

# CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG

## Alternative Dispute Resolution

❖ Resolution Arts Building ❖

2630 J Street, Sacramento, CA 95816

ph: (916) 442-6739 • fx: (916) 442-4107

elong@ernestalongadr.com • www.ernestalongadr.com

### ***Bell v Mason (4/28/11)***

#### **Expert Witnesses; Evidence Code section 801; Proper Foundation**

John and Asa Williams, godparents to plaintiff Kelley Bell, frequently cared for her as a child. On September 2, 2003, title to the Williams property was purportedly transferred by grant deed to Bell. Two weeks after obtaining the property, plaintiff Bell obtained a \$65,000 loan, secured by a deed of trust. The interest rate was 12% because of plaintiff's poor credit history. In October, Mrs. Williams moved to a convalescent hospital, and in December, 2003, Mr. Williams died. Plaintiff Bell entered an agreement to sell the property in November 2003. In April, 2004, Asa Williams and others sued plaintiff to quiet her title to the property, alleging causes of action for fraud, negligence, and other claims. Williams alleged plaintiff fraudulently signed Williams' name on the grant deed and made an illegal transfer to obtain the loan. Williams was later placed under a conservatorship. Williams died in July, 2005, intestate, and with no heirs at law. The conservator then reached a settlement with plaintiff which involved no cash outlay by plaintiff. Instead, plaintiff agreed to pursue claims against Mason, Bonville, and others regarding the financing of the property, and plaintiff agreed to pay the conservator one-half of the proceeds of that claim.

In January, 2007, plaintiff, through her guardian ad litem, sued Mason, Bonville, Gateway Loans and Horizon Escrow, seeking to quiet title with her as the sole owner of the property she obtained from the Williamses. She alleged her former boyfriend, Bonville, forged her signature on the net proceeds of the loan, \$51,971, and converted the money to his own use. She also alleged she was defrauded in the transaction by Shante Mason, pursuant to a representation that the sale was a mere sham intended to gain the necessary credit rating to furnish funds to repair the premises. Instead of treating the sale as a sham, as agreed, defendant treated the sale as real and evicted her from the property.

Plaintiff pled that various defendants “relied on their knowledge that plaintiff suffers from mental retardation” and “took advantage of plaintiff’s disabilities in gaining her trust and inducing her to enter into the transaction which deprived her of her home.” She asserted claims for fraud and deceit, conversion by Bonville, conspiracy, negligence and other theories. Prior to trial, Gateway and Horizon were dismissed and the trial court granted summary adjudication in favor of Mason on the quiet title claim. Bonville’s answer was stricken and a default judgment was entered against him. The sole claims in issue at trial are against Mason arising out of plaintiff’s sale of the property to Shante Mason. Under plaintiff’s theory of the case, the parties agreed that the sale was a sham and plaintiff would continue to own the property. Thus, Mason’s payment of \$130,000 to her was made to allow her to continue to live in the home as a gift from a generous stranger, as they had never met. Plaintiff claimed she was entitled to remain in the house rent free as the purported actual owner. Plaintiff presented an expert psychologist, Dr. Scarf, to establish her mental capacity. The expert testified plaintiff was tested and had an IQ of 62, placing her in the bottom one percentile, and thus incapable of entering into contracts.

On cross-examination, the expert testified plaintiff was referred to her for a capacity evaluation to determine whether a conservator should be appointed. Although Scarf testified an intelligence test can be faked, she asserted that “you can’t fake me out” because she looks at other data besides tests scores. Scarf also testified she was not familiar with what is tested on the GED examination, and thus could not address the impact of plaintiff’s completion of the GED on her assessment. Scarf was unaware plaintiff had a driver’s license, and did not look at plaintiff’s high school records. She did not inquire about plaintiff’s employment history. She did not read plaintiff’s deposition or look at the videotape of the deposition to assess plaintiff’s intellectual capacity. Scarf did not inquire of plaintiff as to her real estate knowledge or experience. The trial court precluded the defense expert, Dr. Black, a qualified psychiatrist, from testifying “as to IQ or retardation of Ms. Bell,” stating “I do not believe there’s been a sufficient foundation laid for that,” in that Black had not personally evaluated Bell. The trial court limited the defense expert’s testimony to depression and personality disorder, and as a consequence, the jury was left with the uncontroverted testimony of Dr. Scarf as to Bell’s IQ of 62. The defense theory of the case was that plaintiff lied about being helpless and being taken

advantage of, that in fact plaintiff improperly acquired the property from her godparents, extracted as much equity as she could given her poor credit and then sold the property to extract additional money. The defense claimed plaintiff knowingly entered into an arms-length transaction with Shante Mason for sale of the property, in a fair amount given the condition of the dwelling.

The jury returned a special verdict finding there was a conspiracy between Bonville and Mason to defraud plaintiff, and that plaintiff was a dependent adult at the time of the conduct. She was awarded \$200,000 for past economic loss, and \$100,000 for future economic loss. Shante Mason was ordered to pay punitive damages, as well. The total judgment was 700,000. Mason brought a motion for new trial which was denied. A notice of appeal followed. The trial court later awarded attorney fees as plaintiff had prevailed on an Elder Abuse and Dependent Adult Civil Protection claim. That award was appealed, as well. Mason contends on appeal that the trial court excluded evidence on critical issues, thus preventing the defense from presenting its theory of the case. The defense sought to call Black as an expert psychiatric witness to testify plaintiff does not suffer from mental retardation, and in fact has average intelligence. The Second District Court of Appeal noted that Dr. Black has excellent credentials. He read Dr. Scarf's trial testimony and reviewed the records Scarf testified were the basis of her opinion. He also read three volumes of plaintiff's deposition and viewed in excess of 13 hours of her videotaped testimony. Black testified that psychiatrists commonly offer opinions acquired through means other than personal examination of a person. He explained that IQ tests are not normally used in litigation because the test can be skewed, and also noted the tests have a cultural bias in favor of the white middle class.

Dr. Black offered examples from his review of plaintiff's deposition that helped him form his opinion that plaintiff is not mentally retarded. She was able to read rapidly and clearly from escrow instructions, and she remembered her credit union account number. The trial court ruled Black could not testify regarding plaintiff's mental retardation or lack thereof. The court's sole concern was that Black had not met or personally examined plaintiff, and therefore the defense had failed to lay a sufficient foundation for Black to testify as to IQ or mental retardation.

The Justices turned to Evidence code section 801 which provides: **"If a witness is testifying as an expert, his testimony in the form of an opinion is**

**limited to such opinion as is (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.”**

The DCA stated the trial court’s reliance on *People v Bassett* (1968) 69 Cal.2d 122 was misplaced. Although that case found that testimony of prosecution experts that had not examined the defendant could not be deemed “substantial” evidence to support the implied finding of defendant’s mental capacity on the guilt phase of trial, the opinion noted, “We do not imply, of course, that the testimony in question was inadmissible. Assuming the necessary minimum acquaintance with the case in which he is called to testify, the extent of an expert’s knowledge goes to the weight of his testimony, rather than to its admissibility. (*Estate of Schluttig* (1950) 36 Cal.2d 416) This rule has been applied to the sanity testimony of a psychiatrist who was not permitted to conduct a personal examination of the defendant. (*People v Brekke* (1967) 250 Cal.App.2d 651)

Here, Black had more than the “necessary minimum acquaintance with the case in which he was called to testify.” (*Bassett*, at p. 146) He read Dr. Scarf’s trial testimony and reviewed the records she used as the basis for her opinion. He read three volumes of plaintiff’s deposition and viewed a videotape of the entire deposition. Thus, Black established a solid foundation for his testimony. The trial court’s exclusion of Black’s expert opinion that Bell has normal intelligence was clearly erroneous.

Plaintiff’s theory of the case is that she suffers from mental retardation and that Mason took advantage of her disabilities in gaining her trust and inducing her to enter into the transaction which deprived her of her home. The exclusion of Black’s expert opinion that plaintiff has normal intelligence eviscerated the defense case and left the jury with uncontroverted expert testimony by Scarf that plaintiff is mentally retarded. This prejudicial evidentiary error requires reversal

of the judgment. The judgment and the post-judgment attorney fee order are reversed and the matter is remanded to the trial court to enter judgment in favor of Mason who will also recover costs on appeal.