1978

Thomas J. Thorley v. William R. Thorley : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT

In the Matter of the Estate
ESTER R. THORLEY, deceased

HOMAS J. THORLEY,

Plaintiff-Appe

LLIAM R. THORLEY,

Defendan

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Broadway
Diego, Califo

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IN THE SUPREME COURT OF THE STATE OF UTAH

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In the Matter of the Estate of

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LESTER R. THORLEY, deceased

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Case No. 15350

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THOMAS J. THORLEY,

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Plaintiff-Appellant

-vs- *

WILLIAM R. THORLEY, *

Defendant-Respondent

* *

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is a Will Contest but there was never any trial of the contest below. Instead, this case consists of a series of rulings and orders of the lower court, a domiciliary trial below but which is not be specifically appealed or included in the Record, and a final judgment admitting the will to probate without contest.

DISPOSITION IN LOWER COURT

On the different matters appealed, the Court ruled with the Respondent.

RELIEF SOUGHT ON APPEAL

The Defendant-Respondent requests affirmance of the lower Court's Orders and Judgments being appealed.

STATEMENT OF FACTS

As a word of explanation, the Clerk of the lower Court h not numbered the pages of the Record consecutively but has divid the record into that part designated by the Appellant and that p designated by the Respondent. The documents designated by the Appellant have been numbered 1 to 26 and the documents designate by the Respondent numbered from 1 to 11. Reference to the Record this brief will refer to the Appellant's Designation or Responde Designation, as the case may be by the number of document which is consecutive.

The "Introduction" and Statement of Facts set forth in th Appellant's brief contain so many statements of "fact" which are included any where in the Record on Appeal,it is felt that the Re ent should set forth the facts in complete detail insofar as disc by the uncontroverted pleadings, rulings, orders and Findings and Judgments below. There will be no attempt here to try to get bef this Court many matters which are simply not disclosed in the Rec such as accusations of wrong doing on the part of the Proponent o the Will, who is the Respondent, the type of man the decedent was intimations he was easily led and influenced by a greedy brother could or did perpetrate a fraud. There is absolutely nothing in Record as to these accusations and they reveal a wild attempt to before this Court claims of fraud and undue influence which Appel only hoped he could prove but which he chose not to present to t Court below. These statements are contained in the last Paragra page 1 of Appellant's brief, the first and second paragraphs of

2 of the brief and again the second paragraph of page 16 of Appellant's brief. What he sought or hoped to accomplish by this recitation of so-called facts is not known and they can be dismissed by a reminder that they are shown at no place in the Record on Appeal.

This case was never tried on the merits and the one trial held, that on the one question of the domicile of the decedent, is actually not appealed by the Appellant and there is no transcript of this four day jury trial. Since these proceedings have continued over a period of almost two years and the Record discloses numerous orders, motions, continuances, Findings and Judgments, the Respondent will attempt to set forth what happened below as disclosed by the Record on Appeal.

The decedent died at Cedar City, Utah on December 21, 1975 and was at the time of his death, a resident of Cedar City, Utah. On December 29, 1975 a petition for the probate of his last Will and Testament, executed May 19, 1975, was filed. This will left the entire estate of decedent to the Respondent herein, William R. Thorley, a brother of decedent, as decedent had never married and had no children or family. Another brother, the Appellant, filed a contest to this Will and also filed a petition for the probate of an earlier will of decedent, in the Superior Court of San Diego County, California. The decedent had lived in Iron County for approximately the first fifty years of his life but then had moved to San Diego County, California where he had lived for almost thirty years before moving back to Cedar City where he lived seven months

before his death. The entire estate, consisting of real prope in Iron County and also savings accounts in savings institutio in California, has its situs in Iron County as decedent was do iciled in this County at his death.

The probate petition filed was set for hearing for two di ferent times and each time vacated at the request of counsel fo Appellant. It was set a third time for April 8, 1976 and altho counsel for Appellant again requested that the setting be vacat the Court refused to do so whereupon Appellant dismissed his co without prejudice. The Proponent of said will, who is Respondent herein, then made proof on the will and it was admitted to prob upon full Findings of Fact and Conclusions of Law and Judgment, (Nos. 2 and 3, Respondent's Designation of Record). Approximat six months later, the same contestant filed a new contest under Section 75-3-12 of the Utah Probate Code.

Since the proceedings filed in San Diego County by the Appellant claimed the residence of the decedent at his death to be San Diego County and since the contest filed in Iron County, Utah claimed the residence to be either Iron County or San Dieg County, California, Respondent herein moved the Court for a Pre inary hearing or trial to determine this question of residence o domicile as it was felt to be jurisdictional. The Appellant re quested a jury trial. The Court thereupon set the trial on the issue of domicile for December 9, 1976 which setting was vacat

at the request of counsel for the Appellant. It was next set for January 26, 1977 and again vacated at the request of counsel for Appellant. The domiciliary trial and also the trial of the Will contest on the merits were then set for March 9, 1977, with the domiciliary trial to be before an advisory jury. Appellant again requested that this setting be vacated which was resisted by Respondent. However, due to the Judge becoming incapacitated, necessitating the calling in of a judge Pro Tem, who declined to hear the case, the setting was vacated. The domiciliary trial was then set for May 23, 1977 before a jury, to be followed by the jury trial on the merits in the event the domicile had been found to be Iron County, Utah.

The domiciliary trial was held between May 23 and May 27, 1977. Special Interrogatories were submitted to the jury on the question of residence or domicile and the jury found the domicile of decedent to have been Cedar City, Iron County, Utah at the time of his death on December 21, 1975 and Findings of Fact and Conclusions of Law and Judgment were entered by the Court, approving and accepting the findings of the Jury(Nos. 17 and 18 Appellant's Designation of Record). This domiciliary trial was never appealed and there is no transcript of this trial.

At the conclusion of the domiciliary trial, the Appellant requested a one month continuance of the trial on the merits in order to prepare for trial, arrange for his witnesses who were in California and also so that he could take an Interlocutory Appeal

to this Court. This request was granted by the trial Judge as h felt that that jury should not try the case on the merits and t setting was vacated, to be re-set in approximately one month so to give time to Appellant to arrange to have his witneses presen and so that he could take is Interlocutory Appeal.

On or about June 1, 1977 the lower court notified all Uta counsel for both the Appellant and Respondent that the case would be set for jury trial on June 28, 1977. Utah counsel for Appella Michael W. Park, acknowledged that he had received notice of this setting and that he had notified California counsel, (Respondent' Designation of Record No. 9, Transcript of June 28, 1977 proceed ings). Formal written notice of the trial setting was given to all parties on June 17, 1977.

On June 28, 1977 all counsel appeared. Counsel for Appe lant then moved for a Stay so as to permit the Superior Court of San Diego County to proceed to hear the case or for a change of venue, and also for a two weeks continuance. These motions were denied and the jury trial re-set for the following morning, June However, counsel for the Appellant informed the Court they were n ready to try the case and would not even appear on June 29th. The Appellant and his counsel did not appear on June 29th, the jury w dismissed and the Court heard the testimony of the Proponent and again admitted the Will to probate and dismissed the contest wit prejudice and again entered complete Findings and Conclusions a

Judgment on June 29, 1977(No. 24 of Appellant's Designation and No. 10 of Respondent's Designation of Record.)

ARGUMENT

POINT I

THERE WAS NO ABUSE OF DISCRETION BY THE TRIAL COURT IN REFUSING A FURTHER CONTINUANCE OF THE TRIAL SETTING.

The many settings of this case below, totalling eight and the many continuances have been set forth in the Statement of Facts to show there was no abuse of discretion in refusing a Ninth continuance. All these different settings and continuances are set forth in the Findings of Fact and Conclusions of Law entered June 29, 1977(No. 10 of Respondent's Designation of Record.)

It is little wonder that the Court on June 28, 1977 refused another two week continuance. In fact it would have been an abuse of discretion for the Court to have done so. The setting for June 28, 1977 was the eighth setting and 27 days notice was given, not ten or less as Appellant now claims. Claims of the Appellant that he needed this additional time to arrange for his witnesses are ridiculous in the light of the many prior settings for which the witnesses should have been ready. Claims of the Appellant that he did not have sufficient time because this Court did not rule on his petition for Interlocutory Appeal until June 27th are without merit. The domiciliary trial had concluded on May 28th and yet Appellant waited until June 17, 1977 to file his petition for Interlocutory Appeal. He gives no reason why he could not have taken this sooner. Interlocutory Appeals under our practice are not as a matter of right

and are sparingly given. The hope that this Court would enter this appeal could only have been a false hope or faint one at be and for Appellant to now say that he was not ready to try the ca because of his petition for Interlocutory Appeal is a weak excus at best. Interlocutory Appeals in Utah are only granted where there is a decisive issue presented which could lay to rest the entire case without the necessity for a trial as pointed out in Manwill vs. Oyler, 361 Pac.2d 177 (Ut).In fact Rule 72(b) providing for Interlocuatory Appeals provides that substantial rights must be involved which will materially affect the decision. The fact that this Court did refuse to entertain the Interlocutory Appeal shows that the matters appealed were not considered decisive. T Appellant sought to have reviewed three Orders of the trial court, (1) Refusal to stay proceedings on the ground of Comity and Forum Non Conveniens and defer to the Superior Court of San Diego Coun California, (2) Refusal to change the venue and (3) Refusal to order a psychiatric examination of the Proponent of the Will, the Respondent herein. It is submitted that none of these had merit even for a final appeal, let alone an Interlocutory appeal. As to (1), an Iron County jury had already found that domicile of the decedent was Cedar City, Utah and for the lower court to have is a Stay order of the proceedings below and deferred to the Superi Court of San Diego County would have been not only a serious ab of discretion, it would have been out-right error. As to (2) c change of venue on the showing made was not called for and as particularly set forth in point II hereafter. Furthermore, a c

of venue is a discretionery matter and it most certainly would not be a decisive matter anyway which this court would entertain on Interlocutory Appeal. As to (3), the refusal to order a psychiatric examination of the Proponent of the Will most certainly was proper under Rule 35(a) of our Rules of Procedure which provides in pertinent part "when the mental or physical condition ......of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician..........." But the mental and physical condition of the Proponent of the will, William R. Thorley, was never in controversy. True the mental condition of the decedent was at issue and in controversy but not the proponent of the will. Furthermore, under the Utah case of Stone vs. Stone, 431 Pac.2d 802, this is a discretionary matter and there was no merit to this point on appeal, final or Interlocutory.

It was a mis-placed hope that this Court would grant the Interlocutory Appeal and the Appellant should have been ready to try the case in any event.

As stated above, the setting for June 28, 1977 was actually made on June 1, 1977 and counsel for Appellant notified. No motion for a continuance was filed but only an oral motion made on the day set for trial. Rule 40(b) of our Rules of Procedure provides that "Upon motion of a party, the Court may it its discretion....postpone a trial or proceeding upon good cause shown." In First Security Bank vs. Johnson, 540 Pac.2d 531(Utah) the case had been procedurally

delayed for two and half years by interrogatories and various motions and this Court held that a motion for continuance filed nine days before the trial setting, did not justify a continuan From this short opinion, it would indicate that the long series delays, motions, interrogatories and rulings is somewhat compara to the record in this case. Furthermore, Appellant admits in his brief that he had depositions of all his witnesses, except possib one expert witness and there should have been no difficulty getti this testimony from his California witnesses received. Appellant cites the Utah case of Bairas vs. Johnson, 373 Pac. 2d 375 in support of his motion for a continuance but this case is of no he as in that case the plaintiff, who was an indispensable witness i himself, did not know until two days before the trial setting tha his health would prevent him from attending trial and the Court i that under these conditions, a continuance should have been grant

POINT II

THE APPELLANT WAS NOT ENTITLED TO A CHANGE OF VENUE.

On or about June 10, 1977 and after the domiciliary trial, the Appellant filed a motion for a change of venue, supported by Points and Authorities. The claim was that the Respondent herei was prominent, was well known in the community, had many financia connections and was a life time resident, whereas the Contestant was a resident of California although born and raised in Cedar C that a jury would probably be influenced to the point of bias i his favor. The Court denied the motion to change the venue on

June 28, 1977 and on June 29th entered the final decree in this case. Some time afterward, the Appellant secured and filed in the lower court three affidavits in support of the motion for a change of venue but which motion had already been denied, one from an Ione Bonzo, one from Ada W. Thorley and one from a John Rowberry. These affidavits were not on file and were not considered by the Court below when ruling upon the motion for a change of venue. However, when the Appellant filed his designation of Record below, he also filed these affidavits and included them in his Designation of Record. However, the court below made an express Order on September 15, 1977(Supplemental Record on Appeal) excluding these affidavits from the Record on Appeal for the reason they had not been filed so they could be considered by the lower court in its considerations of the motion for a change of venue. Therefore, we have a situation where nothing but the motion and points and authorities was submitted in support of the motion for a change of venue. Under the ruling of this court in C. R. Owens Trucking Corp. vs. Stewart, 509 Pac.2d 821(Utah) the court was not obliged to change the venue based only upon the assertion that the other party would be well known to jurors in the county, particularly where the court in the jury selection process excluded any one indicating any bias or prejudice . It is submitted the Court could have done the same in this case.

But even if the motion for a change of venue had been supported by the claimed affidavits, this court has ruled that prominence of or acquaintance with a party does not amount to such bias

that gives "reason to believe that an impartial trial cannot be had in the county, city or precinct designated in the complaint" to use the language of Section 78-13-9 Utah Code, pertaining to causes for change of venue. The Utah case of Chamblee vs. Stock & Tibbetts, 344 Pac. 2d 980 held that it was not an abuse of discretion to deny a change of venue based on the fact that the defendant was an elected official, that he was a member of one of oldest families in the county and that he had many friends in the county. This court in the Chamblee case stated as follows:

> "It would not be consonant with our traditional judicial procedures or complimentary to our jury system to deny a man trial by his neighbors because he happens to be an official and had friends and relatives in the community."

Likewise, the Owens Trucking case, supra, held that the reputation of or acquaintance with a party was not ground for a change of venue. Also in the Bairis case, supra, one of the parties had filed a motion for a change of venue based upon a petition signed by a number of local residents to the effect that many people in the community had formed an opinion on a vital fact and that it would be difficult to get a fair and impartial trial but this Court held that the lower court did not abuse its discretion by denying the change. This Court further stated that change of venue was a discretionary matter and that there would have to be an abuse of that discretion before this Court would over-turn the lower court. Also the case of Winters vs. Turner, 278 Pac. 816 (Utah) held that change of venue was a discretionary matter and an abuse of have to be shown. Since this is the law and the lower Court had

nothing in the way of affidavits or evidence, how could it now be said that the lower court abused its discretion? For the Supreme Court to do so it must give weight and consideration and credence to matters which were not even before the lower court.

POINT III

THE JURY TRIAL HELD BELOW ON THE QUESTION OF DOMICILE ACCORDED APPELLANT ALL RIGHTS TO WHICH HE WAS ENTITLED.

In the Appellant's Notice of Appeal, he states he is appealing from (1) the Order of the lower court refusing to stay the proceedings or in the alternative, refusal to change the venue and (2) Failure to grant a two week continuance of the trial and (3) the final Decree and Findings and Conclusions of June 29, 1977. He mentioned nothing about Point III in Appellant's brief wherein he now complains that the court below should have granted a regular jury trial on the question of domicile and not an advisory jury. It should be noted that the Appellant is not appealing this domiciliary trial and there is no transcript of this four day jury trial. This matter was concluded June 3, 1977 by the Findings of Fact and Conclusions of Law and Judgment which were never appealed and are now final. But the Appellant is now attempting to attack these findings through the "back door" by claiming that he was not granted a jury trial but only an advisory jury. It is true that when the Court originally granted the jury trial on the question of domicile, he called for an advisory jury, presumably on the ground that the Court considered this was a jurisdictional matter to be found by the court. However, it is clear from the proceedings

below,(Supplemental Record, Transc. of the May 23, 1977 proceed that the court at least treated the jury as a regular jury and n an advisory jury. From this transcript of these proceedings, t trial judge made it clear that the Appellant was getting what he had asked for, a jury to find upon the question of domicile or residence of the decedent, upon full and complete instructions. The Findings and conclusions and Judgment (Nos. 17 and 18 of Appe lant's Designation of Record) show that the matter was submitted to the jury on special interrogatories upon which the jury found domicile to be in Iron County. It is submitted that since they made this finding, it would make no difference whether they were acting as an advisory jury or as a regular jury.

Furthermore, the trial judge accepted the jury finding an entered judgment pursuant therewith. The only difference betwee regular jury and an advisory jury is that the court need not acce their "advice" or be bound by it if the court feels the jury fin was against the evidence. But so long as the court does accept the finding of the jury, then there is no difference. If the jur had found domicile in California and yet the trial judge had fel it was against the evidence and ruled otherwise, then the Appell would have cause to complain, but not in this case.

The Appellant at no time or place has shown or claimed th he was in any way prejudiced by trying this case to an advisory jury,if in fact it was one. He has not shown how he would ha tried the case any differently or that he was deprived of any r

or that he could have tried the case any more favorably than he did. The appellant's claim that he was deprived of a valuable right just because the court initially ordered that the case be tried before an advisory jury just does not have merit.

CONCLUSION

The re-counting of the many settings and continuances, delays, motions and hearings, spanning over a period of two years, should indicate that the Appellant has never been really serious about trying this case in Iron County, Utah. As alluded to in many places in the Record, there has been a parallel probate proceeding in San Diego County, California. The reason the Appellant has never been ready or willing to try the case in Utah has been because he has been trying desperately to get the case to trial first in California. It has been a "race to judgment" situation where Appellant has been extremely diligent in trying to get the case to trial in California and yet has used every device, delay, continuance, motion, hearing and appeal and excuse to head off a trial in Iron County, hoping he would have a more favorable climate in San Diego County, California.

It should be abundantly clear that there is no merit to this appeal. The lower court could well have despaired at ever getting this case tried and concluded. After the many continuances granted, there was no abuse of discretion in the refusal to grant a ninth continuance, particularly where the Appellant had had more than ample notice of the last trial setting and did not even move for

a continuance until the morning the trial was to commence. The last continuance granted was for the purpose of giving Appellant time to arrange to have his witnesses present and prepare for trial and to take an Interlocutory Appeal. Therefore, he had ample time to be ready and he also took his Interlocutory appeal.

Refusal of the court to change the venue was not an abuse of discretion upon the showing made by the Appellant. Prior holdings of this Court establish the rule, in any event, that mere acquaintance with or prominence of a party or witness, particularly in our rural counties in Utah, do not show bias or that a fair and impartial trial cannot be had where the trial judge has an opportunity to be careful in his jury selection process so as to eliminate all possible bias.

Finally, the jury in the domiciliary trial made its findings the same way, whether it be a regular jury or an advisory jury and these findings were expressly approved and accepted by the trial court and a judgment entered thereon and the Appellant has made no showing that he was in any way prejudiced.

Dated this 23rd day of January, 1978

Orville Isom
Attorney for Respondent

I certify that I mailed two copies of the above brief to Rex E. Madsen of Snow, Christensen & Martineau, 700 Continental Bank Bldg. Salt Lake City, Utah 84101 this 23 day of January, 1978

Orville Isom