1977

Gloria G. Fenton v. Gaylord S. Gardner : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

In the Matter of the Estate of ANNIE B. GARDNER, also known as ANNIE BUTLER GARDNER, Deceased.	)	Case No. 14729
GLORIA G. FENTON, Appellant,	)	
GAYLORD S. GARDNER, Respondent.	)	

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

The appellant filed a petition asking to have a will made by Annie B. Gardner, also known as Annie Butler Gardner on the 11th of March, 1972, which was a holographic will, admitted to probate. This is entirely a holographic will and contains the following paragraph:

> "In the event my husband precedes me in death I leave all I posess (sic) to our daughters Tess Sorensen and Gloria Fenton, to be evenly divided between them, and their children shall take over their mothers share if either Tess or Gloria have passed on."

There is no provision whatsoever as to what happens to the property in the event the good lady's husband did not precede her in death. There are other things in the will that are very definitely intentional, including the omission of the children of Tess and Gloria, which says she is omitting them, "...because it is my intent to leave whatever I am going to leave to our daughters Tess and Gloria and let them take care of their children." There is also provision in the will that she is intentionally leaving nothing to her deceased son's children, to-wit, Wilford Butler Gardner, because the testatrix and her husband had already provided for these children and the deceased son's widow.

Mrs. Gardner became deceased on or about the 28th day of March, 1976, in Salt Lake City, Salt Lake County, Utah, and was at the time of her death a resident of Salt Lake City, and left estate and property in Salt Lake City, Salt Lake County, State of Utah. Said will also provided for a son-in-law, Pat Fenton, to be executor and serve without bond. That a petition for appointment of executor was filed by one Gloria G. Fenton, one of the daughters mentioned in said will, asking to have executor appointed and serve without bond on or about the 27th day of May, 1976. There was no prior filing and same was set for the 16th of June, 1976. That under date of the 15th of June, 1976, H. Ralph Klemm, as attorney for Gaylord

Gardner, one of the grandchildren who had already been provided for, filed a document entitled Opposition to Probate of Will and to Appointment of Executor, of which appellant was not aware until the 16th of June, 1976, after appearing pursuant to said original petition, alleging:

1. Petition failed to show whether or not the Executor consented to act.

2. Failure of the Executor to file his own Petition within the 30 day priority provided by statute.

3. Objection to the Executor on the basis of being a husband of one of the devisees.

4. Objection to the proceeding on the basis the will is invalid on its face.

That thereafter, after much shuttling back and forth between the various District Judges of the Third Judicial District in Salt Lake County, the matter was heard by the Honorable Bryant H. Croft, on the 15th of July, 1976, and on the 16th he signed an Order, which the undersigned presumes was entered the same day, said Order making a finding:

(a) The Petition of Gloria G. Fenton for Appointment of Executor is denied.

(b) The will of Annie B. Gardner also known as Annie Butler Gardner, is denied admission to probate in this court.

No findings of fact were made anyplace outside of this order.

The Court took no evidence in relation to the matter and simply put its own interpretation upon the document that had been filed as the will in question. All parties admitted that Wilford W. Gardner, the husband of the decedent, survived decedent and was married to her at the time of her death.

DISPOSITION IN THE LOWER COURT

On 15 July, 1976, Judge Croft denied the will being admitted to probate, and on the 16th, signed an Order denying the Petition for Appointment of Executor and denying admission to probate of the will.

RELIEF SOUGHT ON APPEAL

The reversal of Judge Croft's Order and the will being allowed to have proof made on it in accordance with statute and be admitted to probate.

STATEMENT OF FACTS

The facts in this case largely consist of an examination of the will, and the primary question is whether or not the will in failing to make any reference whatsoever to decedent's surviving husband and in one place intentionally stating that decedent is leaving out her two daughter's children because she is leaving everything to her two daughters,

and in another place stating very definitely that she is leaving out a deceased son's children because they have been provided for. Then the statement,

> "In the event my husband precedes me in death I leave all I posess (sic) to our daughters Tess Sorensen and Gloria Fenton, to be evenly divided between them, and their children shall take over their mothers share if either Tess or Gloria have passed on."

is of such indefiniteness that the entire will should be denied probate.

ARGUMENT

POINT I.

THERE IS NO FINDING OF POINTS 1, 2 or 3.

There is no finding of points 1, 2, or 3 of Objection as far as the undersigned acting as Executor; he has filed consent to act as Executor and does so consent. As far as not having filed within the statutory period, no one else filed and the filing of one of the legatees and heirs at Law to have the will probated and the undersigned appointed was the first filed. The authority for this as quoted in the objection, Utah Code Annotated, 1953, Title 75-3-3(2) has been corrected.

Pertaining to the second item, 75-3-4, is permissive and not mandatory. Pertaining to the third item, that is not

a disqualification and there has been no hearing on the capacity of the proposed Executor. There are no findings in the Court's Order on Points 1, 2 and 3, and the Court's Order is based entirely on Point 4 and does not follow the statute. There is no finding of invalidity, but is simply a denial for probate. There must be either a finding of invalidity of the will or it must be allowed for probate insofar as it can be, under the provisions of Chapter 2 of Title 74, and the first section thereof specifically states if the intention cannot have effect to its full extent, it must be given effect as far as possible, and this has not been done by the trial court.

POINT II.

NO OTHER PETITION HAS BEEN FILED FOR APPOINTMENT WITH THE EXCEPTION OF ALTERNATE PETITION OF GLORIA G. FENTON AND TESS G. SORENSEN.

As of the time of hearing on this item, no other petition had been filed by any person for any proceeding in pursuit of this estate, with the exception of the petition of Gloria G. Fenton asking that she and her sister, Tess G. Sorensen, be appointed Co-Administratrices in the event a valid will was not forthcoming. If any item has been filed since that time, no notice has been given of same, and as of this date the undersigned is not aware of same.

POINT III.

THE FINDING OF THE TRIAL COURT DENYING ADMISSION TO PROBATE IS IMPROPER.

Title 74-2-1 makes specific provision that if there is something that cannot be given effect to, that his intention should be given effect to as far as possible. This has not been done by the trial court. The findings in connection with this matter have long been upheld by the Utah Supreme Court interpreting Section 1, Section 2, Section 3, Section 5, Section 6, Section 7, Section 9, Section 10, Section 12, Section 28, Section 29 and Section 30 of Chapter 2 of Title 74, Utah Code Annotated. Some of the decisions of the Utah Supreme Court that endorse this procedure and the fact that these items have to be construed together are as follows: Ellerbeck v. Haws, 265 P.2d 404, 1 Utah 2d 229. These specific items were applied in the item of the Estate of Manatakis v. Walker Bank, 303 P.2d 701, 5 Utah 412, in which a similar will was upheld. There is no question that the animus testandi in Mrs. Gardner's estate should have the standard of Ingram's Estate applied to it, which is found 307 P.2d 903, 6 Utah 2d 149. Similar provisions were upheld by the Utah Supreme Court in the matter of Auerbach v. Samuels, 342 P.2d 879, 9 Utah 2d 261. The question of intention is discussed In Re Howard's Estate, 278 P.2d 622, 3 Utah 2d 76. There is also a point

clear in the manner in which counsel has worded the Order just simply denying the matter to probate rather than finding it invalid, and desires to use said phrase of the so-called will, 'revoking all former wills.' A former will has been filed. If this will is invalid, then the former will or wills, as the case may be, will take effect. There is no question that the will itself qualifies the matter of the precedence inasmuch as the previous paragraph states that the decedent is intentionally omitting the children of her daughters because she is leaving everthing to the daughters and expects the daughters to take care of their children. Certainly the intent was just exactly that.

POINT IV.

THE ORDER FAILS TO GIVE EFFECT TO 74-2-35, UTAH CODE ANNOTATED, 1953.

There is no question the intent of the testator is to take the advancements that have been given to one group of grandchildren and have them take that in lieu of inheriting in her estate. The Court's Order is attempting to go around a very clear and definite provision of the will that is not in anyway ambiguous. The Auerbach v. Samuels case, as quoted above, makes provision for items of this nature and refers back to 74-2-1 and 74-2-2, Utah Code Annotated, 1953.

POINT V.

THE COURT'S ORDER FAILS TO GIVE EFFECT TO 74-2-10, UTAH CODE ANNOTATED, 1953.

This is by and for the reason that simply finding that it cannot be admitted to probate does not invalidate the will, and under these conditions former wills would be allowed under the provision of this will, revoking all former wills. In all probability, former wills are not satisfactory to protestant either, inasmuch as protestant already been provided for and is now trying to share children's legacy. Not invalidating this will, but not allowing it to probate, results in intestacy. There is at least one other will that has been filed that undersigned is aware of.

CONCLUSION

The only conclusion we can come to is that the will should either be invalidated or it should be allowed to be probated. The Order denying it probate without a reason and without an invalidation of the entire will is highly improper. If there is one phase of the will that pertains to distribution that cannot be ascertained, then that is a question that should be handled at the time of distribution,

but is not a grounds for invalidation of a will, and unless the will is invalid, there is no reason for denying it probate. Under these conditions, the Order of the Trial Court should be reversed and the Trial Court should be ordered to have proof on the will and to go forward with the probate of the estate, rather than allowing the property to deteriorate and fall apart so that no one gets any benefit of it.

Respectfully submitted,

PATRICK H. FENTON
Attorney for Appellant

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS (Continued)

PAGE

STATUTES CITED