeding at the time of the trial of the matter when the issue of the deed had in fact been raised by Howes.

C.

Colloquies Between Court and Counsel.

Because of the legally insufficient evidence to support Findings of Fact 9, 10 and 38, Howes relies on the colloquy between Court and Counsel at (R. 1082-1085) also cited by Appellant in her Brief at page 9, where there is a reference to an unidentified joint tenancy deed.

It should be further noted that Mr. Shapiro has supplemented his "testimony" at (R. 1084) by bracketed insertions and a footnote to clarify the thoughts of the parties at the time of the colloquy.

The colloquy at (R. 1431) fails to identify any specific deed.

D.

Testimony.

Howes cites the testimony of Howes being cross examined by Griffiths attorney Mr. Bybee, at (R. 1499). There is no reference to any specific deed in the testimony but Mr. Shapiro again inserts the identification of the deed in brackets to cover his own error.

E.

Poulsen's Closing Argument.

Howes cites the closing argument of Poulsen at (R. 1518, 1519) as evidence to support Findings of Fact 9, 10 and 38 even though the argument does not refer to a specific deed.

F.

Griffiths' Attorney's Closing Arguments.

Howes cites Griffith's attorney's closing arguments as evidence to support Findings of Fact 9, 10 and 38 even though the argument, as before, does not refer to a specific deed.

G.

Affidavit of Gregory Griffiths.

The affidavit of Griffiths, Trial Exhibit 82, was introduced by Mr. Shapiro for the sole purpose of impeaching Griffiths' testimony that the Wedding Reception Center known as Stevenson House was a partnership between he and Decedent when his affidavit stated it was Decedent's sole proprietorship. (R. 1333) There is a reference to a deed in the affidavit, but the deed is unidentified. The affidavit was not presented, introduced or argued to the trial court as evidence of the state of title to the subject property at the time of Decedent's death and was received in evidence for the limited purpose of impeaching Griffiths.

H.

Trial Issues as to the Deed.

The sequence of filings related to the issue of the purported Quit Claim Deed of March 10, 1989 are detailed in Appellant's Brief at pages 10 and 11. The issue of this deed was raised by Howes and it was he who had the burden of proof as to the deed and all of the aspects of its validity including the existence of at least two unities of title that are still currently required. It is conceded that the burden was on Poulsen and Griffiths to prove severance once the joint tenancy deed had been proven by a preponderance of the evidence.

I.

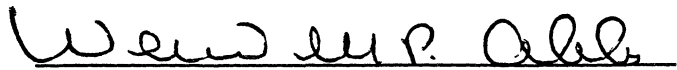
Preserving Issues on Appeal.

Poulsen agrees that there are no citations to the record preserving the issue of the purported Quit Claim Deed of March 10, 1989 for appeal as there is no evidence or a portion of the trial record identifiable where the purported deed was proved and thus, impossible to cite to the record.


CONCLUSION

The purported Quit Claim Deed dated March 10, 1989 was not properly authenticated and introduced into evidence at the time of trial, nor was there any evidence as to its due execution, delivery, recording, consideration therefor, the intent of Decedent and the parties or acceptance. Further the evidence showed that the untities of interest and possession were not established by a preponderance of the evidence. Relief should be granted as requested in the Conclusion to Appellant's Brief, page 15.

Respectfully submitted,



Wendell P. Ables
Attorney for Appellant Lynn Poulsen



Lynn Poulsen, Pro Se
Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June, 1996, two (2) true and correct copies of the foregoing Reply Brief of Appellant were mailed, postage prepaid, to the following:

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