1977

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

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, Petitioner-Appellant,	
GAYLORD S. GARDNER, Contestant-Respondent.	

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Petitioner Gloria G. Fenton has appealed from the District Court's refusal to admit the holographic Will of Annie B. Gardner to probate and to appoint Patrick H. Fenton as the executor of her estate.

DISPOSITION IN LOWER COURT

Upon objection of Contestant Gaylord S. Gardner, the District Court of Salt Lake County, with the Honorable Bryant H. Croft presiding, denied the Petition of Gloria G. Fenton for appointment of executor and refused to admit the holographic Will of Annie B. Gardner to probate because said Will fails to make any disposition of decedent's property. The court's written Order has been made a part of the files of this Court.

RELIEF SOUGHT ON APPEAL

Petitioner-Appellant Gloria G. Fenton seeks to have this court reverse the Order of the lower court and to have the decedent's Will admitted to probate.

STATEMENT OF FACTS

Mrs. Annie B. Gardner, also known as Annie Butler Gardner, died in Salt Lake City, Utah, on March 28, 1976. Two months later, Mrs. Gloria G. Fenton, a daughter of the decedent, filed her Petition For Appointment of Executor in the District Court of Salt Lake County, seeking to have her mother's holographic Will admitted to probate and requesting that Petitioner's husband, Patrick H. Fenton, be appointed to act as executor of decedent's estate. Among other things, the holographic Will 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."

No other part of the Will purports to dispose of any of decedent's property, and the Will contains no residuary clause. Petitioner has admitted that decedent's husband, Wilford W. Gardner, has survived his wife and is still alive today. Consequently, the condition precedent set forth in the decedent's Will has never been fulfilled.

On June 15, 1976, Contestant Gaylord S. Gardner filed his Opposition to Probate of Will and to Appointment of Executor, contesting the admission of the Will to probate on the ground that it failed to make any disposition of her property because all gifts made therein were contingent upon the

prior death of testator's husband, which contingency had failed to occur. The Contestant also opposed the appointment of Patrick H. Fenton as executor of the estate for statutory and conflict of interest reasons.

After hearing argument on the issues raised by the Contestant's objections to the probate of the Gardner Will, Judge Bryant H. Croft entered an Order denying admission of decedent's holographic Will to probate as a matter of law on the ground that it failed to make any disposition of decedent's property because the condition precedent had failed. During the hearing, the court expressly declined to hold that the Will was invalid and reserved that question for some later time. (TR8-9) No ruling was made by the court on the qualifications of Patrick H. Fenton to serve as the executor of the estate. That issue was moot because of the ruling of the court.

ARGUMENT

POINT I.

THE DISTRICT COURT NEVER RULED ON THE QUALIFICATIONS OF THE EXECUTOR BECAUSE THE WILL ITSELF WAS NOT ADMITTED TO PROBATE.

The Appellant argues under Point I of her brief that the court failed to make any findings as to the qualifications of Patrick H. Fenton to serve as executor of decedent's estate. We must agree that no findings were made, but we hasten to add that no findings were necessary. The issues pertaining to the qualifications of the proposed executor to serve in that capacity were mooted by the court's denial of the admission of

the Will to probate. Since the court held that decedent's holographic Will failed to make any effective disposition of her property and that probate would have no useful purpose, there was no need to deal further with the qualifications of Patrick H. Fenton to serve as executor of the estate. No executor was needed in this instance, and no findings were necessary in this regard.

POINT II.

THE COURT PROPERLY REFUSED TO RULE ON THE VALIDITY OF THE HOLOGRAPHIC WILL.

During the hearing held by the court on July 15, 1976, the court responded to some reference to "invalidity" of the Will in the following language:

> "THE COURT: Even if there were, I am not satisfied while this Will under my ruling leaves nothing to be probated, it doesn't mean that it is not a valid Will. In this Will, she says 'This Will revokes all former Wills,' which might very well have that effect if there is a prior Will that she made. The fact that this Will fails for the reason I have stated, doesn't mean that the Will itself is void. And therefore, that revocation of all prior Wills might well have accomplished that very fact. But that isn't before me and I won't purport to make any ruling on that."

Because there may be other Wills that would be governed by decedent's declaration that all prior Wills are revoked, the court declined to rule that the holographic Will was invalid. The court limited its ruling to the question of whether or not decedent's Will effectively disposed of any of her property. Whether that limited ruling of the court was proper is the issue now on appeal before this body. We think the Supreme Court should limit its consideration of this matter to that issue.

The Appellant argues in Point I of her brief that the court should have found that the Will was invalid before refusing to admit it to probate. This argument has no merit because the document may have been proper in every way except in the disposition of decedent's property. The formalities surrounding the preparation of the document may have been fully complied with, and it could otherwise have been proved and admitted to probate. The fact that the contingency prevented any disposition of decedent's property did not necessarily invalidate the Will, it merely made it ineffective for probate purposes. The court gave full effect to the intentions of the testatrix in making its decision to reject the probate of the Will. No other construction was possible under the circumstances. As demonstrated in other parts of this brief, the Will may be valid, but the property must still be distributed in accordance with Utah laws of intestacy.

POINT III.

CONTESTANT HAS NO OBLIGATION TO PETITION FOR APPOINTMENT OF AN ADMINISTRATOR IN THIS MATTER.

The Appellant seems to place some significance on the fact that the Appellee has not filed a Petition For Administration or for probate of any other Will in connection with Mrs. Gardner's death. She notes in Point II of her brief that an alternate petition has been filed by herself and her sister Tess G. Sorensen requesting that they be appointed as co-administratrixes in the event that a valid Will is not forthcoming.

Of course, the Contestant has no obligation to file any petition for administration in this matter. Under the provisions of Utah Code Annotated, 1953, Title 75-4-1, administration of an estate of a person who died without a Will must be granted to certain relatives in order of priority. The Contestant is a person of low priority under the terms of that statute, while the daughters of the decedent, who have already filed their petition for such administration, are given high priority for this purpose. The Contestant would accomplish nothing of value in filing his petition for issuance of letters of administration under the circumstances.

POINT IV.

THE PROVISIONS OF TITLE 74-2-10 DO NOT GOVERN THE CIRCUMSTANCES OF THIS CASE.

Appellant asserts in her brief that the court has acted contrary to the provisions of Utah Code Annotated, 1953, Title 74-2-10 in refusing to admit decedent's Will to probate. That statute reads as follows:

> "Of two modes of interpreting a Will, that is to be preferred that will prevent a total intestacy."

Appellant's argument assumes that the District Court was dealing with a problem of interpretation when it denied admission of decedent's Will to probate. In reality, there was no question of interpretation facing the court when the ruling was made. The language of the Will is clear and unequivocal. All gifts are contingent upon the prior death of decedent's husband, Wilford W. Gardner. Since that contingency had failed in its entirety, the Will did not

accomplish its purpose. It did not dispose of the decedent's property, and admission to probate would have served no useful purpose. No other construction was possible under these circumstances.

In referring to the purpose of the above statute, the Supreme Court of Utah once made the following statement in the case of Inre Beal's Estate, 117 U. 189, 214 P2d 525(1950):

> "The rule that testacy rther than intestacy is preferred does not relieve courts from the obligation to construe the language of the Will according to the legal effect of the words used."

That statement seems to be appropriate in the instant case.

Appellant also argues that the District Court has ignored the mandate of Title 74-2-35 in denying probate of decedent's holographic Will. This statute deals with advancements made during the life of the testatrix. Since the condition precedent has prevented any gift from taking effect, the issues about her advancements to her heirs are foreign to this appeal. Under Utah law, as set forth below, it is evident that decedent's estate must be distributed in accordand with the laws of intestacy and the advancements would have no relevance to such distribution.

POINT V.

THE DISTRICT COURT PROPERLY DENIED ADMISSION OF THE GARDNER HOLOGRAPHIC WILL TO PROBATE.

Under Utah law, as set forth in UCA, Title 74-2-30, a condition precedent in a Will is one which is required to be fulfilled before a particular disposition takes effect. Title

74-2-31 states that where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled.

In the matter now before the court, all gifts made by Mrs. Gardner in her Will were contingent upon the prior death of her husband, Wilford W. Gardner, who has survived her to this date. The condition precedent has never been performed and can never be performed. Therefore, the disposition of decedent's entire estate has failed, and none of her property has been disposed of by her Will. For this reason, the admission of the Will to probate would have had no useful purpose. It is evident from the above that the court was following established Utah law when it refused to admit the Gardner Will to probate.

In Larsen vs. Paskett, 29 Utah 2d 360, 510 P2d 520, the Supreme Court of Utah had a previous occasion to deal with the "vesting" concept of probate law. The words of the court in that case are of assistance to us in this matter. The language of the court is as follows:

> "But the trial court adopted the view, with which we are in accord, that the rule as to immediate vesting of property in the heir or the devisee upon the decedent's death does not apply where it appears from the Will that the testatrix had a different purpose in mind and the Will states conditions precedent to such vesting."

There can be no doubt that ownership of decedent's property never vested in anyone as a result of the terms of her Will. The court and the parties must now follow other avenues in distributing decedent's estate.

Under the provisions of Title 74-1-1, any part of decedent's estate not disposed of by Will is succeeded to as provided in Chapter 4 of Title 74. Under that chapter, the legislature has set forth the manner in which property must be distributed in the absence of a Will or marriage contract. In other words, when decedent's property is not disposed of by Will, then her property should be distributed to her heirs in accordance with the Utah laws of intestacy.

The Appellant now has every right to go forward with the probate of her mother's estate. She and her sister have already filed a Petition to have themselves appointed as co-administratrixes to administer their mother's estate. At their request, a hearing on that Petition has been post-poned pending the outcome of this Appeal. There is no reason why the District Court cannot go forward with an intestate probate at this time.

Utah law is not unique on the question of contingencies. The courts of other states have held that where a contingent gift fails, such gift falls back into the estate of the decedent to be distributed under the laws of intestacy in the absence of a residuary clause. See Nichols vs. First Security National Bank of Baker, 264 P2d 451, 191 Ore. 659.

The Arizona courts have held that where a contingent beneficiary under a Will has pre-deceased the testatrix, the Will was inoperative as to the portion belonging to the deceased's beneficiary, and such lapsed share remained undisposed of under the Will. See In re Jackson's Estate, 464 P2d 1011, 11 Ariz. App. 424.

Our sister state of Idaho held in 1963 that property not disposed of by a Will containing no residuary clause must descend in accordance with Idaho laws of succession. See In re Corwin's Estate, 383 P2d 339, which also held that the court may not speculate as to what the testator intended to declare in his Will, but must determine what he meant by the words actually used therein. In Idaho, as in Utah, all presumptions and auxiliarly rules applicable to probate matters are subordinate to this cardinal rule.

Appellant insists that the court failed to give credence to the intention of the testatrix in refusing to admit the Gardner Will to probate. Again, we stress that this case is not a matter of simple interpretation of the contents of a Will. The question is whether a condition precedent to the granting of any gifts was fulfilled, enabling the distribution of decedent's estate to be made in any event. Since the condition precedent never took place, the court had no duty to look at the intention of the testatrix regarding what should have been done if the condition had been fulfilled.

CONCLUSION

The District Court properly applied Utah law in denying admission of the Gardner Will to probate. For reasons set forth herein, it's ruling should be affirmed.

DATED this 19th day of November, 1976.

Respectfully submitted,

H. Ralph Klemm

H. RALPH KLEMM
Attorney for Respondent

CERTIFICATE OF MAILING

Two copies of the above and foregoing Respondent's Brief was mailed to Patrick H. Fenton, Attorney for Appellant, 13 West Hoover Avenue, Cedar City, Utah, 84702, by United States Mail, postage prepaid, this 19th day of November, 1976.

H. Ralph Klemm