

1941

In The Matter of the Estate of John H. Gordon : Brief of Respondents

Utah Supreme Court

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In the Supreme Court of the State of Utah

IN THE MATTER OF THE ESTATE
OF
JOHN H. GORDON,
Deceased.

No. 6374

RESPONDENTS' BRIEF

APPEAL FROM THE FOURTH JUDICIAL DISTRICT
COURT, UTAH COUNTY, STATE OF UTAH.
HON. DALLAS H. YOUNG, Judge.

CHRISTENSON & CHRISTENSON,
Attorneys for Respondents.

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RESPONDENTS' BRIEF

This is a will contest. The only property involved is a small house and lot in Provo, Utah. The claimed will was signed September 14, 1938. The deceased died October 13th, 1938.

The contestants of the will, respondents herein, are three children. The proponents, appellants here, are four other children who were left substantially the whole estate.

The jury found, within the issues framed by the pleadings, that John H. Gordon, the deceased, was not of sound and disposing mind and memory at the time he executed the will in question.

The Court denied appellants' motion for a new trial

QUESTION FOR DETERMINATION

The appellants raise only one question on this appeal—whether the evidence is sufficient to support the verdict. They took no exception to the instructions of the court. Indeed, the instructions were most favorable to them. They claim or assign no erroneous admission or exclusion of evidence.

Appellants contend that the court erred in denying their motion for non-suit, their motion to set aside the verdict and their motion for a new trial, on the single ground of insufficiency of the evidence. (P. 11 of Appellants' Brief)

RULE AS TO SUFFICIENCY IN WILL CONTEST

It is established beyond controversy in this jurisdiction that a will contest is a law case and the jury's verdict must be upheld if it is supported by substantial evidence. In re Goldman's Estate, 260 Pac. 586; in re Miller's Estate, 31 Utah 415, 88 Pac. 338; in re Swan's Estate, 51 Utah 410, 170 Pac. 452; in re Jones estate, 59 Utah 99, 202 Pac. 206.

As is said in re Miller's Estate, Supra:

"A suit to revoke probate of a will is an action at law in which a jury may be demanded by either party as of course and as a matter of right . . . The Supreme Court in such an action at law cannot treat as found that which might have been found, or weigh or pass on conflicting evidence, or pass on the credibility of witnesses, for such matters are in the province of the trial court without a jury and within the province of the jury when tried before a jury."

It, therefore, becomes necessary only to determine herein whether there is evidence in the record from which the jury was authorized to find that John H. Gordon was not of sound mind at the time he signed the claimed will.

STATEMENT OF FACTS

Appellants' "Statement of Facts" (pp. 5 to 9 of their brief) fairly reflects the course of the proceedings, but contains no statement of facts on the issue of sanity. Appellants reserve for their argument a statement of what they claim the evidence shows, but their references to the testimony are confusing and fragmentary. They serve merely to indicate a conflict. The preponderant facts and circumstances supporting the verdict of the jury are either lightly passed over or ignored.

Contestants Case in Chief

For a more representative picture of the evidence supporting the verdict of the jury we shall attempt to summarize the determinative testimony which we believe will show without the necessity of lengthy argument that not only is the jury's verdict amply supported, but very close to the only reasonable result that could have been reached.

Maud Olsen

She is one of the contestants, a widowed daughter of the deceased (Tr. 6). John H. Gordon was 83 years of age at the time of his death. (Tr. 5) His first wife, (mother of the parties herein) died about thirty-five years ago, and

he married Julia Gordon, his surviving widow, about 10 years later. (Tr. 6). Besides his second wife, John H. Gordon left surviving him nine children (three being contestants and respondents herein and four being proponents and appellants) and the children of one deceased child. (Tr. 6-7)

About a year before his death John H. Gordon was in an automobile accident (Tr. 8) and injured his head. (Tr. 9)

About August 15, 1938 (the will bears date September 14, 1938) John H. Gordon became ill. (Tr. 10-11) Prior to that time the witness visited him every Saturday. Thereafter and until his death she was with him every night to sit up with him (Tr. 10-12)

In the latter part of August, 1938, John H. Gordon did not know the witness, his own daughter, although she sat up with him every night, and he never knew her any more after that. (Tr. 15-16)

About the first of September he thought he had just been to Salt Lake with three fellows and had dinner with them, when he had not been. (Tr. 17 - 18).

Shortly after this incident he wanted the witness to go out and see if his car was in the garage. He claimed three fellows had borrowed it three weeks before and hadn't returned it. There had been no one borrow it and the car had been in the garage all the time. (Tr. 19)

In a lengthy cross-examination, Mrs. Olsen's testimony was unshaken that at no time after August 20, 1938

did her father know her notwithstanding she was with him every night. (Tr. 21) She was not present the day the will was made, but was with him that night. (Tr. 22-23) Mrs. Olsen for 10 years had taken butter and eggs to her father every Saturday and he had paid her the market price for them. When he took sick she continued to bring butter and eggs to his home, but he never paid her after that, and he didn't know who she was. (Tr. 29) After the second week of his illness he didn't know anybody that called. (Tr. 33)

Mrs. Olsen further testified that the picture mentioned in the will as going to her had been given to her two or three years before. (Tr. 37)

Eva King

Mrs. King is the daughter of Julia Gordon by a former marriage. (Tr. 41) She lived just over the block from Mr. Gordon. Her mother had been married to him for 25 years and she lived with them during her earlier years and has frequently been with them since. (Tr. 42)

From the time Mr. Gordon took sick in August until September 14, the date of the will, she saw him practically every day. (Tr. 42) Prior to September 14 she had noticed that he was failing. (Tr. 43)

About the middle of September, 1938, he asked her why she didn't shut the water off.

"I asked him why, what water". And he said, 'Well, they was trying to drown him; they was trying to run the water through the house'. And I said, 'There is no water

here, grandpa'. He said, 'I can't see why my knees and legs are so wet then if there wasn't any water'." (Tr. 43)

He told about the water a good many times to others. (Tr. 43)

From the time of these occasions up until the time of his death the condition of his mind never changed. In the judgment of the witness at no time during the month of September (the month the will was signed) was John H. Gordon of sound mind, and his condition continued up to the time of his death. (Tr. 21)

About the 10th of September the witness called and Mr. Gordon did not know who she was. When Mrs. Gordon told him who she was he said he wanted her boy. When the boy was sent for he didn't know him, but when assured that it was he, Gordon told him to go down to Sanpete County and drive his cattle home. He said a lot of the cattle had already died and the rest were poor. He said they would feed them and he would split the difference with the boy. The witness had never before heard of him having cattle in Sanpete (Tr. 44-45) (and there is no mention or claim of cattle in the inventory and other probate proceedings).

On August 16, 1938, Mrs. King called at Mr. Gordon's home and found him under the table. He said, "If I ever catch those brats I will kill them". There was no one else in the house. Mrs. King got him out from under the table and put him to bed. (Tr. 46)

In September when Mrs. King talked to him about

drinking eggs and milk for his strength, he said he was waiting for "Mrs. Jensen" to bring some eggs. When he was told Maud would bring them, he asked who Maud was, and denied he had a daughter Maud.

From her observation of him Mrs. King testified Mr. Gordon was not of sound mind on or about September 14, 1938, and that "he never had a good conversation after the 16th of August". (Tr. 47)

On cross-examination Mrs. King testified that after the 16th of August he didn't know the people who came to his house all the time, at times he maybe would know some but some he didn't know at all. After the 16th he didn't very often know Mrs. King. At times he didn't know his wife. (Tr. 48) On cross-examination it was also brought out from Mrs. King that Dr. Westwood advised not to leave her mother alone with Mr. Gordon because he was not safe. (Tr. 56-57) She further testified Mr. Gordon was not just right ever since the accident more than a year before his death. (Tr. 59-60)

Ned Olsen

This witness is the grandson of the deceased, son of Maud Olsen. He had known Mr. Gordon ever since he could remember, and used to work for him on his farm and took care of his car. (Tr. 61)

The first time he called after his grandfather became ill, he put his arm around Mr. Gordon as he usually did and asked him how he was. Mr. Gordon mumbled something and someone else says "That is Ned." Mr. Gordon said

"Ned? No, I don't know Ned." (Tr. 62)

From that time to the time of Mr. Gordon's death he saw him almost every day, but Mr. Gordon did not know him. (Tr. 62)

In the judgment of the witness from the time he first saw him in August when he was ill to the time of his death he was not of sound mind. Not once when he saw him was his mind clear. (Tr. 63)

Mr. Gordon talked about his "red headed girl" in Springville, and about going and getting her. (Tr. 69)

The cross-examination of the witness concluded as follows:

Q. You think at any time he became sick, after the 15th of August, that he knew his children?

A. No.

Q. And he didn't know his property?

A. No.

Q. And he didn't know you after the 15th of August?

A. No, sir. (Tr. 70-71)

Thelma Carter

She is the daughter-in-law of Julia Gordon. She had known the deceased about 18 years. About the first of September, Mrs. Carter went in the house and was asked by Mr. Gordon to get a doctor for "that man there; they are tearing the flesh all off him". (Tr. 72-73)

Later he complained about the toughness of "his steak", when all he was eating was mush and eggs. His mind wandered terribly. (Tr. 73)

From the first of September until his death in the judgment of the witness he was not of sound mind. (Tr. 74)
 Ilas Carter

Son of Julia Gordon. Had known John H. Gordon about 27 years. In the Spring of 1938 John H. Gordon was ill. (Tr. 84-85)

In the Fall of 1938, the witness had a conversation with Mr. Gordon who said he had some property "up on the hill" he wanted his son Jack to have. (Tr. 87) This was about three weeks before his death. (Tr. 88)

Within a few months prior to his death the witness met Mr. and Mrs. Gordon near their home. Mr. Gordon told the witness they "were going to their other home". He pointed to the railroad station. When he was told that was the railroad station, he then said it was "next to the Gibby home". Finally, after designating his chicken coop, the witness took him by the arm and led him into his own home. (Tr. 89) The witness didn't think he was of sound mind while he was sick. (Tr. 90)

When Mr. Gordon was out looking for his other home, Mrs. Gordon was trying to keep him back. (Tr. 93)
 Nettie Carter

No relation to the deceased or to the Carter who previously testified. She had known John Gordon for 25 years or more, and had visited a good many times. (Tr. 96)

In the latter part of August she heard he was sick. He seemed to know her when she first went there, but didn't seem to be right at that time. (Tr. 97) When she called

back within a night or so, she could see he wasn't the same as he was before. Sometimes he knew her and sometimes he took her for someone else.

During all the times after her first visit he wasn't in his right mind. "Anybody that has anything to do with old people or takes care of them can tell when an old person is right and when they are wrong." (Tr. 98)

John Gordon (Jr.)

Son of the deceased. (Tr. 105)

From two weeks after his father took sick until his death he was not of sound mind. (Tr. 108)

In the forepart of September, 1938, the witness was talking to his father, and was told by him that he had several properties. He said he had a home up on the hill, "You just as well have it", he told the witness. (Tr. 109)

About a week or so after he was at his father's home, and the witness was asked by his father to "take him home". They couldn't make him believe he was in his own home. (Tr. 110)

About a year and a half before John Gordon, Sr. died, his only sister in Ogden had died and willed him "one dollar". He broke down and cried. He said "I would hate to think I had a child I would treat that way." (Tr. 110)

The witness was at his father's home the day the will was executed. He saw him five minutes after the will was executed. He didn't know who the witness was. (Tr. 111)

The first time the witness knew his father was making a will was when he arrived and Mr. Booth was in the house,

and Curtis (one of the proponents) came out and said the witness couldn't go in because his father was making a will. (Tr. 115)

The witness visited his father almost every night from the middle of August. (Tr. 115) From the first of September he didn't know the witness. (Tr. 116)

His father never gave him anything during his lifetime. (Tr. 126)

John Gordon, the deceased, couldn't write except his own name. He could read the newspapers a little. (Tr. 127)

Robert R. Shoemaker

Sixty-eight years old. Had been next door neighbor to John Gordon for 16 years. Saw him several times during his sickness. He was in bad shape. About two weeks before he died didn't know the witness at all. Didn't seem to recognize anyone. At anytime during his sickness didn't seem to be just right. (Tr. 130)

For a couple of weeks after his illness he may have been of sound mind. After the first two weeks of his illness he was not of sound mind in the opinion of the witness. (Tr. 130)

The foregoing testimony all appears in the record as a part of the contestants' case in chief and prior to the proponents' motion for non-suit. (Tr. 136) It is such evidence which the proponents claim did not raise an issue of insanity to go to the jury. The contestant's also produced three other witnesses on rebuttal, and also recalled

Mrs. Olsen and John Gordon, Jr. the testimony of which will be later referred to.

PROPOSERS' EVIDENCE

The proposers produced thirteen witnesses, two of which were the witnesses to the will and eight of which were proposers or relatives. The testimony of most of these witnesses was generally to the effect that John Gordon was of sound mind right up to the time of his death. Thus there was a sharp conflict in the testimony, and the jury obviously believed the testimony adduced by the contestants.

We will not attempt to set out the evidence of the individual witnesses of proposers, in view of the fact that the issue here is simply whether there was substantial evidence to the contrary, and in support of the verdict of the jury. However, a reading of the testimony of these witnesses itself reveals inherent weaknesses.

Curtis Gordon, was a son named as a devisee and the executor of the pretended will. He claimed that Mr. Gordon was perfectly all right on August 21, and that two weeks after he found on visiting him that he had probably taken "a little cold" — "wasn't really sick." (Tr. 136) On the date the will was made he claimed he sent for the attorney at the request of Mr. Gordon. (Tr. 138) Although did not claim that his father had anything to do with selecting the witnesses. (Tr. 138-139). Curtis Gordon got the witnesses and transported Mr. Booth back and forth in connection with the drafting of the will. (Tr. 139) He

claimed Mr. Gordon "was in as sound mind as he ever was in his life." (Tr. 139) He also claimed that practically up to the time of his death, Mr. Gordon's mind was clear and he denied that he knew anything about the various incidents related by the witnesses preceding him. (Tr. 146)

Curtis Gordon claimed that he knew nothing about the contents of the will or who were beneficiaries or that he was named executor until the day of the hearing of his petition for letters testamentary when the will was read to the family in Attorney Booth's office. (Tr. 150) He claimed and reiterated that up until that time he didn't know anything about what the will provided and said that when Mr. Booth read the will to the family. (Tr. 151-153)

"Q. And you didn't know that the entire property had been left to you four children and the rest left with a dollar"?

A. No, sir.

Q. The first time you knew anything about that was when the will was read after a petition was made to probate the estate?

A. When that will was read in Judge Booth's office, I was just as much surprised as they were.

Q. That was after the hearing in this court?

A. Yes, sir. My brother John contested the signature of his father there that day — wanted to see it; said it didn't look like his.

Q. Well had the signature been seen by you then prior to its being read.

A. I had seen lots of his signatures.

Q. I mean this signature on the will.

A. No. (Tr. 153-154)

Yet he finally admitted that more than ten days before he had repeatedly claimed he first learned of the contents of the will, he signed the verified petition for probate. (Tr. 153-157)

A reading of his entire testimony is necessary to fully disclose the complete breakdown of the testimony and the memory of the witness, but a few more extracts are given as examples.

Q. You hadn't even seen the will prior to that time (the day of the court hearing)?

A. No, sir.

Q. You knew some of the beneficiaries, didn't you?

A. I didn't know anything about it, I am sure.

Q. You swore here under oath at the time ten days prior to the hearing to which you refer that you were named as executor in the last will and testament and what the provision was of the will with respect to serving without bond, and other details with regard to the will, didn't you?

A. I never swore to that.

Q. You are positive of that.

A. I am sure of that.

Q. Didn't you know who the beneficiaries were who were named in the will at that time?

A. No, sir; not until after the will was read. (Tr. 154)

....

Q. You swore, did you not, under oath, that the deceased left a last will and testament, which is presented herewith with their petition, ten days or more before the hearing in the court house, didn't you?

A. This was signed, you mean?

Q. Yes.

A. No.

Q. Positive of that?

A. I believe I am.

Q. Just as certain about that as you are of your other testimony today?

A. Well, I think so. (Tr. 154-155)

(The court hearing was December 3, 1938, and the petition was signed by the witness November 10, 1938.)
—Tr. 155 - 156)

. . . .

Q. You so swore, didn't you?

A. I just can't figure that out some way or another.

Q. Lots of things we can't figure out. Is that your signature?

A. Yes, sir. Now, I don't remember signing any paper except there in that office that day we were all here. (Tr. 156)

. . . .

Q. Isn't it possible that when you told the jury you didn't know anything about the contents of the will before the hearing in court here you were mistaken?

A. No, I don't think I was. I really didn't, now, and I am not kidding you. I just didn't know all the contents of that will. (Tr. 157)

In the remainder of his cross-examination, the witness denied his father was seriously ill when the will was signed — just a cold, and claimed that his mind was clear up to within a week of his death.

The witness, with regard to his opportunity to ob-

serve his father, admitted that his visits during the latter part of August and the month of September were limited to August 21, September 4, September 14 and September 25. (Tr. 168) With regard to the condition of his father, his bringing Mr. Booth back and forth the day the will was signed, and, again, as to when he learned about the will, the witness testified,

Q. Although the doctor was there a second time then, and had been there up to the 12th of September, you say that on the 14th your father was perfectly all right except for a cold?

A. Well, I thought so.

Q. Now, Mr. Booth didn't mention to you anything about the provisions of the will that you would be made executor?

A. No, sir.

Q. And you didn't know until after the hearing here in Court?

A. No, sir.

Orville Baum, son of one of the proponents, testified that on the 13th day of September he saw the deceased who had a slight cold—"like any other normal person", and recounted two conversations for the purpose of showing sanity.

Hannah Baum, a proponent described his condition on the 10th and 13th as follows:

Q. What was the condition of your father on the 10th and on the 13th when you went down with your son?

A. He was just all right — fine.

Q. I mean mentally or physically. What was his

physical condition?

A. He was all right, nothing wrong with him at all. He just felt fine (200). Yet she admitted on cross-examination that the doctor was there on the 12th. (Tr. 207) And finally, that Mr. Gordon was ill a week before the will was made. (Tr. 210)

Minnie Gordon, wife of Curtis Gordon, Leon Gordon, one of the proponents, Mrs. Orville Baum, daughter-in-law of one of the proponents, Mr. and Mrs. Ernest Harding, grand-parents of Mrs. Orville Baum, and Mrs. Eliza C. Gibby gave testimony following a similar pattern, giving their opinion that the deceased was of sound mind. The latter admitted he was seriously ill a month before he died, which would be just before the will was made. (Tr. 275) And that he would get funny ideas and say funny things and things that were "not quite right", (Tr. 274) although later she attempted to ascribe this to powders the doctor was thought to have given him. (Tr. 275) She later claimed that he did not take seriously ill until after the will was made, but admitted that he took seriously ill before Dr. Westwood's visits (which were just before the will was made). (Tr. 275)

A. L. Booth, an attorney of Provo, who drew the will, had known Mr. Gordon for a long time but no recent contact with the deceased was claimed, except on the day the will was signed. The last prior to that was probably in the early season. (Tr. 290) Curtis Gordon called him and drove him back and forth. He claimed the deceased directed

him what to put in the will and was perfectly competent. He said Mr. Gordon wanted Maud to have her grandmother's picture and the others, except the proponents, to have a dollar apiece because "they have had their share of the property". (Tr. 280) (This, notwithstanding that the evidence shows beyond dispute that none of them had received any advances)

After the will was admitted to probate, the witness prepared an "acceptance by widow of provisions of will" for Mrs. Julia Gordon to sign, which she did with her mark. (Ex. 3) None of Mrs. Gordon's children were present, the witness did not know whether she could read, and he wrote out her signature and she signed with her mark. (Tr. 286) When she signed it she was alone in Mr. Booth's office with him and Mr. and Mrs. Curtis Gordon who had brought her. (Tr. 295) Mr. Booth testified that in his judgment Mrs. Gordon understandingly signed the relinquishment, as it was his judgment Mr. Gordon understandingly signed the will. (Tr. 295) Mrs. Gordon was about 80 years old at the time, and she later testified she couldn't read, did not understand anything about the paper, didn't know what a life-estate was and only recalled that Mrs. Curtis Gordon signed same paper in Mr. Booth's office when she was there with her. (Mrs. Curtis Gordon signed as a witness). (Tr. 310)

Mr. Booth said he did not discuss with Curtis Gordon the provisions of the will until the court hearing. (Tr. 286) Then later he admitted he may have told him that he was

executor before his father died. (Tr. 287) Then finally, when his attention was called to Curtis Gordon's signing of the petition, he said "It is very probable I showed him the will and let him read it at that time." (Tr. 287) This was about a month before the hearing. (Tr. 288-289)

The other witness who signed the will was taken to the home of the deceased by Curtis Gordon. The deceased said when he came in "Hello, how are you son?" Although the witness explained that was what he usually called him, there is nothing further to show that he was recognized.

Q. You say that is what he usually called you?

A. Yes, sir. And I asked him how he felt, and he said, "fairly good". The Judge said, "I guess we had better read the will". That was about all there was at that meeting.

As Mr. Booth read the will Mr. Gordon said that was the way he wanted it. Then Mr. Booth asked Mr. Gordon to tell "this gentleman" what he was signing. And he said, "This is my will". And he says, "You want us to witness your signature", and we did. The witness did not indicate that the deceased made any request to the witnesses. We quote now, in full, the testimony of the witness as to mental condition, as we do not believe it is what proponents' claim it to be, and is significant because of its studied avoidance of the issue.

Q. Now, from your dealings with Mr. Gordon in the past over the period of 17 years, what would you say

as to his mental condition was when he signed the will?

A. I couldn't see any difference at the time he signed the will from the first time I met him, according to his mind condition. He was very prompt in his methods and when he had anything made, his collections, if a man didn't show up right at a certain minute to pay his interest, why he cancelled the loan. He was right there to get his money and he did everything the same way. I guess, the same as making his will.

Q. Was his attitude and condition, mental attitude, the same as you always found it?

A. He was always very prompt in doing his work.

Q. Did you hear my question? What his attitude and condition of mind substantially the same as you had always found it?

(Objection overruled)

A. Well, it seemed to me like he was just as active as ever.

Mr. Brockbank: You may cross-examine. (Tr. 299-300)

On cross-examination he admitted that it may have been in the spring when he saw him before and that his judgment was based merely on the few moments of observation that he related. (Tr. 301) He never testified directly that at the time the will was executed his opinion was that Mr. Gordon was of sound mind.

Dr. David Westwood testified that he made a professional visit on Mr. Gordon on September 9. He was there "two minutes - 30 minutes maybe." All he testified to as to his condition was "His mind was clear in that conversation I had". "He was perfectly — Seemed to under-

stand everything we talked about at that time." He next called on him on September 13th. Mr. Gordon was sitting in his chair "asleep at that time - resting". He didn't disturb him. He had no conversation.

On cross-examination he testified that in the condition he found him he probably wouldn't live any great while. His heart was very irregular and some short of breath. (Tr. 236) He may have said on the 9th to send for his relatives. (Tr. 237) He felt his pulse on the second visit — the 13th. He denied having made various statements to Maud Olsen and John Gordon, Jr., whereby the foundation for the impeachment hereinafter referred to was laid. (Tr. 237-238) He fixed the dates of his visits by a memorandum made at the time.

He testified that he had signed a statement for Curtis Gordon stating that on the first visit Mr. Gordon was of normal mind. This statement was then produced by Curtis Gordon upon demand of the contestants. (Tr. 240) It was dated October 15, two days after the death of Mr. Gordon. It certified that the doctor had called to see Mr. Gordon on September 12 who "seemed to be in his usual state of mind." (Ex. B)

Then the doctor admitted that he wasn't there on the 12th according to his records. He admitted he didn't talk to Mr. Gordon on the 12th and didn't know what his state of mind was then. (Tr. 244)

He denied that he had said that the first time he called Mr. Gordon was apparently in good shape but the

second time he was in bad shape mentally. (Tr. 242) And he further denied that he failed to mention the second visit in his letter because he knew the second visit Mr. Gordon was not of sound mind.(Tr. 243) He said it was true as far as his recollection was that when he signed the statement as to Mr. Gordon's condition on the 12th of September, he did so without any opportunity for observation on either the 12th or 13th. (Tr. 245)

Contestants' Rebuttal

Mrs. Maud Olsen, called on rebuttal, testified that Dr. Westwood told her after the will was probated that he could not say her father was all right the second time he visited him. She also testified that Dr. Westwood told her not to leave Mrs. Gordon alone with John Gordon, "because he is dangerous . . . "(Tr. 306)

John Gordon (Jr.) on rebuttal testified that Dr. Westwood prior to the commencement of this action told him that on his first visit Mr. Gordon was "pretty fair, nothing so serious; but he said the next time he went that his mind seemed to be wandering." (Tr. 321)

Julia Gordon, the widow, age 80 testified she was present when the will was executed, observed his condition and appearance, and didn't think he was right or that he knew what he was doing. (Tr. 311)

ARGUMENT

Appellants must of necessity contend that the evidence produced by contestants, and the other supporting

facts in the record do not comprise substantial evidence authorizing the jury's verdict.

If it were a question of what this court might regard as the preponderance of the evidence we believe that the jury's verdict would be upheld. Yet when both the jury by its verdict and the court by its denial of a motion for new trial, all of which saw the witnesses on the stand and heard their testimony, have passed upon the weight of the evidence, this Court, as we understand it, will not assume to determine the preponderance, but only the question as to whether there is any substantial evidence to uphold the verdict.

Judged by any standard, we submit, the evidence is more than adequate.

Direct Evidence

By way of rough summary, the evidence shows that about a year before the will was made the decedent was injured in an automobile accident, and some of the witnesses observed a marked change in his mental condition at that time. About August 21st, 1938, Mr. Gordon became seriously ill. From about the first of September he did not even recognize his daughter, Maud, although she stayed with him every night, and he insisted on calling her Mrs. Jensen. Repeatedly about the time the will was signed, he thought small boys were annoying him, or that he had property, cattle or a home he did not actually possess, or that his house was being flooded or evidenced other conditions of mind that can lead to only one conclusion concerning his

sanity. He did not know his grandson who had been taking care of his car, he thought he had been traveling and had just returned from Salt Lake when he had been home all the time; he told John he could have a house which existed only in his mind. Five minutes after the will was signed he did not recognize his own son (while the will was being considered and executed Curtis Gordon told the contestants that the attorney would not permit any of the children to enter the room, although, for a time, two of the proponents were there.) He recognized few of his callers. He was in bad physical condition and not expected to live.

Eight witnesses, two of whom saw him every day during his illness and all of whom frequently visited him, testified after relating these and similar observations, that John Gordon was not of sound mind at the time the will was made, a fact that must be obvious from the circumstances related, unless we are to believe that all these witnesses perjured themselves. There is nothing inherently improbable in their testimony; the improbabilities are on the other side, where witnesses testified to such things as that Mr. Gordon was perfectly all right or never been better mentally, or only slightly ailing physically, claims which are unbelievable on the whole record, and which the jury properly refused to believe.

Opportunity For Observation

Those who had the best opportunity for observation testified that Mr. Gordon was of unsound mind all during

September and to the time of his death. Mrs. Maud Olsen was with him every night during his illness, a fact which no one denied. Mrs. King was there practically every day, and was in the room with him when the attorney came with respect to the will.

On the other hand Curtis Gordon who was named executor was at his father's place only three or four times during September, and none of the other proponents saw him much more frequently. The attorney who drafted the will and who was one of the witnesses saw him only two occasions during the period of his illness, and the other witness Mr. Mecham saw him only once for a few minutes, and as pointed out in the statement of facts avoided any direct answer that he was of sound mind at the time. Four of proponents' witnesses saw him on only one or two occasions during September, and in no case, it seems to us, was their testimony that he was of sound mind quite believable. Surely it cannot be argued that the jury **had** to believe it and to disbelieve the witness produced by the contestants, whose testimony was in direct conflict.

Nature of Disposition

We recognize the rule that the mere fact that a testamentary disposition of property is unnatural is no proof in and of itself of unsoundness of mind. Yet where the facts are as they are here, we believe the court may also consider the nature of the provisions.

Four children are singled out to receive the property. The wife who had lived with him for 25 years is simply giv-

en a life-estate, and the other five children are cut off with one dollar, or, in Maud Olsen's case, a picture of her grandmother, which it was family knowledge already had been given her years before. None of the latter had received any advancements. There was nothing to show that they were not equally, or more, faithful or considerate. Take Maud Olsen's case, for example. She was an older daughter who was apparently the only one who was regular in her attendance upon Mr. Gordon during his illness. She stayed with him every night. She had secured no advances or help from him. She was a widow. Every natural inclination would be to recognize her with something more than a picture which had long before already been given to her.

Mr. Booth testified Mr. Gordon said he had already taken care of these children, yet the evidence is beyond dispute that this had not been done to any degree whatever. We shall notice this matter further in connection with the proponents' arguments re delusions.

The evidence further shows that prior to his illness, Mr. Gordon, having been cut off with one dollar by a sister, was deeply wounded and declared that he would hate to think he had a child he would treat that way.

There is nothing to explain the unnatural disposition except that the will was not his understanding act.

An unnatural disposition affords some evidence of testamentary incapacity and, in combination with other circumstances, may be sufficient to carry the issue to the jury and this rule applies where there is

inequality of an unnatural character. 68 C. J. 1087.

Impeachment of Testimony

As we pointed out in the Statement of Facts, Curtis Gordon, apparently in an attempt to show to the jury that he had nothing to do with the terms of the will, or that he did not contribute to its provisions, or that his father used an independent mind, testified and reiterated that he knew nothing of the contents of the will, or that he was named as executor or who the beneficiaries were until immediately after the court hearing at which the will was admitted to probate. In view of the fact that just two days after his father's death, he went to the trouble to get a statement from Dr. Westwood as to the mental condition of his father just before the will was executed, can anyone suppose he had forgotten about his knowledge of the contents prior to the hearing? That is something that one could not be mistaken about. He, of course, knew and could not forget that at the time of the hearing he knew about the contents of the will. His denial of this so persistently, until he was confronted with his own petition signed almost a month before, to which a copy of the will was annexed and in which reference was made to the contents of the will, serves to evaluate all of his other testimony.

Dr. Westwood, it will be recalled, testified that he examined the deceased on the 9th and on the 13th of September, the first time finding him mentally all right and the last time asleep. Yet in a written statement given

two days after Mr. Gordon's death to "the administrator" as the doctor testified, he mentioned examining him only on September 12th. He denied having stated to John Gordon that the first time he examined him he seemed pretty good but the last time his mind seemed to be wandering. He further denied that he told Mrs. Olsen that Mrs. Julia Gordon should not be left alone with him for he was dangerous. He was impeached on each of these statements, and the fact that he had observed the wandering mind on the 13th, we submit is the reason why the doctor only mentioned one visit in his certificate.

None of the contestants' witnesses were impeached or their testimony broken down. It would not seem, in view of the jury's verdict, that the testimony of the proponents can be accepted and that of the contestants' rejected, for the jury arrived at the opposite conclusion as to weight and credibility.

Arguments of Proponents

Before closing we desire to refer to some of the arguments contained in the brief of appellants. We agree with counsel that each will contest has its own peculiar facts, and also we have no quarrel with the authorities cited by them. However, the latter have no application to a case such as the present, where the evidence is so clear and strong as to mental incapacity. No authority goes so far as to say that unimpeached testimony of numerous witnesses may be disregarded by the reviewing court and the verdict of the jury brushed aside because it may be

contended that the jury could have believed the other side.

As an example of counsel's approach solely from their own standpoint and not according to rules of law, we call attention to page 16 of their brief wherein it is stated that "There seems to be only two reasons or grounds from which . . . it could be assumed or inferred that Mr. Gordon was incompetent at the time he made his will (1) that at intervals he did not know people when they came to his home, and (2) he had hallucinations and delusions at times.

In other words, all the evidence that we have set out in the statement of facts is said to be "at intervals he did not know people when they came to his home." This was just one example of his state of mind, and entirely disregards the day by day contact of the witnesses and their considered judgment that he was not of sound mind at the time the will was made. Does counsel believe that the judgment of these witnesses, based on their observations and related examples, as to status of mind, can be disregarded, or that it can be assumed that at every other time than the particular moment of an example, his mind went back to normal? There is much testimony that at no time after the first of September, was he of sound mind, and that his mental status did not change. This was from witnesses, Mrs. King and Mrs. Olsen among others, who saw him every day. At no time after September 1st did he know Mrs. Olsen and immediately after the will was

executed he did not know his own son, John.

Now as to this question of hallucinations or delusions. Counsel argue that unless they operate as a cause influencing the will, they do not establish incompetency. A review of the cases cited by appellants shows that they are inapplicable here except to indicate how different the facts must be to permit the disturbance of the verdict of the jury.

The hallucinations and delusions may be and are, in addition to their direct contribution to the terms of the will, evidence of a status or condition of mind, which the evidence of contestants shows continued throughout September until the time of Mr. Gordon's death. But more than this, the particular delusions testified to directly bear upon the terms of the will. He thought Mrs. Olsen, who had been so faithful in his care, was a Mrs. Jensen. As far as he realized, Maud was not loyal and constant as the fact actually was. How could any delusion have more of a bearing on the provisions of a will? Prior to the execution of the will he believed and told others he had other property — another home, some cattle, etc. In fact he told John Gordon, Jr. he could have the other home, which did not exist, and told his grandson, if he would drive them from Sanpete, he could have a share of the cattle which did not exist. Both of these were left out in the will, one being given one dollar, and the other not mentioned. He told Mr. Booth, according to the latter, that he had already taken care of the protestants. This could have been

only with such imaginary property, for the evidence which the jury had a right to, and indeed was almost bound to believe, was that neither Maud nor John ever received any advance.

It is next argued that the testimony of the subscribing witnesses is entitled to great weight. This may be true, but after all, it is a question of weight. No court has held, insofar as we can determine, that the testimony of subscribing witnesses is conclusive. Here, Mr. Meacham's testimony is not to the point of sound mind. He did not directly answer this question, and leaves the impression that he wished to avoid committing himself. Counsel says that Julia Gordon's testimony as to Mr. Gordon not being right or understanding when he signed the will cannot be considered because she gave no examples forming basis of judgment. We have not above urged this testimony in itself, but compare her's, with her 25 years of daily observation and association of and with Mr. Gordon and her direct answer as to condition of mind, with Mr. Meacham's testimony, with his few minutes observation, and avoidance of any direct answer. Mr. Booth, the other witness we believe was mistaken or did not remember clearly what happened. In any event the jury did not have to accept his testimony. As an indication of how a person may be had to sign an instrument without knowing or realizing its contents, we call attention to the waiver of widow's rights which was signed by a cross in Mr. Booth's office by Julia Gordon. Mr. Booth probably be-

lieved it was all right but is there any doubt from the record that this 80 year old woman did not know or realize what it was? How much more likely was this true with regard to Mr. Gordon and the pretended will when we consider Mr. Gordon's condition and mental incapacity.

Appellants further argue that testamentary capacity must be determined at the time the will was made. It is shown by witnesses who saw him every day that all during September and particularly on September 14th, Mr. Gordon was not of sound mind. Every inference from the proved state of his mind clearly shows that he was not of sound mind at the time. Mrs. King saw him immediately before and testified he was not of sound mind — that he was not changed from his condition she described in connection with incidents of the most obvious unbalance. Five minutes after the will was signed he saw his own son and did not know him. Mrs. Gordon said he was not right at the time, and while appellants complain because she did not cite particular examples of conduct, certainly her testimony cannot be construed as implying he was of sound mind. She was an old, infirm lady of 80, herself because of age not too mentally active. But she did know when the person she had lived with for 25 years was not right and did not understand. Appellants had the right to cross-examine, but her testimony, whatever it was worth, was unimpaired. There is abundant additional testimony, and the question as to whether Mrs. Gordon's testimony was sufficient in itself is unimportant. Yet counsel must be

driven to great lengths when they try to draw inferences in their favor from her testimony.

If, as here, there is logical correlation between the testator's mental state before or after the testamentary act and issue of mental capacity, the weight of evidence is for the jury. In *re Sandman's Estate*, 8 Pac. (2d) 499.

In the last analysis, what appellants are trying to get the court to do is to announce as a matter of law that notwithstanding conflicts, or abundant evidence showing mental incapacity, and the verdict of the jury in accordance therewith, the jury's verdict should be disregarded if the witnesses to the will say the testator was sane at the precise time the will was signed. What a perfect pattern such a decision would furnish to sustain every will, no matter how convincing the evidence of insanity, for as here, all the attorney would have to do would be to exclude the other parties in interest at the time the will was signed, and then produce the two witnesses to the will who would testify, as all witnesses to wills are assumed to satisfy themselves, that at the particular time the testator was of sound mind. Evidence would be adduced in such a case, as here, that immediately before and after, he was mentally incompetent, and that his condition did not change over the surrounding weeks, but according to appellant's contention, as we see it, this would be no answer, as the testimony of the witnesses would be final as a matter of law.

The law furnishes sufficient safeguards without such an unsupportable extreme. That of course is not the law,

though it is the only proposition as we see it that would suggest the result sought by appellants.

The testimony of an attesting witness may be overcome by any competent evidence. Such evidence may be direct, circumstantial or opinion. — Baird vs. Shaffer, 168 Pac. 836.

No court has gone so far as to hold that the testimony of an attorney or subscribing witness is conclusive. It may be weighed by the jury; otherwise every will as a matter of law might be valid. No witness is supposed to subscribe to a will unless he believes the testator sane.

CONCLUSION

If the verdict should be set aside in this case, it would, we feel, completely alter the long accepted concept of the function of a reviewing court in a law case. It would establish a pattern which would permit the sustaining of every claimed will. It would entirely disregard the testimony of numerous witnesses whom the jury who heard them believed, in favor of conflicting evidence much of which was discredited. It would cause the verdict of a jury on weight to mean nothing, or say that the testimony of a person belonging to a particular class, such an attorney or witness to a will, is conclusive.

This case, we submit is exceedingly important from a law standpoint only because of the implied claim on the part of appellants that these things, which we had thought impossible, could be done. No case can be found, com-

parable to the facts here, where it has been done. We have chosen to deal largely with the facts, in this brief, rather than to cite numerous authorities, because, as we view it, once the facts in the record are considered, no close point of law is involved, but simply a verdict by the trier of the facts which should be sustained.

The appellants had a fair trial, favorable instructions, the court was fair in its rulings at the trial, none of which are complained of, the jury has decided the facts and passed on weight and credibility, the court which also saw and heard the witnesses held the evidence sufficient in denying the motion for new trial. There is abundant evidence in the record to support the verdict and judgment. The verdict of the jury should be upheld and the judgment affirmed.

Respectfully submitted,
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Attorneys for Respondents.