

1988

Wendell E. Taylor v. The Estate of Grant Taylor, Esther Taylor, Darren G. Taylor, and John Does 1 through 5 : Brief of Appellant

Utah Court of Appeals

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A. Howard Lundgren; Attorney for Appellant.

L. S. McCullough; P. Bryan Fishburn; Callister, Duncan and Nebeker; Attorneys for Respondents.

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

DOCKET NO. 880136-CA

WENDELL E. TAYLOR,

Plaintiff-Appellant,

No. 860481

vs.

13-B

THE ESTATE OF GRANT TAYLOR,
deceased, ESTHER TAYLOR,
DARREN G. TAYLOR, and
JOHN DOES 1 THROUGH 5,

Defendants-Respondents.

88-0136-CA

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Raymond S. Uno

A. Howard Lundgren
The Judge Building
No. 8 East Broadway
Suite 426
Salt Lake City, UT 84111

Attorney for Appellant

Leland S. McCullough
P. Bryan Fishburn
CALLISTER, DUNCAN & NEBEKER
Suite 800 - Kennecott Building
Salt Lake City, UT 84133

Attorneys for Respondents

FILED

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Clerk of the Court, U

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Attorney for Appellant

Leland S. McCullough
P. Bryan Fishburn
CALLISTER, DUNCAN & NEBEKER
Suite 800 - Kennecott Building
Salt Lake City, UT 84133

Attorneys for Respondents

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STATEMENT OF ISSUES

The following issues are presented for review in this Appeal:

1. Did the District Court err in granting the Defendants-Respondents' Motion For Summary Judgment?
2. Did the District Court err in failing to apply a standard of substantial compliance with the relevant statute regarding the execution of testamentary documents?
3. Did the District Court err in granting Defendants-Respondents' Motion For Attorneys' Fees?
4. Did the District Court err in failing to make specific findings of fact with regard to the Defendants-Respondents' Motion For Attorneys' Fees on the basis of alleged bad faith conduct or other conduct violating Rule 11, Utah Rules of Civil Procedure?

STATEMENT OF THE CASE

Wendell E. Taylor commenced this action to invalidate a document entitled the Last Will And Testament of Grant R. Taylor dated August 30, 1984 and, to give effect to the provisions of a document dated June 30, 1984, executed by Grant R. Taylor and witnessed by Noel M. Taylor and Geraldine Taylor (R. 2-6). By the terms of the June 30, 1984 document, Grant R. Taylor agreed to forgive a substantial debt owed him by Wendell E. Taylor (R. 104).

Defendants initially responded to Plaintiff's Complaint by

filing a Motion To Dismiss Plaintiff's Complaint With Prejudice (R. 8). This Motion was never heard by the district court. After the completion of some discovery, Defendants filed a Motion For Summary Judgment, and a Motion For Attorneys Fees (R. 132, 200). On or about March 24, 1986, the Honorable Raymond S. Uno entered an order granting Defendants' Motion For Summary Judgment, dismissing the action with prejudice and awarding Defendants attorneys' fees (R. 235, 236).

STATEMENT OF FACTS

Wendell E. Taylor, hereinafter "Wendell" was the brother of Grant R. Taylor, hereinafter "decedent". Decedent died on September 26, 1984 (R.3, 99, 100, 101). In January of 1984, decedent had loaned Wendell a significant amount of money enabling Wendell to avoid a financial problem associated with his residence (R. 102, 104).

On June 30, 1984, decedent dictated a document to another of his brothers, Noel M. Taylor, which cancelled the debt owed him by Wendell (R. 3, 12, 104). After the document was typed and read back to the decedent by Noel M. Taylor, and in the presence of Noel's wife, Geraldine, decedent executed it in the presence of Noel and Geraldine Taylor (R. 168, 169, 176, 188). Thereafter, Noel M. Taylor signed the document as a witness in the presence of his wife Geraldine J. Taylor and decedent (R. 168, 169, 176, 188, 189). Geraldine J. Taylor did not execute this document at this time (R. 188). However, Mrs. Taylor did sign the document in the capacity of a witness on a subsequent date (R. 191-192).

The June 30, 1984 document cancelling the debt owed by Wendell to the decedent was intended by decedent to be a portion of the decedent's final will and testament (R. 104). The decedent intended that the document supercede any previous or subsequent order of his, or anyone else, with regard to the decedent's estate (R. 104).

The decedent created and executed this June 30, 1984 document because he believed "that in the presence of certain people and by their instruction, future written negotiations may be attempted to be made while I am under the influence of medicines or coercion and not of my clear, free and sober desires. This I deeply and positively believe could or will happen." (R. 104).

On or about August 30, 1984, decedent executed a document entitled Last Will and Testament. This document made no provision for Defendant Esther Taylor to inherit any of decedent's estate. (R. 77, 78, 79, 80, 81). On or about August 27, 1984, decedent created a revocable trust known as the Grant R. Taylor Trust (R. 41-65, 78). This trust was amended on September 21, 1984 (R. 66-76).

Decedent and Defendant Esther Taylor were divorced in December of 1983. This divorce was an extremely bitter one (R. 100). Notwithstanding this bitter divorce, they were allegedly remarried on September 21, 1984, only nine months after the divorce, the same date the revocable trust was amended to provide for Esther, and five days prior to the decedent's death from cancer (R. 66-76, 100, 105, 107).

On the date of his remarriage to Esther Taylor, September 21, 1984, decedent was on his deathbed, suffering from cancer and was unable to walk or speak audibly. Decedent had been extremely ill with cancer for at least one month prior to this date (R. 100, 109). In fact, in a letter to the Marriage License Bureau on September 20, 1984, Dr. Edward G. Jenkins, decedent's son-in-law, stated that decedent was "very ill with a serious medical condition" which did not allow him out of bed. (R. 109).

In his Complaint, Wendell has alleged that decedent was mentally incompetent and incapable due to his terminal illness for at least sixty (60) days prior to his death (R. 3). Wendell further alleged that during this sixty day period of incompetence, the Defendants, Esther Taylor, Darren G. Taylor and John Does 1-5 wrongfully and maliciously manipulated decedent with regard to the preparation of trust and will documents and further, exercised undue influence over decedent in connection with his purported remarriage of Defendant Esther Taylor so as to obtain an advantage for her from his estate. According to the Complaint, decedent would not have prepared these various documents or remarried Esther Taylor if he had been in full control of his faculties at that time (R. 2, 3, 4, 5). The decedent was concerned that as his terminal illness progressed and as stronger medication was required in connection with this illness, "certain people" would attempt to exercise undue influence over him with regard to his estate and assets (R. 104).

Wendell's relationship with the decedent had been amicable and brotherly (R. 102). Wendell's relationship with Defendant Esther Taylor, however, had been extremely hostile for some years prior to decedent's death (R. 101, 102).

Wendell did not learn of the existence of the June 30, 1984 document until January or February of 1985. At that time he was provided with a copy of it by his brother Noel M. Taylor (R. 169, 171). This document's existence was not brought to Wendell's attention earlier due to the specific directions of the decedent as set out in the document (R. 104).

The decedent left instructions with his "benefactors" that all financial obligations owed him by Wendell were to be cancelled at his death (R. 104). He was, however, concerned that his wishes in this regard would not be carried out (R. 104). He therefore stated in the June 30, 1984 document:

. . . "I handle this subject this way in the hopes that the principal desire of mine to be consummated is that Wendell will be free of financial obligations to me and/or my estate. I handle it with you Noel so that if all goes as I desire and as instructed by me that this document be destroyed without revelation. I suggest to you Noel a short period of waiting after my passing to present this document, if needed, in order to see an accurate picture of the developments if a problem arises"

(R. 104).

He also included a provision whereby Wendell was to "be compensated in treble for all expenses, legal and ordinary, he incurred or will incur in resisting the dwelling debt problem as well as

the cancelled debt." (R. 104).

Noel M. Taylor did not become aware that Wendell was having a problem with Defendant Esther Taylor regarding his home until January or February of 1985 (R. 171, 176, 177). When he became aware of Wendell's difficulties, Noel was unable to locate the original June 30, 1984 document (R. 173, 174, 175, 176). Noel Taylor located the original June 30, 1984 document and gave it to Wendell sometime in the Spring of 1985 (R. 174, 175, 176, 191).

In October of 1985, Wendell commenced this action in the Third District Court for Salt Lake County to enforce the terms of the June 30, 1984 document (R. 2). When this action was initially commenced, Wendell's attorney at the time, Stanley S. Adams, mistakenly attached to the Complaint a copy of the June 30, 1984 document bearing only the signatures of decedent and Noel M. Taylor (R. 2, 3, 4, 5, 6, 99, 100).

On or about March 24, 1986, the Honorable Raymond S. Uno, Third District Court Judge, granted Defendants' Motion For Summary Judgment Dismissing Action With Prejudice And Awarding Defendants Attorneys Fees (R. 235, 236). The District Court made no finding that Wendell's action lacked merit or that Plaintiff's conduct in bringing the suit was lacking in good faith (R. 235, 236). Further, the District Court made no finding that the Plaintiff or his counsel had violated any of the terms of Rule 11, Utah Rules of Civil Procedure (R. 235, 236).

SUMMARY OF ARGUMENT

1. Genuine issues of fact exist with regard to the

influence exerted over decedent by Defendants and the decedent's competence for a period of thirty to sixty days prior to decedent's death.

- A. Decedent was concerned about the exercise of undue influence over him as his terminal illness progressed (R. 104).
- B. Decedent was aware that his mental and physical condition was deteriorating and therefore the exercise of undue influence over him was possible.
- C. The District Court made no findings of fact with regard to the decedent's mental competence for a period of thirty to sixty days prior to his death.
- D. The District Court made no findings of fact with regard to the Plaintiff's allegations of undue influence exercised by Defendants over the decedent.
- E. The District Court made no findings of fact as to the Plaintiff's standing to challenge the validity of decedent's August 30, 1984 will and revocable trust agreements.
- F. Plaintiff is an "interested person" as defined by U.C.A. § 75-1-201.

2. Decedent substantially complied with the provisions of the Utah Uniform Probate Code with regard to the execution of the June 30, 1984 will/codicil.

- A. The June 30, 1984 will/codicil was executed by the Decedent in the presence of two witnesses,

Noel M. Taylor and Geraldine J. Taylor.

- B. Noel M. Taylor and Geraldine J. Taylor acted as witnesses of this document at the decedent's request.
- C. Subsequent to the decedent's execution of the June 30, 1984 will/codicil, Noel M. Taylor executed the document as a witness in the presence of decedent, Grant R. Taylor.
- D. Although Geraldine J. Taylor did not execute the June 30, 1984 will/codicil in the presence of the decedent, she did execute the document confirming that she had witnessed the execution of the June 30, 1984 will/codicil.
- E. The execution of the June 30, 1984 will/codicil substantially complied with the terms of U.C.A. § 75-2-502 so as to provide protection against fraud.
- F. The Utah Uniform Probate Code is to be liberally construed so as to discover and give effect to the intent of the testator in the distribution of his estate.

3. The Defendants are not entitled to an award of attorneys fees pursuant to Rule 11, Utah Rules of Civil Procedure, or U.C.A. § 78-27-56.

- A. The District Court failed to make any findings that there was wilfull violation of Rule 11, Utah Rules of Civil Procedure, by the Plaintiff or his attorney

which would give rise to an award of attorneys fees or other sanctions under that rule.

- B. The District Court failed to make any findings of fact with regard to the Plaintiff's alleged intent to defeat the purpose of Rule 11, Utah Rules of Civil Procedure.
- C. The District Court made no findings of fact as to whether or not Plaintiff's claim lacked merit as defined in Utah law.
- D. The District Court failed to make any findings of fact that the Plaintiff's claim was not asserted in good faith.
- E. There is not substantial evidence in the record to support an award of attorneys fees against the Plaintiff and in favor of Defendants pursuant to either Rule 11, Utah Rules of Civil Procedure, or U.C.A. § 78-27-56.

ARGUMENT

POINT I

GENUINE ISSUES OF MATERIAL FACT EXIST WITH REGARD TO DEFENDANTS ESTHER AND DARREN TAYLORS' INFLUENCE OVER DECEDENT IMMEDIATELY PRIOR TO HIS DEATH AND AS TO HIS COMPETENCE FOR A PERIOD OF SIXTY DAYS PRIOR TO HIS DEATH.

Rule 56 of the Utah Rules of Civil Procedure entitles a party to an award of summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to

judgment as a matter of law. See; Rule 56, Utah Rules of Civil Procedure, Olwell v. Clark, 658 P.2d 585 (1982), Lockhart Company v. Anderson, 646 P.2d 678 (1982), Geneva Pipe Company v. S&H Ins. Co., 714 P.2d 648 (1986). In Gadd v. Olsen, 685 P.2d 1041 (1984) this court stated:

"A motion for summary judgment can only be granted when 'there is no genuine issue as to any material fact,' and 'even assuming the facts as asserted by the party moved against to be true, he could not prevail.'"

"Since the party moved against is denied the opportunity of presenting his evidence and his contentions, it is and should be the policy of the courts to act on such motions with great caution, to assure that a party whose cause might have merit is not deprived of the right to access to the courts for enforcement of rights or the redress of wrongs."

It is well settled that a motion for summary judgment should be granted only when it clearly appears that there is no reasonable probability that the party moved against could prevail. Frisbee v. K&K Construction Company, 676 P.2d 387 (1984), Snyder v. Merkley, 693 P.2d 64 (1984), Gadd v. Olsen, supra.

In this case, the very language of the June 30, 1984 document showed that the decedent was concerned about the exercise of undue influence over him as his serious illness progressed (R. 104). Assuming all of the facts alleged in Wendell's Complaint to be true and considering the clearly stated concerns of the decedent as set out in the June 30, 1984 document, genuine issues of fact do exist and therefore the granting of Defendants' Motion For Summary Judgment by the District court was inappropriate (R.

2-6, 104).

Although no finding was made by the District Court on this point, Defendants contend in their Memorandum Of Points And Authorities In Support Of Defendants' Motion For Summary Judgment that Wendell lacks standing to challenge the validity of decedent's August 30, 1984 will. They base their contention upon the premise that Wendell is not an "interested person" as defined by U.C.A. § 75-1-201 (20). This statute states:

"'Interested person' includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person, which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of and matters involved in, any proceeding."

In this case, Wendell clearly is an "interested person" as defined by this statute. Whether or not the June 30, 1984 document is a valid testamentary disposition, it evidences a debt owed by Wendell to the decedent. Wendell therefore has a property right in or claim against the estate in the determination of whether the debt to the estate is cancelled. Further, the statute specifically provides for a case by case analysis and determination as to who is an interested party in any proceeding.

Genuine issues of fact exist regarding the allegations of Plaintiff's Complaint and Plaintiff's standing to contest decedent's August 30, 1984 will. Therefore, the District Court's

Order granting Defendants' Motion For Summary Judgment was erroneous.

POINT II

THE JUNE 30, 1984 WILL AND/OR CODICIL WAS PROPERLY EXECUTED IN SUBSTANTIAL COMPLIANCE WITH THE NECESSARY REQUISITES OF THE UTAH UNIFORM PROBATE CODE AND SHOULD THEREFORE BE TREATED AS VALID AND EFFECTIVE ACCORDING TO ITS TERMS.

The requirements for execution of a testamentary document in Utah are set forth in U.C.A. § 75-2-502 as follows:

"Except as provided for holographic wills, writings within section 75-2-573, and wills within section 75-2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will. The signing by the witnesses must be in the testator's presence and in the presence of each other."

This statutory provision was enacted in 1975 and was essentially an adoption of the Uniform Probate Code.

Compliance with the final sentence of the statute is contested by the Defendants in the instant case. Defendants in their Memorandum Of Points And Authorities In Support Of Motion For Summary Judgment note that the purpose of such a provision is to guard against fraud. (See; Defendants' Memorandum In Support Of Motion For Summary Judgment, pg. 9; 94 CJS Section Wills 189). Defendants then rely on the language used by the Utah Supreme Court in In Re Alexander's Estate, 139 P.2d 432 (Utah 1943). In that case, the court stated:

"The right to dispose of property by will is governed and controlled entirely by statute. Such statutes are mandatory, and, unless strictly complied with, the instrument, as a will, is void."

139 P.2d at 434.

Although the above quoted language provides for no exception, Plaintiff respectfully urges this court to consider several additional factors and similar judicial authority that would lead to a more equitable and just interpretation of the current statute governing execution of wills in Utah. In the Editorial Board Comment to U.C.A. § 75-2-502, the Editorial Board stated:

"The formalities for execution of a witnessed will have been reduced to a minimum. Execution under this section normally would be accomplished by signature of the testator and two witnesses; each of the persons signing as witnesses must 'witness' any of the following: the signing of the will by the testator, an acknowledgment by the testator that the signature is his, or an acknowledgment by the testator that the document is his will." (Emphasis added)

Utah Code Annotated § 75-1-102 specifically defines the purposes of the Utah Uniform Probate Code and rules for its construction. This statute states:

"(1) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this code are:

(a) To simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;

(b) To discover and make effective the intent of a decedent in distribution of his property;

(c) To promote a speedy and efficient system for administering the estate of the decedent in making distribution to his

successors;

(d) To facilitate use and enforcement of certain trusts; and

(e) To make uniform the law among the various jurisdictions." (Emphasis added).

The case of In Re Alexander's Estate, supra, is a 1943 case, decided long before the adoption of the Utah Uniform Probate Code or the initial drafting of the Utah Uniform Probate Code itself. The court did not, therefore, attempt to construe the present Utah Uniform Probate Code. In that case, the testatrix' will was declared invalid where the testatrix had not signed the will in the presence of the witnesses, as strictly required by statute, but she had definitely acknowledged to the witnesses that the instrument was her will. This decision was a very close 3-2 decision with Justices Wade and Moffat dissenting. In his dissenting opinion, Justice Wade stressed the importance of another Utah statute which provided that the statutes of this state be construed liberally and in a manner to promote justice. 139 P.2d at 434. Justice Wade, in reviewing the facts of the Alexander case, stated that although the testatrix had failed to comply strictly with the statutory requirements, she clearly thought she had made a valid will and desired disposition of her property according to her purported will. He then concluded:

"The legislative intent that our statutes shall be liberally construed with a view to effect the objects of the statutes and to promote justice". . . was undoubtedly enacted to prevent the harsh results of following to literally the exact wording of the statutes, and, to my mind, was made for just such a case as we have here."

139 P.2d at 434

As previously stated, U.C.A. § 75-1-102 specifically requires that the provisions of that Utah Uniform Probate Code be liberally construed and applied to promote the Code's underlying purposes. One of the specific underlying purposes and policies of the Utah Uniform Probate Code is "to discover and make effective the intent of a decedent in distribution of his property." A liberal construction of U.C.A. § 75-2-502 is warranted given the specific purposes of the Utah Uniform Probate Code and the facts of this case.

Other jurisdictions have reached similar conclusions with regard to substantial compliance and liberal construction as set out in Justice Wade's dissent. In In Re Rudd's Estate, 369 P.2d 526 (1962), the Montana Supreme Court, interpreting a similar wills statute stated:

"This court has held that the right to make a will depends upon the consent of the legislature and there must be strict compliance with the statute, but we have also declared that substantial compliance with the statute is sufficient."

369 P.2d at 530.

The Montana Court also defined "substantial compliance" to mean "only that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. The intent of the legislation being the elimination of fraud."

In In Re Estate Of Perkins, 504 P.2d 564 (1972), the Supreme Court of Kansas interpreted the requirements set out in the

Kansas statute regarding the execution and attestation of testamentary documents. In that case, at page 568, the court stated:

"The will of the testator should be carried out if reasonably possible and a substantial compliance with statutory requirements is enough. Slight or trifling departures from technical requirements will not operate to defeat a will." Citing Kitchell v. Bridgeman, 267 P. 26. See also Hobbs v. Mahoney, 478 P.2d 956, 958 (1970) (the Oklahoma Supreme Court adopts the 'substantial compliance doctrine; literal compliance with the requisites pertaining to the execution of a will is not required.)."

It is also important to note that the provisions of U.C.A. § 68-3-2 also require that all of the statutes in Utah be liberally construed. This statute states:

"The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter, the rules of equity shall prevail."
(Emphasis added)

This statute has also been applied with regard to the laws of inheritance within the State of Utah. See; In Re Garr's Estate, 86 P. 757 (1906).

Further support for a liberal construction of the Utah Uniform Probate Code is found in the recent case of Estate Of Grossen v. Vincent, 657 P.2d 1345 (1983). There the Utah Supreme

Court considered a different section of the Probate Code, but stated:

"The [strict] interpretation urged by the appellants would make the decedent's will now invalid in this state; but it could be admitted to probate in any other state which had adopted the Uniform Probate Code. We will not lightly ascribe an interpretation which will produce such an incongruous result."

In the instant case, based upon the provisions of the Uniform Probate Code as set out in other jurisdictions, the June 30, 1984 document would have been given effect. To require an absolute and strict compliance with Section 75-2-502 as it now reads would likewise result in an "incongruous result". The provision at issue in the present case is not a provision of the standard Uniform Probate Code. The very purpose of the Code was to reduce the formalities for execution of a witnessed will to a minimum.

The June 30, 1984 will and/or codicil of the decedent was executed in substantial compliance with the necessary requisites of U.C.A. § 75-2-502. The will was signed by the decedent in the presence of both Noel M. Taylor and Geraldine Taylor, the attesting witnesses. Noel Taylor witnessed the will with his signature in the presence of both decedent and his wife, Geraldine J. Taylor, the second witness. Geraldine J. Taylor witnessed the will with her signature in the presence of Noel, the other witness. There is no question that each of these witnesses were present at the time decedent executed this document.

Therefore, each of these individuals "witnessed" the decedent's execution of the codicil. The only element lacking is in Geraldine J. Taylor's failure to sign the instrument in the presence of decedent. The requirements which were literally complied with are sufficient to protect against fraud and therefore satisfy the very purpose for which the requirements set out in U.C.A. § 75-2-502 are imposed. In view of the clear legislative intent that the statutes of Utah and particularly the Utah Uniform Probate Code be liberally construed so as to discover and make effective the intent of a decedent in the distribution of his property, the document at issue herein has clearly satisfied the requirements of the law.

Plaintiff submits that the facts of this case warrant the application of the doctrine of substantial compliance regarding the execution of a testamentary document. The decedent's intent with regard to the cancellation of the debt owed by Wendell to him is absolutely clear on the face of the document. That two individuals witnessed his execution of the will is uncontroverted. The fact that the technical act of Geraldine J. Taylor signing the document did not take place at that time should not work to upset the specific intent of the decedent with regard to this debt. Moreover, the subsequent events involving the purported remarriage of decedent and Esther Taylor and the amendment of the Grant R. Taylor Trust when decedent was deathly ill and five days before his death, at the very least, raise a suspicion of fraud.

The Utah statute should be interpreted consistently with the intent of the Uniform Probate Code and with other jurisdictions allowing for substantial compliance. Its interpretation should also be consistent with U.C.A. §§ 75-1-102 and 68-3-2 providing for liberal construction to promote justice and equity.

POINT III

THE DISTRICT COURT ERRED IN AWARDING DEFENDANTS ATTORNEYS FEES IN CONNECTION WITH THIS ACTION

In their Motion For Attorneys Fees, Defendants allege that they are entitled to an award of attorneys fees due to the "inexcusable neglect" of Wendell's attorney. In support of this claim Defendants cite Rule 11, Utah Rules of Civil Procedure and U.C.A. § 78-27-56 (R. 119-127).

The provisions of Rule 11 in effect at the time Wendell filed his Complaint in this action state in pertinent part:

"The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule it may be stricken as sham and false and the action may be proceed as though the pleading had not been filed. For a will-full violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted."

When this action was filed, a copy of the June 30, 1984 will/codicil which contained the signatures of only Grant R. Taylor and Noel M. Taylor was mistakenly attached to the Complaint. The signature of Geraldine J. Taylor did not appear

on this copy (R.6). It is this error which forms the basis of Defendants' claim for attorneys fees.

The attachment by Plaintiff's counsel of the "two signature document", as opposed to the "three signature document", was inadvertent. Further, this error was corrected by Plaintiff's Affidavit dated November 12, 1985 wherein he stated:

"I have reviewed the Complaint that has been filed in this matter and specifically that June 30, 1984 'will and/or codicil' that was attached thereto as Exhibit A. That document is not a true and accurate copy of an original document that I have in my possession that bears the signatures of Grant R. Taylor, Noel M. Taylor and Geraldine Taylor. A true and accurate copy of the document is attached hereto as Exhibit A." (Emphasis added).

In order for Rule 11 to be invoked, the court must find a "wilfull violation" of the rule. The inadvertent inclusion of the copy of the wrong June 30, 1984 will/codicil containing only the signatures of the decedent and Noel Taylor cannot be considered a "wilfull violation" of the rule. Wendell's attorney's signature on the original Complaint which included the mistaken document, cannot be said to have been completed with the intent to defeat the purpose of Rule 11. Further, this error was quickly corrected and Defendants were in no way prejudiced.

Defendants also rely upon U.C.A. § 78-27-56 to support their award of attorneys fees. This statute provides:

"In civil actions, where not otherwise provided by statute or agreement, the court may award reasonable attorneys fees to a prevailing party if the court determines that the action or the defense to the action was without merit and not brought or asserted in good faith."

This statute has been interpreted by this court in Cady v. Johnson, 671 P.2d 149 (1983). In Cady, the court set out three requirements which must be met before attorneys fees will be awarded under this statute. First, the party to whom fees are to be awarded must prevail. Second, the court must find that the action or defense was "without merit". Third, the court must find that an action or defense was not brought or asserted in good faith.

In this case, only the first requirement set out in Cady has been met. Defendants have prevailed on their Motion For Summary Judgment. The other requirements set out in Cady are not met.

The Cady court defined the term "without merit" as: "Frivolous, or little weight or importance having no basis in law or fact."

Plaintiff's action is not "without merit" as that term is defined in Cady, supra. Wendell brought this action to enforce the provisions of the June 30, 1984 will/codicil and thereby obtain the cancellation of a substantial debt he owed to the decedent. The basis of this action was the June 30, 1984 will/codicil itself and the alleged undue influence exercised over the decedent by the Defendants. By the very terms of the document the decedent himself was concerned about this exercise of undue influence. As previously stated in Point II of this Brief, there was substantial compliance with the requirements of the Utah Uniform Probate Code regarding the execution of this document. The facts in the record of this case show a factual

and legal basis for Wendell's claims. The issues raised in Wendell's Complaint have substantial weight and importance and therefore cannot be considered frivolous or "without merit".

The court in Cady also defined "good faith" as:

1. An honest belief in the propriety of the activities in question;
2. No intent to take unconscionable advantage of others;
3. No intent to, or knowledge of the fact that the activities in question will, hinder, delay or defraud others.

In order for attorneys fees to be awarded pursuant to U.C.A. § 78-27-56, the court stated that a party must establish a lack of good faith by proving that "The unsuccessful party lacked at least one of the good faith elements." According to Cady, therefore,

"... not only must there be substantial evidence that the claim was lacking basis in either law or fact and therefore frivolous, but there must also be sufficient evidence that the unsuccessful party lacked at least one of the good faith elements heretofore stated (citations omitted)." 671 P.2d at 152.

In the Cady case, the Supreme Court found that although the Plaintiffs were pursuing a meritless claim that better preparation might have avoided, that conduct alone did not rise to lack of good faith.

The Defendants in the case before the court contend that

because Wendell's attorney failed to attach the correct document to the initial Complaint in this action, he and Wendell are guilty of "inexcusable neglect" and therefore, bad faith. The attachment of the wrong will/codicil to the Complaint, however, was merely an inadvertent error on the part of Wendell's attorney. This inadvertence alone cannot be considered to rise to the level of bad faith as defined by this court in Cady, supra.

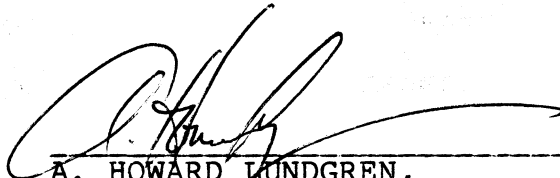
Finally, it is well settled that an award of attorneys fees must be based upon substantial evidence and findings of fact from that evidence. FMA Financial Corp. v. Build, Inc., 404 P.2d 670 (1965), Lockhart Company v. Anderson, 646 P.2d 678 (1982), Cady v. Johnson, supra. In this case, the district court made no findings of fact whatsoever with regard to the Defendants' entitlement to an award of attorneys fees, Wendell's alleged bad faith conduct, or the alleged lack of merit of Wendell's action. Without the required findings of fact, the award of attorneys fees to Defendants was erroneous and must be reversed.

CONCLUSION

Plaintiff respectfully submits that the order of the District Court granting summary judgment and attorneys fees for defendants should be reversed and this matter remanded for a full trial on the merits for the following reasons: Genuine issues of fact exist with regard to Defendants Esther and Darren Taylor's exercise of undue influence over the decedent immediately prior to his death; genuine issues of fact exist with regard to the decedent's competence for a period of thirty to sixty days prior

to his death; genuine issues of fact exist regarding Wendell's standing to contest decedent's August 30, 1984 will; decedent substantially complied with the provisions of the Utah Uniform Probate Code with regard to the execution of the June 30, 1984 will/codicil; and the District Court erred in awarding the Defendants attorneys fees without making specific findings of fact with regard to the purported bad faith conduct of Wendell and the alleged lack of merit of his action.

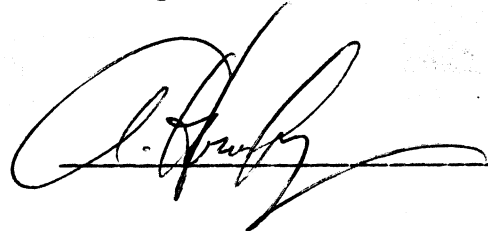
RESPECTFULLY SUBMITTED this 13th day of March, 1987.


A. HOWARD LUNDGREN,
Attorney for Wendell E. Taylor

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March, I served the foregoing Appellant's Brief by mailing four (4) copies thereof by first class United States Mail, postage prepaid, addressed as follows:

Leland S. McCullough
P. Bryan Fishburn
CALLISTER, DUNCAN & NEBEKER
Suite 800 - Kennecott Building
Salt Lake City, Utah 84133
Attorneys for Defendants-Respondents



ADDENDUM

30 June 1984

After consideration I read from my personal authorship notes in hand and dictate the following instructions to my brother Noel because I trust that he will follow my orders after my impending demise.

I have not taken any medication in the last 24 hours except two pain pills 1 hr ago. This has very slightly affected my legs in locomotion. I report this to say that I am of a clear and sober mind in making the following declaration.

I have a debt owed to me by my brother Wendell concerning his house on Shirecliff Ln. in SLC. I will leave with my will benefactors instructions that all financial obligations that he (Wendell) has with me are to be cancelled at my passing. This statement is my ultimate desire concerning this obligation.

This I do because I believe that in the presence of certain people and by their instructions future written negotiations may be attempted to be made while I am under the influence of medicines or coercion and not of my clear, free, and sober desires. This I deeply and positively believe could or will happen.

I also order, in continued sobriety, that if this instruction isn't carried out by my benefactors, as clearly directed to them, that Wendell be compensated in treble for all expenses, legal and ordinary, he has incurred or will incur in resisting the dwelling debt problem as well as the cancelled debt. This I have verbally expressed to some. I handle this with you, Noel, and not with Wendell directly for personal reasons I won't explain. Here-in is the documentary re-statement of this order.

Also, I handle this subject this way in the hopes that the principal desire of mine to be consummated is that Wendell will be freed of financial obligations to me and or my estate. I handle it with you Noel so that if all goes as I desire and as instructed by me that this document be destroyed without revelation. I suggest to you Noel a short period of waiting after my passing to present this document, if needed, in order to see an accurate picture of the developments if a problem arises. Your judgement in this.

I trust you Noel as a courier and witness to and for this order.

I order the above explained cancellation of debt of Wendell to me or to my estate as part of my Final Will And Testament and this order shall supersede any previous order of mine or any subsequent order of mine or anyone else on this matter.

Soberly and freely dictated by

Grant R. Taylor

Typed as dictated and witnessed by

Noel Taylor

Geroldine Taylor

FILMED

FILED IN CLERK'S OFFICE
Salt Lake County Utah

MAR 24 1986

CALLISTER, DUNCAN & NEBEKER
LELAND S. MCCULLOUGH (A2268)
P. BRYAN FISHBURN (A4572)
Suite 800 - Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 530-7300

By Dixon Hingley, Clerk, 3rd Dist. Court
Deputy Clerk

Attorneys for Defendants

Esther Taylor, personally and as personal representative of
the Estate of Grant R. Taylor, and Darron Taylor.

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

B 1.207 NO. 1304
6-2-86 10:20
QLM

WENDELL E. TAYLOR,

Plaintiff,

vs.

THE ESTATE OF GRANT TAYLOR,
deceased, ESTHER TAYLOR,
DARRON G. TAYLOR, and
JOHN DOES 1 THROUGH 5,

Defendants.

)
) ORDER GRANTING DEFENDANTS'
) MOTION FOR SUMMARY JUDGMENT,
) DISMISSING ACTION WITH
) PREJUDICE, AND AWARDED
) DEFENDANTS ATTORNEYS FEES

Civil No. C-85-6869

Judge Raymond Uno

* * * * *

Defendants' Motion for Summary Judgment and Defendants'
Motion for Attorneys Fees came on regularly for hearing before
the Honorable Raymond S. Uno on Thursday, February 20, 1986, at
8:00 o'clock a.m. Defendants were represented by Leland S.
McCullough, Esq. and P. Bryan Fishburn, Esq. Plaintiff was
represented by Stanley S. Adams, Esq. Based upon the Memoranda

JUDGMENT

000025

filed herein, arguments of counsel, the Affidavit of P. Bryan Fishburn as to attorneys fees, and good cause appearing, therefore,

IT IS HEREBY ORDERED:

1. That Defendants' Motion for Summary Judgment is hereby granted;
2. That this action is hereby dismissed with prejudice; and
3. That Plaintiff is to pay to Defendants their reasonable attorneys fees incurred in defending against this action, such fees having been determined by the Court to be in the amount of \$5,000.00.

DATED March 24, 1986.

BY THE COURT

Raymond S. Uno
Honorable Raymond S. Uno
Third District Court Judge

ATTEST
H. DIXON HINDLEY
CLERK

- 2 - By [Signature]
Deputy Clerk

CDN0643F

00000006

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DISMISSING ACTION WITH PREJUDICE, AND AWARDING DEFENDANTS ATTORNEYS FEES was hand delivered this _____ day of March, 1986, to the following:

Stanley S. Adams, Esq.
Attorney for Plaintiff
521 6th Avenue
Salt Lake City, Utah 84103

Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

COMMITTEE NOTE: Rule 56(c) was amended by the Supreme Court on June 30, 1965, effective October 1, 1965. The amendment inserted "answers to interrogatories" in the third sentence.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

COMMITTEE NOTE: Rule 56(e) was amended by the Supreme Court on June 30, 1965, effective October 1, 1965. The amendment added the words "Defense Required" in the caption, inserted "answers to interrogatories" after "depositions" and deleted the word "by" before "further affidavits" in the third sentence, and added the last two sentences.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 11. Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed in his individual name by at least one attorney who is duly licensed to practice in the state of Utah. The address of the attorney and that of the party shall be stated. Every party who is not represented by an attorney shall sign his pleadings and state his address. Except when otherwise specifically provided by rule, pleadings need not be verified or accompanied by an affidavit. The signature of any attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule it may be stricken as sham and false and the action may proceed as though the pleading had not been filed. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

68-3-2. Statutes in derogation of common law liberally construed — Rules of equity prevail.

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.

History: R.S. 1898 & C.L. 1907, § 2489; C.L. 1917, § 5839; R.S. 1933 & C. 1943, 88-2-2.

tion; law and equity administered in same action, Utah Const., Art. VIII, Sec. 19; Rule 2, U.R.C.P.

Cross-References. — One form of civil ac-

NOTES TO DECISIONS

ANALYSIS

In general.
 Actions against state.
 Amendment of pleadings.
 Bastardy proceedings.
 Decisions of foreign courts.
 Garnishment proceedings.
 Inheritance laws.
 Liability of city.
 Life insurance.
 Penal statutes.
 Questions of novel impression.
 Remedial statutes.
 Rules of equity prevail.
 — Forfeitures.
 Statutes of foreign states.
 Worker's compensation.

In general.

This section abrogates the common-law rule. In *re Garr's Estate*, 31 Utah 57, 86 P. 757 (1906); *State v. Barboglio*, 63 Utah 432, 226 P. 904 (1924).

This section is mandatory. *Hammond v. Wall*, 51 Utah 464, 171 P. 148 (1918).

Where a statute charges one with a duty or imposes a burden or a penalty, it must do so with sufficient clarity that one of ordinary intelligence will understand what he is required to do, and, in case of alternative choices, he can comply by selecting the one least burdensome to him. *Ringwood v. State*, 8 Utah 2d 287, 333 P.2d 943 (1959).

Statutes are to be liberally construed to give effect to their purpose and promote justice but they are not to be distorted beyond the intent of the legislature. *Stanton Transp. Co. v. Davis*, 9 Utah 2d 184, 341 P.2d 207 (1959).

Actions against state.

Statute giving right to sue the state must be construed so as to give effect to intent of the Legislature. There must be substantial compliance with the designated statutory procedure for bringing such actions. *State v. District Court*, 102 Utah 284, 115 P.2d 913 (1941); 102 Utah 290, 128 P.2d 471 (1942).

Amendment of pleadings.

Seemingly, clause of this section, which requires provisions of statutes and proceedings under them to be liberally construed with view to effect statutes' objects and to promote justice, applies, at least in matter of amendment of pleading, as well when it is statutes of another state, as when it is statutes of Utah, which are involved. *Pugmire v. Diamond Coal & Coke Co.*, 26 Utah 115, 72 P. 385 (1903) (decided under prior law).

75-1-102. Purposes—Rule of construction.—(1) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this code are:

(a) To simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;

(b) To discover and make effective the intent of a decedent in distribution of his property;

(c) To promote a speedy and efficient system for administering the estate of the decedent and making distribution to his successors;

SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS 75-1-106

(d) To facilitate use and enforcement of certain trusts; and

(e) To make uniform the law among the various jurisdictions.

History: C. 1953, 75-1-102, enacted
by L. 1975, ch. 150, § 2.

Collateral References.
Wills—203.

95 C.J.S. Wills § 308.
79 Am. Jur. 2d 880, Wills § 827.
Also see Am. Jur. 2d, New Topic
Service, Uniform Probate Code.

DEFINITIONS

75-1-201

(20) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matters involved in, any proceeding.

75-2-502. Execution.—Except as provided for holographic wills, writings within section 75-2-513, and wills within section 75-2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will. The signing by the witnesses must be in the testator's presence and in the presence of each other.

History: C. 1953, 75-2-502, enacted by L. 1975, ch. 150, § 3.

Editorial Board Comment.

The formalities for execution of a witnessed will have been reduced to a minimum. Execution under this section normally would be accomplished by signature of the testator and of two witnesses; each of the persons signing as witnesses must "witness" any of the following: the signing of the will by the testator, an acknowledgment by the testator that the signature is his, or an acknowledgment by the testator that the document is his will. Signing by the testator may be by mark under general rules relating to what constitutes a signature; or the will may be signed on behalf of the testator by another person signing the testator's name at his direction and in his presence. There is no requirement that the testator publish the document as his will, or that he request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses if he later acknowledges to the witnesses that the signature is his or that the document is his will, and they sign as witnesses. [Last sentence in Utah version omitted in official text of Code.] There is no requirement that the testator's signature be at the end of the will; thus, if he writes his name in the body of the will and intends it to be his signature, this would satisfy the statute. The intent is to validate wills which meet the minimal formalities of the statute.

A will which does not meet these requirements may be valid under section 75-2-503 as a holograph.

Cross-References.

Probate and administration, 75-3-101 et seq.

Proof of will, 78-25-12.

Collateral References.

Wills—111, 113-123.

94 C.J.S. Wills §§ 169-177, 182-197.

79 Am. Jur. 2d 430, Wills § 210.

Also see Am. Jur. 2d, New Topic Service, Uniform Probate Code.

Admissibility and credibility of testimony of subscribing witness tending to impeach execution of will or testamentary capacity of testator, 79 A. L. R. 394.

Admissibility of evidence other than testimony of subscribing witnesses to prove due execution of will, or testamentary capacity, 63 A. L. R. 1195.

Admissibility of testator's declarations upon issue of genuineness or due execution of purported will, 62 A. L. R. 2d 855.

Assistance: validity of will signed by testator with the assistance of another, 98 A. L. R. 2d 824.

"Attestation" or "witnessing" of will, required by statute, as including witnesses' subscription, 45 A. L. R. 2d 1365.

Beneficiary under nuncupative will as witness thereto, 28 A. L. R. 2d 796.

Character as witness of one who signed will for another purpose, 8 A. L. R. 1075.

Character of instrument as will, or its admissibility to probate as such, as affected by its failure to make any disposition of property or by fact that there is no beneficiary entitled to take thereunder, 147 A. L. R. 636.

Codicil as affecting application of statutory provision to will, or previous codicil not otherwise subject, or as obviating objections to lack of testamentary ca-

78-27-56. Attorney's fees — Award where action or defense in bad faith.

In civil actions, where not otherwise provided by statute or agreement, the court may award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.

History: L. 1981, ch. 13, § 1.

Meaning of "without merit" and "good faith."

A frivolous action having no basis in law or fact is "without merit," but is nevertheless in "good faith" as long as there is an honest belief that it is appropriate, and as long as

there is no intent to hinder, delay, defraud or take advantage of another. *Cady v. Johnson* (1983) 671 P 2d 149.

Law Reviews. — Attorney's Fees in Utah, 1984 Utah L. Rev. 553.

Attorney's Fees in Bad Faith, Meritless Actions, 1984 Utah L. Rev. 593.