

1953

In the Matter of the Estate of Emma G. Buttars : Objections to Rehearing

Utah Supreme Court

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**IN THE SUPREME COURT OF THE
STATE OF UTAH**

In the Matter of the Estate)

of)

Case No.

7945

EMMA G. BUTTARS,

**)Objections to
Rehearing**

deceased.)

**Appeal from the District Court of Cache County,
Utah**

Respectfully submitted,

L. E. Nelson

Geo. D. Preston

Attorneys for Respondent

FILED
OCT 14 1953

Clerk, Supreme Court, Utah

**IN THE SUPREME COURT OF THE
STATE OF UTAH**

**In the Matter of the Estate
of
EDNA G. BUTTARS,
deceased**

Case No. 7945

OBJECTIONS TO REHEARING

TO THE HONORABLE SUPREME COURT OF UTAH:

We received the brief of Contestants and Appellants on their application for rehearing just prior to the close of business on Wednesday, October 14, 1953. In order to register our objections to granting a rehearing we hasten to submit our objections, without waiting the expenditure of time for printing such objections.

Counsel for Appellants carries his reasons in summary form in the prayer beginning

at the bottom of page 12.

Attention is called to the parallel case of *In Re Lavelle's Estate*, 246 P. 2d 372, decided by this Court on September 11, 1952. This Court did exactly in that case as it has done in our case. One circumstance, common to both cases is worth mentioning, as conclusive against the contentions of Appellants.

From the Lavelle case: "As to the actual execution of this third will: Two or three days prior thereto, Immerthal, apparently at testatrix's request, phoned an attorney previously unknown to her, and asked him to call on her at the hospital. The attorney went there, was introduced to her by Immerthal, who then left and never thereafter appeared during any of the further conversations concerning the will, nor at the time of its execution. At that first meeting, Mrs. Lavelle discussed her affairs and directed that her entire estate be willed to Monte Hogg."

From our case: "The record discloses that at the time the will was made testatrix was about 80 years old and had been brought to the lawyer's office by Wallace Butters, her youngest son, who was named executor in the will. In order to reach the attorney's office she had to ascent a steep flight of stairs. After reaching the office, Wallace left her alone there and went down to the street while she transacted business she came for and then came back and got her

when the attorney went down and informed him his mother was ready to leave."

From the Lavella case: "Viewing the evidence and every fair inference therefrom most favorably to the finding of the trial court, we cannot find it sufficient to support the conclusion reached that the third and last will was induced by undue influence."

From our case: "The evidence related above is proof that the testatrix was eccentric in her actions and forgetful at times of some things, but is utterly insufficient to sustain the contestants' burden of proving by a preponderance of the evidence that she lacked testamentary capacity at the time she executed the will. "

Both cases upheld the wills. These objections are not meant to be exhaustive, but are prepared in haste to be of what assistance is possible on short notice. Additional authorities will be furnished if desired.

Respectfully submitted

L. E. Nelson

Geo. D. Preston

Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate

of

EMMA G. BUTTARS,

Deceased.

Case No. 7945

PETITION FOR
REHEARING on
behalf of Contest-
ants and Appellants.

Appeal from the District Court of Cache County, Utah

FILED
OCT 10 1903
Clerk, Supreme Court, Utah

Respectfully submitted,

George C. Heinrich

Attorney for Contestants and Appellants.

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*Point No. 1. After stating in the opinion rendered under date of Sept., 26, 1953, that this is a law case, the court nevertheless in the last two paragraphs of its opinion sets out testimony of respondent and weighs it against testimony of appellant, thus clearing invading the function of the jury.

**POINT No. 2: The court in its opinion not only invaded the province of the jury in weighing the evidence, but it also entirely overlooked from its consideration a great quantity of evidence produced upon the trial for the consideration of the jury, none of which is referred to in its opinion.

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate

of

EMMA G. BUTTARS,

Deceased.

Case No. 7945

PETITION FOR
REHEARING on
behalf of Contest-
ants and Appellants.

Comes now the contestants and appellants herein and hereby petition the above Honorable Court for a rehearing for the following reasons and grounds upon which it is most respectfully submitted the court erred, to-wit:-

ARGUMENT

Point No. 1: After stating in the opinion rendered under date of Sept., 26, 1953, that this is a law case, the court nevertheless in the last two paragraphs of its opinion sets out testimony of respondent and weighs it against testimony of appellant, thus clearing invading the function of the jury.

It is indisputable that in *re Hanson's Will*, 50 Utah, 207, 167 Pac. 256, *In re Hanson's Estate*, 87 Utah 580, 52 Pac. 2d 1103, and in *re Swan's Estate*, 51 Utah 410, 170 Pac. 452, all hold that whether or not a testator was of sound and disposing mind is a law case and so a question of fact for the jury upon competent evidence, and that

these cases prescribe and define what sort of evidence is admissible. In fact, in the Swan case, *supra*, at page 457 left-hand column, this court says:

“As before stated, if there is any substantial evidence to support the findings, our duty becomes fixed and absolute, no matter how much or what kind of evidence there may be on the other side.”

It is submitted that the two last concluding paragraphs of the opinion written in the face of evidence in the record flatly contradictory and which the court apparently entirely ignored. The statement that the “uncontradicted testimony of friends, neighbors and trademen was that their contacts with testatrix even after her illnesses she always appeared neat and understood what she was talking about” etc. is not a fact. Evidence in direct conflict to this statement was given by Melvin, a son, who at all times knew his mother intimately, and by her daughters, Margaret and Maybell, both of whom lived close-by, visited with their mother often, assisted in her care, who were literally at all times in and out of her home and all of whom observed their mother’s every change both mentally and physically over the years. In fact, Melvin, in great detail recited and described the failing condition of his mother’s health from her first illness through her second illness both of which occurred before she signed her so-called will, then gave it as his opinion that his mother’s mental condition was one of incompetence, even on the date the will was signed, and both of his sisters, Margaret and Maybell, in substance gave the same conclusion. A mere cursory examination of the testimony of such “friends and neighbors” who testified, being Dave Sparks, Bishop Raveston, S. Goodey, and Mrs. Thompson, will show that their testimony was very unsatisfactory and very little left of it after cross-examination. A jury could hardly be expected to follow such testimony as against the other positive testimony just mentioned given on behalf of the children

of deceased. The opinion then further stated "and that the doctor who attended her testified that in his opinion she was competent during all time except in March, 1952." It is submitted that the doctor's testimony is the flimsiest of all and his testimony is respectfully referred to. Such a statement on the part of the doctor cannot be correct because he only saw the deceased occasionally. He knew absolutely nothing about her condition when the will was executed. Then, too, his testimony was flatly contradicted by Melvin, Margaret and Maybell, and the jury could if they preferred accept their testimony rather than that of the doctor according to the specific holding in the Swan case, *supra*. At any rate, this is another conflict in the testimony which this court ignored in its opinion, thus overriding the verdict of the jury on substantial evidence in conflict which the jury had a right to resolve. Two "tradenmen" testified on behalf of proponents, Mrs. Allen of Logan and a Mr. Bowles a linament salesman. The linament salesman saw the deceased periodically and so could know very little about her; and his testimony is also contradicted. Mrs. Allen, also saw deceased very infrequently, and in fact her testimony reveals that she did not even know deceased very well. The deceased at most was a very casual and infrequent customer. In this that she did not even know deceased very well. In this connection it is a singular fact that the last time deceased was in Mrs. Allen's store she was accompanied by her daughters Maybell and Archulius and went to the store to purchase a dress to attend to her deceased son, Ira's, funeral, and then she had forgotten entirely that her son had died. If testimony was desired on the part of tradesmen, then it may appropriately be asked, why did not proponents obtain the testimony of the general storekeeper at Clarkston, where the record shows most of the groceries, etc. were purchased? The obvious answer is as stated by contestants, deceased's condition was such that they did not want it generally known and that she stayed in the home. At any rate, the above shows that there was a

very decided conflict in the testimony, all of which this court also entirely overlooked so far as can be ascertained from its opinion because there is no mention made of it anywhere. Hereafter, petitioner will refer to the testimony of the subscribing witnesses to the will mentioned in the last paragraph of its opinion.

POINT NO. 2: The court in its opinion not only invaded the province of the jury in weighing the evidence, but it also entirely overlooked from its consideration a great quantity of evidence produced upon the trial for the consideration of the jury, none of which is referred to in its opinion.

In its opinion, this Honorable Court gives the following quote from *In re Hanson's Estate*, 87 Utah 580, 52 Pac. 2d, 1103:

"A person may not be capable of conducting ordinary business because not trained in it or even if incapable mentally may in cases be capable of making a simple will. The true test is as to whether the testatrix had sufficient mind and memory at the time of making the will to remember who were the natural objects of her bounty, recall to mind her property, and dispose of it understandingly according to some plan formed in her mind."

Following this the court cites *In re Swan's estate*, supra. It is significant that the Swan case states that when a will is made by a person who has reached the age of upwards of eighty years and it is shown that the usual infirmities of old age such as hardening of the arteries and consequent loss of memory, etc., have supervened, the question of whether the testator possessed the legal capacity to make a will at the time of its execution is never free from difficulty and is nearly always shrouded more or less in doubt. The opinion just handed down by this court recognizes that the deceased was of the age of eighty

years when she executed her so-called will and that when she was seventy-five years of age she became very ill and hospitalized and was suffering from kidney troubles, high blood pressure and hardening of the arteries, and that her memory became poorer and that gradual deterioration continued to the very day of her death. Such, it is submitted is the very situation prevailing in the Swan case, *supra*, and the theory upon which the case at bar was tried and upon which facts the jury decided the issues in favor of contestant.

Now applying the evidence to the last quote: The Swan case holds that it is the duty of the subscribing witnesses not only to witness the signature of testatrix, but they must also pass on her testamentary capacity. At the outset it must be remembered that this so-called will was made within 30 days after the death of her eldest son, David, and whose death Emma G. Buttars could not fully realize.

The two witnesses in the case at bar were the attorney who drew the will and his stenographer. Neither ever saw Emma G. Buttars before. She was only in the office not more than 30 minutes at the very most. She had been brought there by her son Wallace, who Melvin testified simply "led his mother around." The only time the stenographer was in Mrs. Buttars presence was when the attorney dictated the will and then when she returned the typewritten copy. Preparation of the will was a hurried-up affair. The attorney did not remember much of anything about her according to his own testimony. He did not even remember whether or not she had with her a memorandum to recall who the natural objects of her bounty were. The record of both of these witnesses is respectfully referred to. Admittedly neither of them knew much about her. The jury could well have concluded that these witnesses did not pass upon her testamentary

capacity, or if they did, that their testimony taken in connection with the other testimony as to the mental condition of deceased, they disagreed with the judgment of the witnesses to the will, as they had a right to do under the Swan case, *supra*. At any rate here was another conflict which the jury had a right to and did resolve against the validity of the will. Nor is this a case where any one ever considered Emma G. Buttars as an eccentric person. Her whole life and the whole record before this court is exactly to the contrary. The whole picture presented by the record is that before her illnesses she was a resolute determined person, looked after her affairs, with a will of her own and a strong believer that everybody should earn what they received, and that each of her children should be treated equally, even Wallace and Hattie testified to this. In fact, from the time of the death of her husband and during all the times she was in good health she never distributed or gave anything to any of her children. But after she became ill, it affected her, her condition worsened and worsened to the very day of her death. She was never the same herself again according to all of her children who testified for contestants. Gradual deterioration had set in and continued on so that at the time of the execution of her will, and after, she was never in full possession and control of her faculties. It is again submitted earnestly that the case is in all respects similar and parallel with the facts in the Swan case, *supra*. and that it is not the case of a person eccentric in her actions and forgetful at times of some things as stated in the last paragraph of the court's opinion, nor is such a contention anywhere mentioned in the entire record. And the jury upon a very sharp and substantial conflict in the testimony decided otherwise.

As to "recall to mind her property." Even attorney Daines said she did not discuss her property with him. There is therefore no evidence at all on the part of propon-

ents that she fulfilled this requirement for making a will, that she was able to "recall to mind her property." On the other hand, contestants' testimony is positive. Melvin testified that she did not know what she had, worried about income or enough to live on when she in fact had plenty, and that she did not know her property from that of others. The further testimony as to her condition with reference to this point is that all of her children, Orison (now deceased) Wallace, Hattie, Melvin, Maybell, Margaret and Gover, called a meeting because her mental and physical condition was such that she could not be left alone. They did not even want her condition known. So they did not want a guardian appointed. She did not go out of the house, and she did not even know that her daughters were being paid for caring for her out of her own money. She sold one tract of land to Archulius for \$500.00, one fourth its real value. Gave Thatcher Bros. Bank stock (now First Security Stock) to Archulius because, as stated in a memo, that the stock Archulius had received from her father's estate proved eventually to be worthless, and then for the same reason gave Archulius a 48 acre tract of land, and then Archulius said, and it is not denied by her, that she might just as well have had the 160 acre tract instead of just the 48 acre tract. Is not such testimony more reliable and trustworthy than that of "friends, neighbors, trademen" or even that of "the doctor" and surely does it not show lack of capacity to make a will? Small wonder attorney Daines testified that she did not discuss her property with him. The plain truth of the matter is that she could not comprehend her property at the time of execution of her will, and the jury after a three day trial so concluded she could not, and the jury's verdict is supported by an abundance of evidence. The jury's verdict should be upheld by this court.

And the next requirement of the above quote is: "and dispose of it (the property) *understandingly* according

to some plan formed in her mind". Let us now take a look as to how this requirement has been fulfilled according to the evidence in the record. Undeniably, the record shows deceased had and accumulated considerable property at the time she made her so-called will; that from the date of the death of her husband to the time of making her will, March 22, 1945, she disposed of none of it, and that she always said, even in her will, that her children shall all be treated alike. It certainly cannot be disputed that the record is replete with evidence that at the time of making her will she could not "recall to mind her property", some of which evidence is alluded in the preceding paragraph..

In the second paragraph of her will, she gives her grandchildren, the children of one of her very fondest son who was deceased, and of all of whom she could be very proud because they had each and every one of them, the grandsons, either served honorably in the Armed Forces, fulfilled a mission, or in some instances both, each the sum of \$1.00, because she had loaned to her deceased son the sum of \$1500.00 twenty-seven years prior when there is evidence to the effect that the loan had been repaid, and so marked by deceased herself (Cont. Ex. 1) that never once did any one, not even Wallace, ever hear his mother ever say that her deceased son Daniel was owing anything and in the face of undisputable evidence that Daniel was doing well at all times financially. The mortgage security itself had never even been recorded. It must certainly be plain that deceased would not have left her son Daniel, or his heirs, out for any other reason except the notion that he was still indebted when he was not. From such testimony in the record which the jury listened to closely for three full days, can it be said that the deceased "*understandingly*" made the bequest contained in this second paragraph? The jury no doubt decided this otherwise.

And in the next paragraph (3) she directed that the rest, residue and remainder of her estate be given in equal shares to the remainder of her children; and in the fifth paragraph she named Wallace as executor, so to serve without giving bond. This statement that she wanted to treat all of her children “equally” or “alike” is in keeping with what she said all her life, but it is submitted that when the statement was made in the will it amounted to nothing more nor less than a bare statement, because by this time, after two serious illnesses, her mental and physical condition in the language contained Inre Swan’s Estate, was such that it must have caused the jury to inquire into deceased’s “lost memory” and to inquire, “how far the faculty of understanding has lost its original strength and vigor as regards those facts of personal history of testator, which enter into and form a part of the planning and execution of a rational, fair, and just testament”. How “*understandingly*” Emma G. Buttars formed this plan is answered by the fact that commencing six days after the execution of a so-called plan (her will) she conveyed one 60 acre tract of land to Wallace, for which purpose he brought her to Logan, that on April 9, 1945, she gave bonds and stocks of considerable value to Hattie and Archulius because, as she says, (and this was after doing nothing about it from 1917 to 1945) stocks distributed to them out of their father’s estate eventually turned out to be of no value, and then for the same reason gave Archulius a 48 acre tract of land. See the brief of appellants for a list of the transfers and conveyances, as a result of which within beginning within six days after deceased was supposed to have decided to have formed a plan to “dispose of it (her property) *understandingly* according to some plan formed in her mind”, for no explainable reason on earth other than the result of her own failure of health by reason of her advanced age and the impact of her illnesses, she favored Wallace and Archulius with substantial preferences, Wallace getting more than Archulius and

Archulius getting more than Hattie, and all three of these being favored over the other children. So that within a few days after “*understandingly*” willing her estate according to a plan formed, equal to her children, the so-called plan became unequal and unjust to a shameful degree, and it is submitted in a way that Emma G. Buttars never for a moment would have permitted had she been her real former self. Nothing was left of her will except to dispose of what was left and to permit Wallace to act as executor in doing this. The writer of this brief earnestly contends that this action on the part of deceased viewed in the light of the testimony of the condition of the deceased at the time she executed her so-called will, cannot be dismissed in the language of this court contained in the paragraph, “and that after she made her will she disposed of a good portion of her property after a lifetime of careful saving is no proof that at the time of making her will she lacked testamentary capacity”, and that in view of all of the evidence, conflicting and otherwise, which the jury had the right to resolve, that “The court therefore did not err in admitting the will to probate in view of the *complete lack of evidence* that at the time of making the will testatrix lacked the mind to understand what she was doing”. Such a statement completely ignores evidence produced on the part of contestants. Finally, it is seriously urged that a grave injustice will result if this will is permitted to stand, one that testatrix would not herself permit it if she could help herself. If such a will is permitted to stand, then older people and their heirs are helpless to protect them.

WHEREFORE, contestants submit that the decision rendered by this court is upon its face in error in that it weighs the testimony of proponents against that of the contestants, contrary to the authorities cited therein, that it omits from its consideration entirely substantial conflicting evidence given by contestants, and that the decision

is otherwise in error for the reasons given in thie petition and the brief of contestants referred to herein which renders its judgment approving and sustaining the lower court and setting aside the verdict of the jury highly inequitable and unjust, and so earnestly and seriously request a rehearing and reconsideration of the entire cause based on both the facts and the law applicable thereto; that such request in indeed in all respects similar to a like request made and granted in re Swan's Estate, supra, and which resulted upon further consideration of this court in an opinion upholding the trier of the facts based upon evidence almost identical to that produced in the case at bar.

Respectfully submitted,
George C. Heinrich
Attorney for Contestants and Appelants.