

1995

Estate of Marion Howes v. : Petition for Rehearing

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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BRIEF

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DOCKET NO. 950133-CA

IN THE UTAH COURT OF APPEALS

In the Matter of the Estate

of

MARION CATHERINE HOWES,

Deceased.

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PETITION FOR REHEARING

Case No. 950133-CA

PETITION FOR REHEARING

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of	:	PETITION FOR REHEARING
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MARION CATHERINE HOWES,	:	
	:	
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PETITION FOR REHEARING

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IN THE UTAH COURT OF APPEALS

In the Matter of the Estate of	:	
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MARION CATHERINE HOWES,	:	
	:	
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	:	
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Plaintiff, Petitioner and Appellant, by her attorney of record, pursuant to Rule 35, Utah Rules of Appellate Procedure, petitions this court for a rehearing certifying that the petition is in good faith and not for delay. The Petition for Rehearing is sought on the following grounds:

The Court's "Memorandum Decision" is in conspicuous error when it concludes without factual discussion that:

Appellant's Brief represents several legal arguments but fails to properly marshal the evidence and support the findings and show that they are clearly erroneous. (emphasis added)

The Court cites the following cases as authority for its unsupported conclusion which are clearly inappropriate and not applicable.

The Court cites In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989) where the Utah Supreme Court held:

Lola has not even attempted to marshal the evidence in support of the trial court's findings, nor has she attempted to demonstrate that the trial court's findings are against the clear weight of the evidence... (emphasis added)

The Court further cites Ohline Corp. v. Granite Mill, 849 P.2d 602, 604 (Utah App. 1993) where the Court of Appeals held:

Ohline has failed to marshal the evidence. Instead, Ohline has merely selected facts from trial that are most favorable in its position, and then reargued those facts to this court on appeal. (emphasis added)

The only evidence to support the challenged findings of the trial court is marshalled in full in Appellant's Brief at page 9.

This Court has accepted at face value, the arguments in Respondent's Brief that conclude Appellant has failed to marshal the evidence in support of Findings of Fact 9, 10 and 38.

Respondent's Brief is a cornucopia of misrepresentation as to what evidence was introduced at the time of trial to support Findings 9, 10 and 38 and asserts purported evidence that was not offered, admitted or even in existence at the time of trial.

Respondent claims there was a stipulation at to the deed in question, which there was not. See Appellant's Reply Brief, page 1 for detail of the argument showing the purported "stipulation" was part of Mr. Shapiro's opening statement.

Respondent relies on three colloquies between the trial court and counsel to support Findings 9, 10 and 38.

Colloquy 1 at R. 1082-1085 fails to identify or admit into evidence any specific deed.

Colloquy 2 at R. 1431 fails to identify or admit into evidence any specific deed.

Colloquy 3 at R. 1499 fails to identify or admit into evidence any specific deed.

It should be noted that the date and identity of the deed has been inserted by Respondent in brackets due to his failure to introduce any documentary evidence at the time of trial.

Respondent also relies on the closing argument of Appellant Poulsen at R. 1518-1519 as evidence where again no specific deed is identified.

Respondent relies on the affidavit of Greg Griffiths to support Findings 9, 10 and 38 when in fact 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. That 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.

Respondent relies on a decision in a prior court proceeding to support Findings 9, 10 and 38 which it does not. See the argument in detail in Appellant's Reply Brief, page 2.

Respondent relies on the Petition for Permission to File an Interlocutory Appeal and the Docketing Statement filed by Appellant as evidence to support Findings 9, 10 and 38, which Findings were made and entered long before the said documents were in existence.

Plaintiffs' pro se objection to the proposed Findings of Fact and Conclusions of Law and Judgment was made pursuant to Rule 4-504, Code of Judicial Administration. R. 648-651

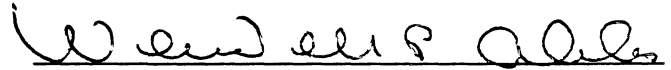
There is no other evidence received at the time of trial to support Findings 9, 10 and 38 other than that marshalled by Appellant at page 9 of her brief. Thereafter, Appellant

demonstrates in her brief, pages 9-15, that Findings 9, 10 and 38 are against the clear weight of the evidence and therefore clearly erroneous.

CONCLUSION

This Court should reverse Findings of Fact 9, 10 and 38 and the Conclusions of Law based thereon and remand the case to the trial court for further proceedings on the still pending other and additional probate matters.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Wendell P. Ables", written in black ink.

Wendell P. Ables

Attorney for Appellant, Petitioner & Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August, 1996, two true and correct copies of the foregoing Petition for Rehearing were mailed, postage prepaid, to the following:

Bruce H. Shapiro
Attorney for Appellee
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Salt Lake City, Utah 84106

Wendell P. O'Neil