

2001

In the matter of the Estate of James Earl Bacon, deceased : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

In the Matter of the Estate of:

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

Deceased.

Case No. 14295

BRIEF OF APPELLANT

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

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Salt Lake City, Utah 84115

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FILED

APR 16 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

In the Matter of the Estate of:
JAMES EARL BACON, also known as
JAMES E. BACON,
Deceased.

Case No. 14295

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action arising out of objections filed by appellant to the appointment of the administrator with will annexed. Appellant further objects to probate of Will and Trust Agreement of James Earl Bacon.

DISPOSITION IN LOWER COURT

The District Court refused to appoint appellant as the administratrix of the estate of deceased James E. Bacon and dismissed without hearing her further objections to probate of the Olographic Will of James Earl Bacon and the distribution of the estate in accordance with a Trust Agreement filed with the court.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the trial court's appointment

of George Mangum as administrator of the estate of James Earl Bacon and judgment that neither the Olographic Will or the Trust Agreement provide a basis for the distribution of the estate of James Earl Bacon. Appellant asserts that said estate must then be distributed as though James Earl Bacon died intestate and without the Trust Agreement.

STATEMENT OF FACTS

James Earl Bacon died on October 23, 1973 at Roosevelt, Utah. He left an estate consisting of both real and personal property in Duchesne County. Appellant is the niece of James Earl Bacon. She filed on November 18, 1974 a petition for the appointment of herself as administratrix of the estate of James Earl Bacon. Her petition reveals that there are numerous relatives of James Earl Bacon with approximately the same relationship to him as she has. The petition for appointment was set for hearing on the 9th of December, 1974. An order was entered appointing appellant administratrix, there having been no objection. The order of appointment was conditioned upon there being no Will filed for probate within fifteen days.

On the 17th of January, 1975, George E. Mangum filed a Verified Cross-Petition for Admission of Olographic Will and Special Trust into Probate. Attached to the petition was an Olographic Will and a document entitled "Special Trust of James E. Bacon, a Single Man" (R. 9-15). Appellant objected to the appointment of Mangum as the administrator. This objection was

heard on the 24th of March, 1975. On the 22nd of May, 1975, the court ordered the Olographic Will admitted to probate, appointed George E. Mangum as the administrator with Will annexed. The reason cited was that he was the Bishop of the ward intended by decedent to be the beneficiary of decedent's estate. Letters of Administration were issued on the 29th of May, 1975.

On the 19th of June appellant filed objections to the probate of the Will and the distribution of the estate in accordance with the Special Trust of James E. Bacon (R. 24). The administrator replied to the objections (R. 29). Appellant requested a trial setting on the issues as made by her objections and the answer. The administrator objected to the request for trial setting. On the 10th of September, without a hearing, appellant's objection was stricken and it was ordered that the probate of the decedent estate proceed in the due and usual form (R. 34). Notice of Appeal was filed on the 8th of October, 1975.

Administrator objects to the appeal on the ground that it was not timely filed. Appellant's appeal was taken within the thirty days after the order of the court dismissing her objection to probate of Will and distribution in accordance with the Special Trust of James E. Bacon. The appeal is within the period permitted for the contest of probate matters as set forth in Utah Code Annotated 75-3-12, which fixes six months after admission to probate for objection.

The facts now before the court involve the following material matters. George E. Mangum has been appointed the administrator of the estate and has qualified. The Olographic Will and the Trust Agreement have both been filed with the court. It appears that these documents will govern the distribution of the estate of James Earl Bacon.

The Findings of Fact which the court has heretofore entered appearing in the Record between pages 20 and 22, outline the matters which appellant believes should determine that neither the Olographic Will nor the Trust Agreement provide a basis for the distribution of the estate of James Earl Bacon. The facts are as follows:

(1) James Earl Bacon made an Olographic Will. In that Will he attempted to leave the residue of his estate to the Roosevelt Fourth Ward.

(2) The Olographic Will was admitted to probate and was executed when the decedent was in sound mind and without being under undue influence.

(3) Roosevelt First Ward is the home ward of decedent and the successor to the previous home ward, Roosevelt Fourth Ward. Neither Roosevelt First Ward nor Roosevelt Fourth Ward are corporate soles. Neither of said wards is the one designated in the Trust as the recipient of the residue of the James E. Bacon estate. In the Trust the recipient is Roosevelt Ward, a corporate sole.

(4) Neither the Olographic Will nor the Trust Agreement contain any kind of standard for the supervision of the expenditure

of either a testamentary trust under the Olographic Will or the specific trust created by a written document. In addition to this defect in the documents, there is not designated any person or corporation by either document that can accept title to property under the laws of the State of Utah.

(5) The Olographic Will seems to be free from serious defect as far as its execution is concerned, but this document is not to control the use of the Bacon estate. The document which will control the use of the Bacon estate, if appellant is not successful, is the Trust Agreement. This document is seriously defective.

(a) If it is to be considered a Will, it was not executed in accordance with the statutes of the State of Utah.

(b) It contains every weakness that the Statute of Wills was intended to remedy:

(1) the document was prepared by the chief beneficiary and designated trustee,

(2) the estate would be under the trustee's supervision,

(3) as Bishop of the ward, he would have control of all of the benefits that would be available out of the use of the estate,

(4) this use would be uncontrolled since there is no purpose set forth in the Trust Agreement that could be supervised by the court or any other regulatory agency.

No person was nominated to be executor in the Olographic Will. The Will had not been presented for probate in the time permitted by statute and no substantial reason given for such failure. The terms of the Trust Agreement are inconsistent with the Olographic Will on several counts:

(a) It removes from the estate all of the property that the decedent owned.

(b) It changed the beneficiary from the First Ward of Roosevelt to a corporate sole, Roosevelt Ward. The court then changed it back in his orders to the First Ward or home ward. A Mormon ward cannot qualify to hold property since it is neither a person nor a corporation.

Two exhibits that have been received demonstrate that the deceased had a different kind of purpose in mind than is expressed in the Trust Agreement. No purpose is stated with sufficient particularity as to provide the standard for enforcement. A letter received from the attorneys for the Church of Jesus Christ of Latter-Day Saints has notes around the margin written by the decedent indicating his disagreement with the letter and his unwillingness to execute a Will which would place his property in the hands of the Church of Jesus Christ of Latter-Day Saints.

What decedent desired, it appears, is to establish a rest home in Roosevelt where people such as himself and his sister, Prudence, could be cared for by their neighbors and by the people in their own ward with whom they were acquainted. Neither the

Trust nor Will distributing the estate of James Earl Bacon will in any way accomplish the purposes Bacon stated he wished his estate devoted to.

ARGUMENT

POINT I

APPELLANT SHOULD HAVE BEEN APPOINTED ADMINISTRATRIX
OF THE ESTATE OF JAMES EARL BACON.

Appellant is a niece of deceased and as close a relative as survived him. Under Section 75-4-1, U.C.A., the language is imperative that letters must be granted to one of the persons in the classes set forth by the Section. Appellant is named also in the Trust Agreement as being the person to divide personal effects among family members (Special Trust of James E. Bacon, a Single Man, ¶4).

No executor is named in the Olographic Will. The attempt to create a testamentary trust in the Olographic Will designates a Bishop of the Fourth Ward to appoint a permanent estate and guardian committee to be composed of various ward officials (See Olographic Will). The Special Trust appoints the Bishop of Roosevelt Ward as the Trustee, and at the time of the creation of the trust, that person was George E. Mangum.

It is appellant's position that the trial court had no discretion in this matter, the words of the statute being imperative and the language being that letters must be granted to appellant.

Appellant filed her petition on the 18th of November, 1974. The Petition for Appointment and for Admission of the Olographic Will and Trust Agreement were not filed until the 11th of January, 1975.

Appellant believes that the failure of respondent to file the Olographic Will for probate within the thirty days permitted by Section 75-3-1, U.C.A. forfeits the right of the possessor of a Will to be executor (75-3-4, U.C.A.). Respondent is not nominated in the Olographic Will. Appellant submits she is entitled to be appointed as the administratrix with Will annexed as the only qualified person.

Section 75-3-19, U.C.A., assists in the interpretation and supports appellant's position. This section covers the absent or minor nominee. Where such a person is nominated and cannot qualify, then Letters of Administration with Will annexed must be granted to a person qualified to be administratrix under Section 75-4-1. Section 75-3-21 specifically covers the situation where no executor was named in the Will and provides the form for the appointment of an administrator with Will annexed.

C.J.S., Volume 34, Section 1031, page 1286, states as follows:

"Statutes regulating the order in which administration with the will annexed may be granted usually are mandatory and leave courts no discretion in the matter".

In re Love's Estate, 75 Utah 342, 285 Pac. 299, is a situation where the person nominated in the Will failed to apply within the time permitted and the court exercised jurisdiction

and discretion in appointing another person.

The leading case in Utah is In re Cloward's Estate, 95 Utah 453, 82 P.2d 336. In the decision the court stated carefully the law applicable and said:

"The first section entitled, "Letters of Administration. To Whom Granted," clearly indicates the purpose of the law to keep administration within those beneficially interested in the estate. It provides: (a) Letters must be granted to the persons therein mentioned (strangers to the estate are not mentioned). (b) Even the mentioned groups can administer only when they are entitled to succeed to personal estate. (c) The right to administer is such a valuable one that the person with preferential right may in writing designate who shall act if he does not choose to act personally. (d) Any person not enumerated in the section may be appointed only when the person enumerated and entitled to letters shall designate him in a writing filed in the court."

There can be no question but that petitioner is a person beneficially interested in the estate of James Earl Bacon. She is mentioned not only in the trust, but is a person who would take the estate if a lawful and effective disposition has not been made by deceased. As is noted in Cloward, supra, we are defining persons who are entitled to inherit.

For the basic proposition that language such as contained in our Sections require the appointment of one of the persons named and in the order set forth as administrator, see In re Schwartz Estate, 179 P.2d 863, 79 Cal.App. 2d 301, Cummings Estate, 100 Cal Rep 809, 22 C.C.A. 3rd 617, In re Blackburn's Estate, 12 N.Y.S. 2d, 328, 171 Misc. 238, In re Eggsmore Estate, 206 N.Y.S. 24, 123 Misc. 548, State ex rel Fansher v. Guinoette, 58 S.W.2d 1005, 227 Mo App 902.

One of the cases decided by this court in the last ten years is The Matter of the Estate of Dallas Bedford Lewis, 19 Utah 2d 278, 430 P.2d 904. This court excused the executors from petitioning within fifty days after the death of the deceased and recognized the trustees qualified in California as the administrators of the estate in Utah.

The Honorable A. H. Ellett dissented. His dissenting opinion points out the importance that the court attaches to prompt filing of wills and documents and the qualification of persons entitled to administer. Judge Ellett was of the opinion that a delay of fifty days after death was inexcusable under the language of 75-3-4, U.C.A.

In the present matter, the respondent was in possession of the documents, Olographic Will and Trust, for a period of fifteen months after decedent's death and failed to come forward with the documents until after appellant had filed for appointment of herself. If Judge Ellett's argument in the Lewis case has merit, how much greater is the argument in the present case for disallowing the late respondent's petition for appointment.

These arguments were made to the trial court and he chose to ignore them and to appoint the respondent as administrator with Will annexed.

The issues made by the pleadings presented only the question of who had the right to be appointed, yet in the Findings of Fact and Conclusions of Law the trial court went far beyond said issues

and made findings on matters that were not presented by appellant nor by respondent in the answering petition seeking his own appointment as administrator.

Appellant's position is that the order appointing was erroneous and that she should have been appointed as the administratrix of the estate of James Earl Bacon, deceased, with Will annexed, and permitted to qualify for the administration of the estate in accordance with the Probate Code.

POINT II

THE TRUST AGREEMENT REVOKED THE OLOGRAPHIC WILL.

An examination of the Olographic Will and the Trust Agreement clearly shows that the Trust Agreement was subsequent in time and covered the very same subject as the Olographic Will and was intended to supersede and, as a practical matter, revoke the Olographic Will. The estate of James Earl Bacon, by the terms of the Trust Agreement, was placed in the trust and subjected to the terms and conditions of the Trust Agreement and the provisions thereof.

While the Trust Agreement could not be claimed to be a Will or effective as a testamentary instrument, since it was not executed with the formalities required for testamentary instruments, it did have an immediate effect. Parts of the estate were placed in trust and the Trustee authorized to use the proceeds and income for the support and care of Trustor and, to that degree, the Trust Agreement is an effective agreement between the Trustor and Trustee.

The Trust Agreement also contained language which is so inconsistent with the existence of a Will disposing of the property of the deceased. It shows an intention by Trustor and should have been so interpreted by the trial court as a document revoking and superseding the Olographic Will.

If the Olographic Will has been revoked, then it is appellant's position that she is entitled to be appointed administratrix of the estate of James Earl Bacon. She wishes to proceed and handle his estate in accordance with the probate statutes of the State of Utah.

There are many actions which should be taken, including publishing of notice to creditors and marshalling of assets. Appellant submits that in the marshalling of assets she would be in a position to examine and submit to the court the Trust Agreement so that its validity, effectiveness, and use as a testamentary disposition could be passed upon by the court.

Under the present orders of the court, no such test can ever be effectively mounted. The Trustee certainly will not submit to the court any propositions which will permit the court to pass upon the basic validity of the Trust Agreement under which he is empowered and acting.

It is submitted then that the appellant is the person interested in the probate of the estate of James Earl Bacon. Respondent is taking the position that there is no estate and that the Trust Agreement provides the instrument through which

the assets of James Earl Bacon will be distributed. This is outside the Probate Court's jurisdiction. There will be no supervision and there will be no requirement that the Probate Code provisions be complied with and the estate administered under the law provided for probate.

A most serious objection to the Trust Agreement being used as the document controlling the distribution of the estate of Bacon arises out of the relationship existing between George Mangum and decedent. Mangum was decedent's Bishop and spiritual counselor. He was also decedent's attorney. In addition, as Trustee, the Trust Agreement gave great practical benefits to Mangum.

A presumption of undue influence arises in a number of situations and has been recognized by this court. In re Swan's Estate, 4 Utah 2d 277, 293 P.2d 682, the burden of discharging such a presumption is discussed and the attorney and counselor for Mrs. Swan failed in their efforts to overcome the presumption.

As far as attorney-client relationship exists, additional facts that must be considered are that Mangum prepared the Trust Agreement and was the Trustee as well as the Bishop of the ward who became the chief beneficiary. The general rule set forth in 94 C.J.S., page 1093, Section 239, is as follows:

"On the other hand, it is the general rule in practically all jurisdictions that undue influence is presumed and the burden of proof shifted so as to require the beneficiary to produce evidence which at least balances that of the contestant, when, in addition to the confidential relation,

there exist suspicious circumstances, such as the fact that the beneficiary or person who benefits by the will took part or participated in the preparation or procuring of the will, or actually drafted it or assisted in its execution; but the part taken by the beneficiary must go to the substance of the testamentary act, and not to some mere formal matter, and no presumption of undue influence will be raised where the activity of the beneficiary in the preparation, drafting, or execution of the will was in compliance with the request of the testator."

The evidence indicates that Bacon had cancer and after the execution of the Trust Agreement did not return to his normal habitat or activities. For a discussion of the circumstances that must prevail where a priest was beneficiary, this court discussed at length the problem in In re Bryan's Estate, 82 Utah 390, 25 P.2d 602. Many of the principles set forth as the law of Utah in the decision are applicable here and certainly raise a question that appellant should be entitled to explore and have a day in court.

The June 19, 1975 objection was intended to raise the issues for examination by the trial court relating to the effectiveness of the Olographic Will and Trust Agreement as instruments through which probate or distribution of the estate of James E. Bacon, deceased, could be consummated. This objection has never been heard by the court. The objections were stricken without hearing.

It is respectfully submitted that the objections contained in the petition of June 19 raise serious questions and require an interpretation of the two instruments relating to the estate of James Earl Bacon.

Appellant respectfully submits that the court erred in striking her objections.

POINT III

NEITHER THE OLOGRAPHIC WILL NOR THE TRUST AGREEMENT
PROVIDE AN EFFECTIVE, ENFORCEABLE OR LAWFUL BASIS
TO GOVERN THE DISTRIBUTION OF THE BACON ESTATE.

Appellant's first position is that there is no trustee qualified by either of the two documents to take property under the laws of the State of Utah. No corporation or person is made the beneficiary of the trust, but an unidentified shifting and changing group of people are specified as beneficiaries.

It will be noted in the Olographic Will that Bacon wanted his Fourth Ward congregation to be a beneficiary, and between the time of its preparation and the time that he died, the Fourth Ward had been divided and now there was a Fourth and First Ward. This issue was resolved in the Findings of Fact and Conclusions of Law filed in the matter, though that issue was never presented by appellant in her petition for appointment of herself as the administratrix.

It will be noted that neither the First Ward nor the Fourth Ward is the named beneficiary in the Trust Agreement. A corporate sole whose identity is named as Roosevelt Ward is beneficiary. In her petition of the 19th of June, appellant denies the existence of the corporate sole, Roosevelt Ward. Whether it exists or not, it certainly is not the ward that James Earl Bacon intended to have the benefit of his estate.

This indefiniteness of identity of beneficiary is a basic and fundamental defect which makes the Olographic Will and the Trust Agreement both ineffectual. Both documents are too uncertain to be used in the distribution and control of the estate of Bacon.

It is clear that under Section 74-1-4, U.C.A. 1953, property may not be left to any entity other than a corporation or person. An unincorporated association not being qualified to accept title to property. This matter was discussed and so interpreted in Estate of Sam N. Manatakis v. Walker Bank and Trust Co., 5 Utah 2d 412, 303 P.2d 701. Respondent recognizes this problem and, as a consequence, attempted to name as beneficiary a corporate sole that was incorporated under the laws of the State of Utah in articles dated November 7, 1928. Corporation was then named Roosevelt Corporation of the Church of Jesus Christ of Latter-Day Saints. Through subsequent amendments, the name of said corporation now appears to be Roosevelt First Corporation of the Church of Jesus Christ of Latter-Day Saints. However, it does not appear to be the First Ward nor the Fourth Ward, and apparently was intended to cover the whole area encompassed in Roosevelt, Utah at the time of its incorporation.

The court, in its Findings, Conclusions and Decree, concluded that what Bacon really wanted was his home ward, Roosevelt First Ward, as beneficiary, which is not the corporate sole referred to in the Trust Agreement nor the one that actually was incorporated, but a subdivision of the early Roosevelt area that obtained the corporate sole status in 1928.

Respondent recognizes this problem and by the attempt to maneuver the corporate sole entity into the beneficiary status, admits that unless there is a corporate sole intended by Bacon to take his estate, there is lack of capacity in the beneficiary.

The American Law Institute Restatement of Trusts, Volume 2, page 249, Section 116, sets forth the rule that a person who has capacity to hold title to property has the capacity to be beneficiary of a trust of such property. Section 117 then sets forth the corollary that a person who has no capacity to take legal title to property has no capacity to become a beneficiary of a trust. Section 119, which is an exception to the last stated rule cited on page 250, indicates that unincorporated associations have the power to become beneficiaries. In discussing beneficiaries who are in an unincorporated association, on page 251, Illustration No. 2, fits exactly the situation in the Bacon Trust. What Bacon indicates in his trust is that the money be used for expenses of a ward, unincorporated association, and for whatever expenses of the ward the Trustees deem appropriate, but not the usual operating expenses of a ward. Illustration No. 2 reads as follows:

"A bequeaths \$10,000 to B in trust to use the income forever to pay the running expenses of the C college chapter of the Alpha Omega fraternity. The fraternity is an unincorporated association comprised of college students elected to membership from time to time. The C college chapter is an unincorporated branch of the fraternity. The trust is invalid."

Appellant's second position is that the Trust Agreement and the Olographic Will both are basically defective in that the purposes set forth in both documents are so indefinite and so

uncertain that the court has no basis on which it can control the use and distribution of the estate.

It is certainly not true that James Earl Bacon wanted his estate divided up among the members of his First Ward and distributed to each of them pro-rata as of the time of his death. Neither the Olographic Will nor the Trust Agreement provides for that. He did not specify that there would be any particular purpose, and he definitely did not want it used for the ordinary use that members of the ward would receive as ward members. He wanted it used for some other purpose. Just exactly what that purpose is is not set down in either the Olographic Will nor the Trust Agreement.

The Law of Trusts seems to be clear that for a trust to be effective, there must be a standard set down in the Trust Agreement that can be enforced by the courts charged with enforcing such instruments. Restatement of the Law of Trusts, Chapter 2, Section 25, page 69, sets down unequivocally:

"No trust is created unless the settlor manifests intention to impose enforceable duties."

See also Ponzelino v. Ponzelino, 238 Iowa 201, 26 NW 2d 330, which sets down the rule that an alleged trust deed is invalid because no enforceable obligation is imposed upon the plaintiff as Trustee.

It is respectfully submitted that neither the Olographic Will nor the Trust Agreement impose any enforceable obligation on the trustees or committee to be organized by trustee under the

terms of the documents. Appellant submits that the trust is an invalid trust in both documents and that the property of James Earl Bacon should then be distributed under the laws governing intestacy and to his natural heirs.

It will be noted that there have been attempts by legal counsel of the Church of Jesus Christ of Latter-Day Saints to obtain title to the James Earl Bacon estate in the First Presidency of the Church, the only organization entitled to hold title to the property. Bacon specifically and categorically refused to do this. The letter from counsel for the Church and the proposed Will are both before the court and it can see, without any possibility of equivocation, that Bacon did not want that to happen. The letters and documents would indicate that what James Earl Bacon had in mind was providing a rest home in Roosevelt where persons such as himself and his sister, Prudence Parrish, could be cared for in their own home environment rather than being taken some other place out of Roosevelt into strangers' hands where persons other than of the L.D.S. faith would be charged with their care. This purpose, however, is not set down in either the Olographic Will or the Trust in a manner that would give a court or any person control and direction so that his desires could be accomplished.

CONCLUSION

It is respectfully submitted that these documents fail as a Will and as a Trust Agreement and the estate should be distributed

to the heirs of James Earl Bacon under the Probate Code. That appellant should be appointed administratrix of the Bacon Estate and proceed with probate under the Probate Code.

Respectfully submitted,

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