In re Estate of Nelson

Navajo Nation Court of Appeals, Window Rock, Arizona

July 19, 1977, Decided

No Number in Original

Reporter
1977 Navajo App. LEXIS 30; 1 Nav. R. 162

IN THE MATTER OF THE ESTATE OF JOE DEE NELSON

Prior History: **[*1]** This case came on appeal from a final decree of probate issued by the Shiprock District Court awarding, among other things, a ***grazing permit*** for 104 sheep-units to the Appellee, Betty Nelson Todecheeny.
In re Estate of Nelson, 1977 Navajo App. LEXIS 9 (1977)

Core Terms

gift, decedent, delivery, Grazing, ***grazing permit***, transfers

Counsel: Claudeen B. Arthur, Shiprock, New Mexico, for Petitioners-Appellants.

Wilbert Tsosie, D.N.A., Shiprock, New Mexico, for Respondent-Appellee.

Judges: Before Kirk, Chief Justice, Lynch and Walters, Associate Justices.

Opinion by: Walters

Opinion

Appellants, Cecelia Henderson and Tom D. Nelson, claim that the ***grazing permit*** was not a proper item for distribution with the probate estate because the permit had been given to them as a gift before the death of the intestate. Appellants maintain that the permit was held jointly by them and the deceased and that upon decedent's death, the permit would automatically pass to them.

The District Court at Shiprock disagreed, and in a written opinion found that there was no gift as delivery had not been completed. The District Court found that, while the decedent and appellants did sign in blank a Bill of Sale or Transfer, evidence of an actual physical transfer was lacking as there had been no Grazing Committee ratification and the Bill of Sale was not completed and therefore the **[*2]** decedent had not carried out his intentions to make a gift.

The question presented to this Court is whether the decedent properly executed a gift to the Appellant before his death. If there was a completed gift inter vivos, then the decision of the District Court must be reversed. A problem this Court must also consider is the nature of a ***grazing permit***: does it represent real property or is it personal property?

The Court has examined carefully the complete record in this case. The Appellants submitted to the District Court the Bill of Sale or Transfer, signed in blank by the parties only and undated. Also submitted was a similar Bill of Sale or Transfer, more fully completed, but lacking signatures of the parties to the transaction and lacking the ratification of the Grazing Committee. This Bill was dated August 13, 1975.

Also submitted to the District Court was a Bill of Sale or Transfer for the same ***grazing permit***, again lacking all signatures, but purporting to make a gift to the Appellee, Betty Nelson Todecheeny. The date on this Bill was June 15, 1976.

To constitute an inter vivos gifts, there must be donative intent, delivery, and the vesting of irrevocable title upon such delivery. **[*3]** *Scoville v. Vail Investment Co., 55 Ariz. 486, 103 P.2d 662 (1940)* and *Armer v. Armer, 105 Ariz. 284, 463 P.2d 818 (1970)*. See also *Espinosa v. Petritis, 1962- NMSC 101, 70 N.M. 327, 373 P.2d 820 (1962)*.

Looking first to the issue of donative intent, it would appear to this Court that such intent to make a gift to the

Appellants is lacking. While at least two Bill of Sale or Transfers were executed in various states of completion, the deceased also executed an incomplete Bill of Sale or Transfer to the Appellee at a later date. As the decedent did contemplate a transfer to the Appellee at this later date, it would appear to this Court that the decedent had changed his mind about the gift to the Appellants. As the Supreme Court of Colorado stated in *Bunnell v. Iverson, 147 Colo. 552, 364 P.2d 385 (1961)*, "it is fundamental that in order to constitute a valid gift, there must be: first, a clear and unequivocal intent on the part of the donor to make a gift..." See *364 P.2d at 387*.

If the decedent had a clear and unequivocal intent to make a gift to the Appellants, this Court doubts he would later have attempted to make a gift of the same permit. This Court also feels that the decedent would have had his **[*4]** action ratified by the Grazing Committee if he had not changed his mind.

Therefore, while the decedent may have once had the intent to give the permit to the Appellants, his intent to do so changed at some later date. While it is clear that once a gift is completed, it cannot be revoked, the converse is that is can be revoked prior to its being completed. See *Bunnell v. Iverson, Ibid., 364 P.2d at 386*. We must therefore look to see if there was delivery and thus a completed gift to the Appellants.

A major problem in the courts of the Navajo Nation has been whether to characterize grazing permits as real or personal property. In non-Indian societies, land is transferred by instruments called deeds, and no gift of real property would be complete until that deed was properly executed. In the Navajo Nation, we hold that a ***grazing permit*** is the functional equivalent of a deed and is therefore an instrument which transfers real property. Land is of primary importance to the Navajo people, and to hold otherwise would cheapen the importance of land transfers.

As we have already pointed out, no Bill of Sale or Transfer was ever ratified by the Grazing Committee or even completely and properly **[*5]** filled out by the parties. No gift of real property is complete until the instrument of transfer is properly completed.

In additional, it is obvious to this Court that the element of delivery was not met in this case. In order to make a valid gift, there must be a delivery amounting to present transfer of title. *Blonde v. Estate of Jenkins, 131 Cal. App.2d 682, 281 P.2d 14*. We have held above that a ***grazing permit*** is the functional equivalent of a deed, which is the necessary instrument to transfer title. Since the Bill of Sale or Transfer was never completed, there was no transfer of title and therefore no delivery.

One of the principles of an inter vivos gift is that the donor must surrender dominion and control over the gift. Appellants, in their brief, admit that creation of a joint tenancy does not require a complete surrender of dominion and control (emphasis added). *Kinney v. Ewing, 1972- NMSC 001, 83 N.M. 365, 492 P.2d 636*. However, obviously, in order to create a joint tenancy by a gift, it is necessary that some dominion and control be surrendered. The donee has the burden to prove the gift and Appellants have failed to show they had some control and thereby meet this burden. See *Blonde v. Estate of Jenkins, Ibid., 281 P. 2d at 17*.

When **[*6]** complete dominion and control is retained by the donor until his death, it becomes merely an unexecuted and unenforceable promise to make a future gift. *In Re McSweeney's Estate, 123 Cal. App.2d 787, 268 P.2d 107*. As such, even if the decedent had promised the ***grazing permit*** to the Appellants, the promise would be unenforceable.

In the future, the kind of problem which has arisen in this case could best be avoided by properly preparing the necessary Bill of Sale or Transfer. This Court recognizes the great burden placed on the Grazing Committee due to lack of legal help. The Court is hopeful that the Grazing Committee will be able to overcome the problems and assist those persons in effectuating the transfers. Cite as 1 Nav. R. 162

The Court therefore finds that there was no gift because the decedent changed his mind about giving the permit to the Appellants and revoked his incomplete gift. No delivery of a gift was made either to the Appellants or to the Appellee.

The Shiprock District Court therefore properly distributed the permit to the Appellee in conformance with the community properly laws of the Navajo Nation as it applies New Mexico law.

The judgment is AFFIRMED.

KIRK, Chief Justice **[*7]** and LYNCH, Associate Justice, concur.

In re Estate of Nelson

Navajo Nation Court of Appeals, Window Rock, Arizona

April 7, 1977, Decided

No Number in Original

Reporter
1977 Navajo App. LEXIS 9; 1 Nav. R. 273

IN THE MATTER OF THE ESTATE OF JOE DEE NELSON

Subsequent History: Related proceeding at *In re Estate of Nelson, 1977 Navajo App. LEXIS 30 (1977)*

Core Terms

decedent, ***grazing permit***, gift inter vivos, probate decree, the will, marriage, ratification, announced, surviving, delivery, probate, silent, donor, deed, gift

Counsel: **[*1]** Claudeen B. Arthur, Shiprock, New Mexico, for Petitioners-Appellants.

Wilbert Tsosie, D.N.A., Shiprock, New Mexico, for Respondent-Appellee.

Judges: John, District Judge.

Opinion by: John

Opinion

Opinion Of The District Of The Shiprock District Court

This matter arises from a Final Probate Decree granted by this court on November 16, 1976, awarding a ***Grazing Permit***, No. 12-960 for 104 SU including 5 horses with brand ZQI assigned in Grazing District 12, to the only surviving child of the decedent, Betty Nelson Todicheeny, upon the filing of affidavit of relinquishment by the surviving spouse of her legal interest in his (decedent's) share of the ***grazing permit***.

Cecilia N. Henderson and Tom D. Nelson, Petitioners, objecting to the Final Probate Decree are natural siblings of the decedent and were granted an order setting aside the probate decree on February 8, 1977 and permitted to file their objections. Petitioners objections were heard on March 9, 1977.

The issue for this Court to decide is the following:

Did the decedent, prior to his death, give a portion of his ***Grazing Permit*** as a gift inter vivos to his brother and sister?

It is undisputed, based upon oral testimony, that a valid marriage existed between the decedent **[*2]** and Marilyn Nelson. There was one child born of this marriage, namely: Betty N. Todicheeny. This then constitute the legal heirs of the estate.

The issue of controversy is a ***Grazing Permit*** issued to the decedent on November 24, 1941, during the existing marriage of the decedent making this property subject to the community property laws. The decedent, if' he was to make a gift inter vivos of the permit could only do so with his half.

Petitioners, Tom D. Nelson and Cecilia N. Henderson, claim that the decedent gave them a portion of his share of the ***grazing permit*** as a gift inter vivos and the court could not include that portion of the ***grazing permit*** in the estate. To constitute a valid gift inter vivos, the property must have been delivered to the Donee effectuated by the delivery of the deed. For obvious reasons, "deed" could not be the mechanism for transfer here. However, a ***grazing permit*** is the functional equivalent. There is some question as to whether a ***grazing permit*** is real or personal property. This is a recurring question so a final determination ought to be made as to the status of that issue; however, that is a question for the Court of Appeals.

In this case, the donor died **[*3]** before the transfer of the permit to the petitioners and our laws are silent on the question as to what constitutes or what is required to prove the decedent's intent under the present circumstances. Most states require a written will to prove the decedent's intention and oral wills are usually not acceptable. Grazing permits and their dispositions

are highly and emotionally sensitive to the Navajo People and generally give rise to highly emotional controversies; therefore, in instances where the donor in a gift inter vivos situation dies before actual or effective delivery of a ***grazing permit*** and absent any written will dictating descent or where the will is silent on that issue, such permit should be transferred to the Navajo Nation's intestacy law or to marital interest law as the case may be.

Petitioner's argument here is relatively weak absent evidence of a duly recorded Grazing Committee approval of the decedent's intentions. The decedent did sign a blank Bill of Sale or Transfer Forms but evidence of actual physical transfer or securing Grazing Committee ratification was unfortunately lacking or not submitted into evidence. It is clear that both of the above elements have to **[*4]** be established before the gift inter vivos is declared valid. This Court may have taken a different view had the Grazing Committee testified as to their ratification of decedent's intention in this case. There was argument offered that BIA approval as far as completion of Bill of Sale and Transfer Forms is essential. This Court will dispose of that contention as irrelevant and immaterial.

The fact that decedent announced his intention to the Grazing Committee is indicative but not controlling. He did not carry through his announced intention, thus the gift still remains unexecuted and that failure properly put the permit into probate.

Therefore, the ***Grazing Permit*** was properly distributed as part of the estate according to the probate laws of the Navajo Nation and petitioners are denied their relief.

It is so ordered.