

1979

In The Matter of The Estate of Annie B. Gardner, Aka Annie Butler Gardner And Gloria G. Fenton And Tess G. Sorenson v. Gaylord W. Gardner : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

IN THE MATTER OF THE ESTATE
OF ANNIE B. GARDNER, aka
ANNIE BUTLER GARDNER,

Deceased.

Case No. 16418

GLORIA G. FENTON and
TESS G. SORENSON,

Appellants,

v.

GAYLORD W. GARDNER,

Respondent.

APPELLANT'S BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE CHRISTINE M. DURHAM, PRESIDING

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STATEMENT OF THE KIND OF CASE

The holographic will of Annie B. Gardner, dated March 11, 1972, was submitted for probate in June of 1976, and upon hearing, the Honorable Bryant H. Croft, sitting in the Third Judicial District Court, denied probate of the will.

The Executor appealed Judge Croft's order (see In The Matter of the Estate of Annie B. Gardner, deceased, 561 P.2d 1079 on the question of admissibility of Will.)

Judge Croft's order was reversed and the matter remanded with directions to admit the will to probate on proof of its authenticity.

The will was admitted to probate.

Upon petition of Gaylord W. Gardner, a grandson of the deceased, a hearing was set to interpret the will. After hearing arguments of counsel, Third District Court Judge Christine M. Durham ruled:

"...and it appearing from the language of the Will that the testator intended to impose a condition precedent on all bequests and devisees contained in the Will, and the parties having heretofore agreed that the condition precedent has not taken place or been fulfilled, and the court having ruled as a matter of law that the Will fails to make any disposition of decedent's property and that disposition of decedent's entire estate by Will has failed..."

and therefore ordered the estate to be disposed of in accordance with the Utah Laws of Intestate Succession.

The Administratrixes filed timely notice of appeal.

DISPOSITION BY LOWER COURT

The District Court, without making Findings of Fact made the legal conclusion that disposition of testator's property was subject to a condition precedent which had not taken place and, therefore, disposed of no property. The court ordered the estate to be disposed of under the Laws of Intestate

RELIEF SOUGHT ON APPEAL

The appeal seeks reversal of Judge Durham's order and remand with instructions that disposition be made in accordance with the intent of the testator.

STATEMENT OF FACTS

On March 11, 1971, at Salt Lake City, Utah, Annie B. Gardner drafted a holographic will as follows:

"To Whom it may concern:

"It is my intent that this be my will. My name is Annie Butler Gardner. I am married to Wilford W. Gardner. We had three children, Tess Gardner Sorensen, Wilford Butler Gardner and Gloria Gardner Fenton. Wilford our son has already passed away. My husband and I have already made many gifts to Wilford's widow and his six children since Wilford's death so I am intentionally omitting them in this will because they have already be provided for. Also I am intentionally omitting the children of our daughter Tess and also of our daughter Gloria, because it is my intent to leave whatever I am going to leave to our daughters Tess and Gloria and let them take care of their children."

"In the event my husband precedes me in death I leave all I possess (sic) to our daughters Tess Sorensen and Gloria Fenton, to be evenly divided between them and their children shall take over their mothers share if either Tess or Gloria have passed on."

"I direct that our son-in-law Pat Fenton shall be executor of my estate and serve without bond. If he has passed on then our daughters Tess Sorensen and Gloria Fenton or the survivors thereof be executor and serve without bond."

"This will revokes all former wills.

"I love all of you."

"Your wife and mother Annie Butler Gardner
1455 Harvard Ave.
Salt Lake City, Utah"

Annie B. Gardner died on March 28, 1976, with her husband Wilford W. Gardner surviving.

Mrs. Gardner left property both real and personal in Salt Lake County, State of Utah.

She was also survived by two daughters, Tess G. Sorensen and Gloria G. Fenton and their offspring. Her son, Wilford Butler Gardner had died before the will was written, leaving six surviving children.

The will was filed for probate and probate was denied by Judge Bryant H. Croft. The then executor appealed to the Supreme Court of Utah and the Supreme Court remanded, ordering the will to be admitted to probate. (See In the Matter of the Estate of Annie B. Gardner, 561 P.2d 1079) The will was then interpreted by Judge Durham as invalid (R. , order of the lower court.)

ARGUMENT

POINT I

THE WILL IS UNAMBIGUOUS AND EFFECTIVELY DISPOSES OF MRS. GARDNER'S ESTATE AND MAKES CLEAR HER TESTAMENTARY INTENT.

Mrs. Gardner died prior to the effective date of the present probate code, July 1, 1977. Titles 74 and 75, Utah Code Annotated 1953, as amended, were in effect at the death of the testator.

Mrs. Gardner's intent in her holographic will seems to be clear (See 74-2-1; 74-2-2; 74-2-3; 74-2-5; 74-2-7; 74-2-9; 74-2-10; 74-2-11 and 74-2-15, Utah Code Annotated 1953, as amended)

The will consists of three paragraphs with Paragraph 1 after declaring the instrument to be her last will, sets forth her marital status, names of heirs at law and specifically omits from her will all but her daughters Tess and Gloria.

She omits her deceased son Wilford's widow and six children:

"My husband and I have already made many gifts to Wilford's widow and his six children since Wilford's death so I am intentionally omitting them in this will because they have already been provided for."
(Will, ¶1)

She omits the grandchildren of her daughters Tess and Gloria in the following language:

"...because it is my intent to leave whatever I am going to leave to our daughters Tess and Gloria and let them take care of their children." (Will ¶1)
(Emphasis ours)

She acknowledges her marriage to Wilford W. Gardner and leaves him nothing. (Will ¶1)

She acknowledges her bequest by the words:

"...it is my intent to leave whatever I am going to leave to our daughters Tess and Gloria..."
(Will ¶1) (Emphasis ours)

The trial court in its Conclusions of Law gives no thought or mention to Paragraph 1 of Mrs. Gardner's will but concludes that the opening statement of Paragraph 2 is a condition precedent to the passage of her estate under her will.

Section 74-2-5, Utah Code Annotated, supra, provides:

"All parts to be harmonized, if possible.--All the parts of a will are to be construed in relation to each other, and, if possible, so as to form one consistent whole; but where several parts are absolutely irreconcilable, the later must prevail."

Cannot the two paragraphs of the will be construed together, and even more reasonably, as a non-lawyer testator having the foresight to provide for contingencies in the future? That is to construe Paragraph 1 of Mrs. Gardner's will:

"...it is my intent to leave whatever I am going to leave to our daughters Tess and Gloria..."

See 74-2-15, U.C.A. 1953, defining "all" property:

"A devise or bequest of all the testator's real or personal property in express terms..."

Then in the second paragraph, but in the event my husband dies before me, or as the will puts it, "precedes me in death I still

leave all I possess to our daughters Tess Sorensen and Gloria Fenton," (which would include any property which might come to the testatrix through a joint tenancy with her husband or a bequest from his estate).

To fortify this reasoning, she goes one step further and provides that in the event Tess or Gloria should predecease her that their children should take their deceased mother's share.

This is not one of the types of will in which a bequest is left to A and in the event A predeceases me to B and C, but a situation where the testatrix leaves everything initially to B and C and that in the event A predeceases her, she still leaves everything to B and C. This includes any windfall which may come from A.

POINT II

THE INTENTION OF THE TESTATRIX IS CLEAR, UNAMBIGUOUS AND SHOULD BE GIVEN EFFECT.

Both the applicable statutes and the case law require that the intention of the testatrix must control where possible (74-2-1, U.C.A., 1953); that all parts of the will must be harmonized if possible (74-2-5, U.C.A., 1953); that all provisions are to be given effect (74-2-9, U.C.A., 1953) and that intestacy is to be avoided (74-2-10, U.C.A., 1953). In

addition thereto, "Conditions precedent" are defined by 74-2-30, U.C.A. 1953.

The Utah case law is consistent with the Utah statutes in requiring that the intent of the testator control and that the intent be determined from the four corners of the document. See In Re Poppleton's Estate, 34 Utah 285, 97 P. 138, and the language in Auerbach v. Samuels, 9 Utah 2d 261, 342 P.2d 879 where the court states at Page 266 of the Utah citation:

"A rule for the interpretation of wills, to which all other rules must yield, is that the intention of the testator must control.¹ (74-2-1, 74-2-2, U.C.A. 1953) This intent must be ascertained from the four corners of the will, unless it is ambiguous.² (95 C.J.S. Wills §591)"

Reading the entire will, only one intention can be sensibly arrived at, that being that regardless of contingencies, the testatrix intended to leave all of her property to her daughters Tess and Gloria.

Paragraph 1 of the will, after disinheriting the decedents of her deceased son (see 42-2-35, U.C.A. 1953) she devises:

"...because it is my intent to leave whatever I am going to leave to our daughters Tess and Gloria..." (72-2-15 U.C.A. 1953)

The intent of the testatrix can be construed in only one way, and that intent was that upon her death everything was to go to Tess and Gloria.

This being a holographic will, drafted by a lay woman, she attempted by Paragraph 2 to provide for various contingencies and set forth therein that if her husband predeceased her it would not change her intent; that she still wanted to "leave all I possess (sic) to our daughters Tess Sorensen and Gloria Fenton..."

POINT III

JUDGE DURHAM DID NOT MAKE FINDINGS OF FACT AND HER CONCLUSIONS OF LAW WERE ERRONEOUS.

Judge Durham made no Findings of Fact but only Conclusions of Law, and therein concluded from the Will and the language of the Supreme Court, admitting that she was influenced by the language of Justice Ellett (Estate of Annie B. Gardner, 561 P.2d 1079, supra, see T.14).

That language is merely dicta, the construction and interpretation of the Will was not an issue on appeal, the issue being: Did Third Judicial District Court Judge Bryant H. Croft err in denying the will to probate?

It is apparent from Justice Ellett's language that he did not consider the devising language in Paragraph 1 of the will:

"...it is my intent to leave whatever I am going to leave to our daughters Tess and Gloria..."

in conjuncture with 74-2-15, U.C.A. 1953 which passes "all" property at the time of death.

It would be appropo to point out that Judge Durham, having made no Findings of Fact, but only Conclusions of Law, that the rule required the appellate court to construe the evidence most favorable to the finding of the trial court does not apply, this court having held in Ellerbeck v. Haws, 1 Utah 2d 229, 265 P.2d 404, at page 233 of the Utah citation:

"The rule that the evidence and findings will be reviewed in the light most favorable to the determination of the trial court does not apply to the interpretation of the language or legal effect of documents, nor to the application of principles of law, but only to questions of fact."

Ellerbeck, supra, at page 234 of the Utah citation:

"A will is to be construed according to the intention of the testator"¹⁰ (74-2-1, U.C.A. 1953) and "of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy."¹¹ (74-2-10, U.C.A. 1953)"

CONCLUSION

There can be only one conclusion, that the purpose of a will is to dispose of a testator's property as "willed or devised by the person signing the instrument".

It is clear that Mrs. Gardner wanted the property she possessed at death to go only one place, to her two daughters, Tess and Gloria. She specifically omitted the wife and descendants of her deceased son, Wilfred, from her largess. She acknowledged her marriage to Wilford W. Gardner, but left him nothing. She expressed her intent to leave "whatever I am going to leave to our daughters Tess and Gloria", then being a person untrained in the law, she attempted to provide for possible

contingencies, those being the death of her husband or the death of one or more of her daughters before her own demise and in each case left her estate exactly as it was in Paragraph 1 of her will.

Read Paragraph 1 independently from Paragraph 2 and it leaves the estate of the testatrix in exactly the same persons as if the two were read together, namely to Tess and Gloria.

Sections 72-2-9 and 72-2-10, Utah Code Annotated 1953, as amended, require giving effect to all provisions of the will and to avoid intestacy.

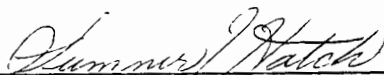
It is respectfully submitted that this court should reverse the lower court and remand with instructions to distribute the estate to the two daughters of the testatrix as was her intent.

Respectfully submitted this 17th day of July, 1979.


SUMNER J. HATCH
Attorney for Appellants

CERTIFICATE OF DELIVERY

I certify that on the 18th day of July, 1979, a copy of the foregoing was delivered to H. Ralph Klemm, Attorney for Respondent, 510 Ten Broadway Building, Salt Lake City, Utah 84101.



SUMNER J. HATCH