

2001

# In the matter of the Estate of James Earl Bacon : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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STATE OF UTAH

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In the Matter of the Estate of

JAMES EARL BACON, also known as  
James E. Bacon,

Case No. 14295

Deceased

BRIEF OF RESPONDENT

Appeal from the Judgment of the Fourth  
Judicial District Court of Duchesne County  
Honorable George E. Ballif, Judge

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FILED

JUN 11 1976

Clerk, Supreme Court, Utah



TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE KIND OF CASE. . . . .	1
DISPOSITION IN LOWER COURT. . . . .	1
RELIEF SOUGHT BY RESPONDENT. . . . .	2
STATEMENT OF FACTS. . . . .	2
ARGUMENT . . . . .	5
POINT I	
APPELLANT'S BRIEF IMPROPERLY ADDRESSES THE QUESTION TO BE DECIDED BY THE SUPREME COURT . . . . .	5
POINT II	
THE TRUST AGREEMENT, DATED JULY 10, 1973, DID NOT REVOKE THE OLOGRAPHIC WILL. . . . .	7
POINT III	
A VALID OLOGRAPHIC WILL HAS PROPERLY BEEN ADMITTED TO PROBATE AND RESPONDENT WAS PROPERLY APPOINTED ADMINISTRATOR OF THE ESTATE WITH WILL ANNEXED. . . . .	8
CONCLUSION . . . . .	11

CASES CITED

<u>In re Cloward's Estate</u> , 95 Utah 453, 82 P. 2d. 336, 119 ALR 123 . . . . .	9
<u>In re Jacobs' Estate</u> , 100 Cal. App. 2d. 452, 223 P. 2d. 898, 903 . . . . .	9
<u>In re Love's Estate</u> , 75 Ut. 342, 285 P.299. . . . .	10

STATUTES

	<u>Page</u>
Utah Code Annotated, Section 74-1-22. . . .	7
Utah Code Annotated, Section 75-4-1 . . . .	8, 9
Utah Code Annotated, Section 75-3-2 . . . .	10



the will and the appointment of the Respondent as Administrator. This objection was stricken by the District Court.

#### RELIEF SOUGHT BY RESPONDENT

Respondent seeks to have the ruling of the District Court striking Appellant's Objections affirmed. If this Court considers other matters beyond the order which has been appealed by Appellant, Respondent seeks affirmation of the District Court's order that the Olographic Will was properly admitted to probate, and that Respondent was properly appointed Administrator of the Estate with Will Annexed.

#### STATEMENT OF FACTS

On December 20, 1971, James Earl Bacon, a resident of Roosevelt, Utah, prepared an Olographic Will (R. 9-12) designating his "home ward" as a beneficiary of the residual of his estate.

On July 10, 1973, the decedent executed a document entitled "Special Trust of James E. Bacon, a Single Man". (R. 13-15) Simultaneously with the execution of the Trust Agreement, Mr. Bacon transferred all of his assets to the Respondent who was serving as the Bishop of the Roosevelt Ward of The Church of Jesus Christ of Latter-Day Saints, and who, pur-

suant to the Trust Agreement was the designated Trustee. Pursuant to the terms of the trust, the Respondent administered the trust property and the income for the benefit of James E. Bacon until his death on October 23, 1973. Upon the death of James E. Bacon, all of the assets belonging to the trust, pursuant to the provisions of the trust, became the sole property of the Roosevelt Ward of The Church of Jesus Christ of Latter-Day Saints.

On November 18, 1974, Appellant, a niece of the decedent, filed a petition for the appointment of herself as Administratrix of the estate of decedent. (R. 1).

The hearing on Appellant's petition was set for December 9, 1974. An order appointing Appellant Administratrix was entered, subject to there being no additional wills filed for probate. (R. 5).

On January 17, 1975, Respondent filed a verified cross-petition for admission of an Olographic Will and Special Trust into probate, by which Respondent sought to be appointed Administrator with Will Annexed. (R. 6).

Appellant objected to the petition of Respondent (R.16). A hearing on the conflicting petitions was set for March 24, 1975. On April 23, 1975, the District Court admitted the

Olographic Will to probate and appointed the Respondent the Administrator of the Estate with Will Annexed. (R.19). The decision of the Court was reduced to a final order on May 22, 1975. (R. 22 ). Letters of Administration were issued to Respondent on May 29, 1975. (R. 21).

On June 19, 1975, Appellant filed objections to the probate of the will and the appointment of Respondent as Administrator. (R. 24). The Respondent replied to the objections. (R. 29). On September 10, 1975, the District Court ruled that the objections, as filed by the Appellant, were an attempt to raise and re-litigate questions previously ruled upon by the Court and, accordingly, Appellant's objections were stricken and it was ordered that the probate of the decedent's estate proceed in the due and usual form. (R. 34).

On September 18, 1975, Appellant filed a motion for reconsideration of the objections. (R. 35 ). This motion to reconsider was denied by the Court on September 18, 1975. (R. 33).

Notice of Appeal was filed by the Appellant on October 8, 1975. (R. 36).

## ARGUMENT

### POINT I

APPELLANT'S BRIEF IMPROPERLY ADDRESSES THE QUESTION TO BE DECIDED BY THE SUPREME COURT.

Appellant's Notice of Appeal, dated October 7, 1975, seeks a review of the ruling of the District Court of September 10, 1975, wherein Appellant's objections to a prior ruling of the Court were stricken. The Brief, as presented by the Appellant, however, addresses the questions which were previously resolved by the District Court in its decision of April 23, 1975, which was reduced to a written order on May 22, 1975. Appellant has failed to consider the actual decision as handed down by the Court on September 10, 1975, from which the appeal was taken.

Rule 73(2) of the Utah Rules of Civil Procedure, provides that parties may appeal within thirty (30) days from the entry of the judgment or order from which they are taking an appeal. Rule 73(b) of the Utah Rules of Civil Procedure, provides that the Notice of Appeal "...shall designate the judgment, or part thereof, appealed from...." The Notice of Appeal, as filed by the Appellant, merely indicates

a dissatisfaction with the order dated September 10, 1975, whereas the entire Brief of Appellant discusses a dissatisfaction of the order dated May 22, 1975.

If Appellant desired a review of the May 22, 1975, order of the Court, wherein the will was admitted to probate, and the Respondent was appointed Administrator of the Estate with Will Annexed, Appellant was obligated to file a Notice of Appeal of said decision within thirty (30) days of the date the order was made final. Appellant elected, however, to file objections rather than file an appeal. By so doing, Appellant has waived her rights to have this Court review the questions decided by the District Court, specifically the questions concerning the admission of the Olographic Will to probate, and the appointment of the Respondent as the Administrator of the Estate with the Will Annexed.

The only question presented to this Court, by this appeal, is whether the District Court erred in striking Appellant's objections to the admission of the will and the appointment of the Administrator. Appellant's Brief fails to speak to this question on appeal.

POINT II

THE TRUST AGREEMENT, DATED JULY 10, 1973, DID  
NOT REVOKE THE OLOGRAPHIC WILL.

Section 74-1-22, Utah Code Annotated (1953) as  
Amended, provides:

"A prior will is not revoked by a subsequent will, unless the latter contains an express revocation or provisions wholly inconsistent with the terms of the former will; but in other cases, the prior will remains effectual so far as consistent with the provisions of the subsequent will."

The Trust Agreement was not entered into evidence as a subsequent will; however, it was offered into evidence for the purpose of indicating the intent of the Testator, and also for purposes of designating the ultimate beneficiary of the assets of the estate. The Trust Agreement contains no words which would in any way revoke the provisions of the Olographic Will. There are no provisions in the trust which are inconsistent with the provisions of the will. To the contrary, the trust merely substantiates and reinforces the decedent's desires as set forth in the Olographic Will.

Respondent submits that the Olographic Will is a valid testamentary document and is properly entitled to

probate, as was determined by the District Court.

### POINT III

A VALID OLOGRAPHIC WILL HAS PROPERLY BEEN ADMITTED  
TO PROBATE AND RESPONDENT WAS PROPERLY APPOINTED  
ADMINISTRATOR OF THE ESTATE WITH WILL ANNEXED

On March 24, 1975, pursuant to notice properly given by the Court to each of the parties to this action, the District Court listened to evidence concerning the validity of the Olographic Will which was presented for probate by the Respondent. Based upon the evidence submitted, the District Court held that the will was properly executed by the decedent in accordance with the requirements of Utah statutes; that the decedent was of sound mind and disposing memory and not acting under any menace, fraud or undue influence at the time he executed the will. The Court further ruled that the will was a proper document, and that the same should be admitted to probate.

Respondent concurs with Appellant that, had the decedent died intestate (without a will), the Appellant would be the proper party to be appointed Administratrix of the estate, in accordance with the provisions of Section 75-4-1, Utah Code Annotated. However, by virtue of the existence of the

Olographic Will, the decedent did not die intestate and, accordingly, the provisions of Section 75-4-1, Utah Code Annotated, are not controlling.

Sections 75-4-1, Utah Code Annotated (1953) further provides that "...the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof...." In re Cloward's Estate, 95 Utah 453, 82 P. 2d 336, 119 ALR 123 (1938), the Supreme Court held as follows:

"It has long been an elementary doctrine governing courts exercising probate jurisdiction that the right to the administration of the estate follows the property in the estate.... The courts have deemed it their duty to place administration in the hands of the persons most likely to convert the property to the best advantage of those beneficially interested. That person is he who, because of his interest as distributee is entitled, in whole or in part to the residue, after the claims of creditors have been satisfied..."

The Appellant, although a relative of the decedent, was not named in the Olographic Will and, therefore, is not entitled to succeed to any portion of the estate. For this reason, the Appellant should not enjoy the right to administer the estate. In the case of In re Jacobs' Estate, 100 Cal. App. 2d. 452, 223 P. 2d. 898, 903 (1951) the California Supreme Court, in interpreting statutes similar to Utah, held:

"The right to administer, as among relatives of the decedent, follows the property, and one not entitled to succeed is obviously excluded. A relative who applies for Letters of Administration with the Will Annexed must be both an heir-at-law and entitled take under the will."

Section 75-3-2, Utah Code Annotated provides as follows: "Any person interested may, at any time after the death of the testator, petition the court to have the will proved." Pursuant to this section, the Respondent, representing an interested party, requested the admission of the will to probate and the appointment of himself as Administrator with Will Annexed. In the case of In re Love's Estate, 75 Ut. 342, 285 P. 299 (1930), the Utah Supreme Court held that the court could use its discretion as to whether the court should appoint the person having the preferential right or some other competent person. In the opinion of Respondent, the court exercised this discretion by appointing Respondent the Administrator of the Estate with Will Annexed.

The Olographic Will, admitted to probate, provides as follows:

"It is my desire to leave any unused portion of my estate to The Church of Jesus Christ of Latter-Day Saints but want it to go directly to the use and benefit of my home ward, which is Roosevelt Fourth Ward of Roosevelt Stake."

At the time of the death of the decedent, his "home ward" was the Roosevelt Ward. The name of the "home ward" was later changed to Roosevelt First Ward, Roosevelt Stake. Respondent was, at the time of the decedent's death, and also at the time the will was admitted to probate, serving as bishop of decedent's "home ward". In the Special Trust of James E. Bacon, the decedent has named the "Bishop of the home ward" to serve as the Trustee for and in behalf of the trust. At the time the trust agreement was prepared, the Respondent was serving as bishop of the "home ward" and was so named in the Trust Agreement.

Inasmuch as Appellant is not entitled to succeed to any of the interests of the estate of the decedent, she is not entitled to be appointed Administratrix of the Estate with Will Annexed. The Respondent, as bishop of the decedent's "home ward", was properly appointed Administrator with Will Annexed.

#### CONCLUSION

It is respectfully submitted that the Appellant has attempted to have this Court review matters which are not properly before the Court on appeal. The only question

properly presented is whether the District Court, in striking the objections of the Appellant, acted appropriately. Respondent urges the Court to find that the order striking the objections of the Appellant was proper.

In the event this Court determines that other matters presented by the Appellant in this appeal may be properly considered at this time, Respondent urges the Court to hold that the Olographic Will, as previously admitted to probate, is valid, that it was not revoked by the trust, and that, pursuant to the terms of the will, in conjunction with the Trust Agreement, the Respondent was the properly appointed Administrator of the Estate with Will Annexed.

Respectfully submitted,

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