1949

Orson H. Beal v. Mattie Beal Hansen : Brief of Respondents

Utah Supreme Court

Wm. L. Beezley; Attorney for Respondents;

7369

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE
of
THOMAS A. BEAL, sometimes
known as T. A. Beal, *Deceased.*
ORSON H. BEAL, et al,
Appellants,

vs.

MATTIE BEAL HANSEN, et al,
Respondents.

Case No.
7369

Respondents' Brief

Appeal from the District Court in and for Salt Lake
County, State of Utah,
Honorable Roald A. Hogenson, *Judge*

WM. L. BEEZLEY
Attorney for Respondents.
Salt Lake City, Utah.

Point 1

We contend that by virtue of the express terms and conditions as contained in Paragraph Five of said Will, it is not subject to judicial construction for the reason that the terms and wording are concise and not ambiguous in any respect and that said terms and the language employed leave no doubt whatever as to the intention of testator.

INDEX

STATUTES CITED

CASES AND TEXTS CITED

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This is an appeal from the decree of final distribution heretofore made and entered by the Third Judicial District Court of Salt Lake County, State of Utah, in the Estate of Thomas A. Beal, deceased, on June 13, 1949.

The appellants are all of the relatives of the full blood of the deceased. The respondents are the relatives of the half blood of said deceased, and respondents contend that by virtue of Paragraph Five, which in effect was stricken from said Will, the heirs of the half blood as outlined in the decree of distribution shall participate in and to the assets of deceased's estate by virtue of the laws of succession as provided for by the compiled laws of Utah.

I.

STATEMENT OF FACTS

Thomas A. Beal, deceased, made his last will on March 13, 1941. He died on January 3, 1948. His Wife, Ida Peterson Beal, predeceased the death of her husband and died on January 6, 1945. The Will was admitted to probate and Letters of Administration with the Will Annexed, in accordance with the terms thereof, were issued to Berdella B. Evans on March 20, 1948. In connection with this statement, we refer to the last Will and testament of Thomas A. Beal, Deceased, on file herein and make the same a part of this statement and particularly refer to Paragraph Five thereof, which is as follows:

"Fifth—*In the event* that my wife and I shall perish in a common catastrophe, or disaster, *then and in such event*, I give, devise, and bequeath to the President of the University of Utah for the School of Business the sum of $500.00, and to the President of Snow College for the Snow College a like amount, for the purchase of books in Business and Economics, for the use and benefit of said schools in building up their libraries. *And in such case of death*, I give, devise and bequeath all the rest, residue and remainder of my property, both real and personal, of whatever kind the same may be, or wherever situated, or to which I may be entitled, to my nearest of kin and my wife's nearest of kin. That is to say, to our brothers and sisters, of the full blood, share and share alike, it being understood that the children of any said brother or sister now dead, or who may predecease us, shall stand in the place of such deceased brother or sister, and take a one-tenth interest in the remainder therein devised and bequeathed. *Further, in such case*, I nominate and appoint Carvel Mattsson the Executor of my last Will and Testament, to serve without bond, and I hereby revoke any and all former wills by me made." (Italics ours.)

The only issue involved in this matter is whether or not the contingency as outlined in Paragraph Five of deceased's Will is a condition precedent and failed to occur and by reason of such failure, the will as to Paragraph Five is inoperative.

II.

ARGUMENT

Point 1

We contend that by virtue of the express terms and condition as contained in Paragraph Five of said Will, it is not subject to judicial construction for the reason that the terms and wording are concise and not ambiguous in any respect and that said terms and the language employed leave no doubt whatever as to the intention of testator. Section 101-2-1, Utah Code 1943, reads:

> "A will must be construed according to the intention of the Testator. Where his intention cannot have effect to its fullest extent, it must have effect as far as possible."

Section 101-2-27, Utah Code 1943, reads:

> "If a devisee or legatee dies during the lifetime of the Testator, the testamen-

> tary disposition to him fails unless an intention appears to substitute some other in his place except as provided in Section 101-1-35."

Section 101-2-30, Utah Code 1943, reads:

> "A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect."

Section 101-2-31, Utah Code 1943, reads:

> "Where a testamentory disposition is made upon a condition precedent, nothing vests until the condition is fulfilled except where such fulfillment is impossible in which case the disposition vests unless the condition was the sole motive thereof and the impossibility was unknown to the testator or arose from an unavoidable event subsequent to the execution of the will."

The Will in question is unambiguous, clear and to the point and raises no question as to the Testator's intention in the premises. He first directs that all of his just debts and funeral expenses be paid and that he be buried in accordance with his station in life. He then gave and bequeathed to the School of Business of the University of Utah his professional library but retained therefrom family records, books of account, and books of religion. He thereafter gave and devised the rest of his entire

estate to his wife, Ida Peterson Beal, who thereafter predeceased Testator in death and of course, her heirs cannot inherit in any event by virtue of the Section of the Utah Code above set forth. Thereafter, in Paragraph Four of the deceased's Will, he nominated and appointed his wife as Executrix of his Will to act without bond.

The conditional element in said Will is confined to Paragraph Five thereof and it will be noted that in said Paragraph the common catastrophe or disaster was referred to specifically four distinct times, to-wit: "*In the event* that my wife and I shall perish in a common catastrophe or disaster, *then and in such event*, I give, devise and bequeath . . . . . *And in such case of death*, I give, devise and bequeath . . . . . *Further, in such case* . . . . ." (Italics ours.)

It will be further noted that the deceased bequeathed unto the University of Utah $500.00 and a like amount to Snow College which bequests were also based upon the condition precedent as contained in said Paragraph Five.

> "The power of a Testator to give includes the right to withhold or to fix the terms of a gift no matter how whimsical or capricious they may be provided only they do not in any way violate the law."

Holmes vs. Conn. Trust Dep. Co., 92 Conn. 507, 103 At. 640.
In re Holbrook, 213 Pa. St. 93, 62 At. 368.

"The condition or stipulation so attaches to the devise as to become a part of it and controls the terms on which the enjoyment of the gift is to take effect or be retained."

Holmes, Supra.

"The rule that courts favor testacy rather than intestacy does not relieve courts from obligation to construe language of will according to legal effect of words used and wills must be construed as written."

In re Searl's Estate, 186 Pac. 2d 913 (Wash.)

In the case just cited above, the rule is the same that the respondents contend for in this cause. In the above case, Homer I. Searl and Edda Marie Searl, were husband and wife. Mrs. Searl made her will. She devised and bequeathed to her husband her estate, providing: "However, in the event my husband and I should meet death by accident or otherwise at the same time or approximately the same time, then it is my desire and will that all such residue and remainder of my estate is to pass to, and in the event of such happening, I do give, devise and bequeath the same unto my sister, Mrs. Anna

Florence Conwell, who is now a resident of Columbus, Ohio."

She appointed her husband as Executor. The testatrix died on May 19. 1945; her husband filed will for probate in June of said year, and he died on July 5, 1945, or 47 days after his wife's death, and the Court held that the word "approximately" in testatrix' will giving residue to wife's sister if husband and wife should die at approximately the same time, would be assumed to have been employed in its customary sense of "nearly," and that 47 days subsequent was not approximately the same time. Therefore, the condition precedent never occured.

In the case of *Glover vs. Reynolds*, 135 N.J.Eq. 113, 37 At. 2d 90 it was held that "The rule of presumption against intestacy cannot be used to justify a revision of the clear language of a will where will giving all Testatrix' property to her husband provided that 'in the event that my husband and myself die simultaneously regardless of the order of passing, I give and bequeath my property as therein specified' but made no provision for contingency if husband predeceased Testatrix and will was inoperative to pass any of wife's estate where husband predeceased Testratrix and property passed as in case of intestacy."

The Court stated: "By her will, the testatrix appears to have had in mind only two possible situations; to-wit: That she would predecease her husband or that they would die simultaneously, or at least contemporaneously. She completely overlooked the contingency which did occur. Her failure to anticipate this or in the alternative to execute a new will in the four months which intervened between the death of her husband and her death cannot now be cured. This Court under the guise of construing the Will will not write a new one. As has frequently been pointed out in our decision, it may be that if she could now express her views, she would wish her estate to pass to the defendant beneficiaries but this is of no moment here." "In the case of *McDonald vs. Clermont*, 107 N.J.Eq. 585, at page 589, 153 At. 601, 603, the Court of Errors and Appeals adopted as its own view the following language of Vice-Chancellor Buchanan: 'He did not say it in his Will and this Court cannot say it for him. It is regretful, but after all, it is the Testator's own fault. The law froze all possible safeguards about the execution of a will so a man may be sure that his property will go in accordance with what he provides in his will; but the law cannot, or at least does not, compel a man to have his will drawn by someone who knows how'."

It will be noted that the terms of Paragraph Five herein of Deceased's Will that nothing appears

to the effect that the contingency as stated merely is the reason for making the will that the devises and bequests are based solely upon the contingency named therein.

In the Matter of *Porter*, L.R. 2 P. & D. 22, 23, cited in Note 71, 68 C.J. 631, where the Court stated:

> "It is the common feature of wills in respect of which this sort of question arises, that the testator therein refers to a possible impending calamity in connection with his will; and the question arises, whether he intends to limit the operation of his will to the time during which such calamity is imminent. If the language used by him can be construed to mean that he refers to the calamity and the period of time during which it may happen as the reason for making the will, then the will is not conditional; but if he refers to the calamity or the possible occurrence of some event as a reason for a certain disposition of his property, and mixed up the disposition with the event so that one is dependent on the other, then the court must hold the will to be conditional."
>
> *Matter of Porter, Supra.*

It seems very evident that the Testator referred to the calamity or the possible occurence of such event as a reason for a certain disposition of his property, and he mixed up the disposition with the event

and that one is dependent upon the other. As must be noted in Paragraph Five, based upon such event, he named the President of the University of Utah, the President of Snow College, and to deceased's nearest of kin and his wife's nearest of kin.

The writer respectfully submits that the Findings of Fact, Conclusions of Law and Decree made and entered by the trial court in this matter should be upheld and affirmed.

Respectfully submitted,

WM. L. BEEZLEY,
Attorney for Respondents.