

1953

National Trust Company, Ltd. V. Helen Duys et al : Reply Brief of Contestant Respondents

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

In the Matter of the Estate of FLORENCE
P. HOWARD, also known as F. P.
HOWARD, *Deceased.*

NATIONAL TRUST COMPANY, LTD.,
as Administrator with the Will Annexed
of the Estate of Robert Bown Ferrie, De-
ceased, and COLINA FERRIE,

*Petitioners in Intervention
and Appellants,*

— vs. —

HELEN DUYS, ETHEL FORREST,
ERNEST F. HOWARD, THE PROTES-
TANT BOARD OF SCHOOL COMMIS-
SIONERS and MCGILL UNIVERSITY,
MILDRED BLACK, HILDA BLACK,
ROGER BLACK, RACHEL HELPS and
WALKER BANK & TRUST COMPANY,
a Utah Banking corporation, Executor of
the Estate of Florence P. Howard, also
known as F. P. Howard, Deceased,

Respondents.

REPLY BRIEF OF CONTESTANT RESPONDENTS

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FILE
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Clerk, Supreme Court,

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the Estate of Florence P. Howard, also
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Respondents.

Case No.
7970

REPLY BRIEF OF CONTESTANT RESPONDENTS

INTRODUCTION

In answering the Brief of Appellants on Inter-
mediate Appeal, represented by Mr. Rice and associates,
we shall in order to avoid confusion, refer to such Appel-
lants as Intervenors. This being the answering Brief of

the original Contestants, Helen Duys, Ethel Forrest and Ernest F. Howard, we will denominate it the Contestants' answering Brief, and are authorized to state that Gustin, Richards and Mattsson and Fred H. Evans, representing Respondents, The Protestant Board of School Commissioners and McGill University, join in this Brief. As to point I of Intervenor's Brief, we make no comment, since that is more properly the responsibility of the attorneys for the Executor.

POINTS II AND III — INTERVENORS' BRIEF

We discuss jointly points II and III, since they involve but one question, namely, the right to intervene on the basis attempted.

May it be kept in mind that on May 14, 1952, the Court admitted to probate four instruments as constituting the Last Will and Testament of Decedent (R. 33). On November 12 and within the six months period allowed by law, these Contestants filed contest attacking the validity of the order admitting to probate the instruments of 1939 and 1940 (R. 131). Therefore, on November 15 when the six months limitation had expired, the order admitting to probate the 1949 and 1952 instruments became final and uncontestable, and they together constituted the Last Will of decedent if Contestants were successful in their position. Otherwise, the order was final as to all four instruments, and they together constituted the Last Will. Thereafter, on or about December 6, Mildred Black, on behalf of herself, her brother and two sisters, filed an instrument denominated "Appearance and Answer" (R. 62). It is an inartificially drawn

document, probably prepared by herself and constitutes in its wording more of an attempt to render an opinion as to the Testatrix's intention. In any event, we assume it should be considered an answer to the will contest and in response to the citation served on these parties when the contest was initiated. In no event can it be a contest as to the 1949 and 1952 instruments since the order of the court in relation to these had already become final. Intervenor and the Blacks occupy the same position so far as the starting of a new will contest is involved.

On January 14, 1953, Intervenor filed a Motion to Intervene on the basis of an "Answer and Cross Complaint in Intervention" filed concurrently (R. 141, 162). The first part of this instrument constitutes an answer to the contest, and as such, could properly have been filed by any interested party without any order of court except as to its lateness, as to which no question was raised and except as it attacked a Court order already final.

However, Intervenor did not choose to do this. By tying the two together and making a Motion to Intervene in order to start a new will contest after the period of limitations had run, they sought to do indirectly what they obviously could not do directly.

Their motive is obvious. If they could throw out all four instruments, they, as cousins once removed, would inherit. If they could throw out all except that of 1952, which contained no residuary clause, they would at least come in for the residue. It did them no good to go along

with the timely contest, since the order admitting to probate the 1949 and 1952 wills, now final, disposed of Mrs. Howard's estate.

May we emphasize that Intervenors had no interest whatever in the contest before the court. They wanted to start a new contest, and instead of saying so, which would have made the impossibility of their position obvious, they attempted to come in as parties in the pending contest. When, most properly, not permitted to do so under the instrument they proffered, they now take the position that any interested party may intervene in a pending action. Assuming Intervenors had filed an answer to the contest, as they properly might, and then attempted to intervene under their cross complaint, the defect would have been obvious. They would have been in court as to the pending contest. They would have been out as to the cross complaint on the ground that they were starting a will contest attacking an order of the court, which was absolutely final. Having joined the two to serve their purpose, they are hoist by their own petard and now complain that they had no day in court to pursue their objective of attacking the 1949 and 1952 instruments. Utah decisions at least slant at this question in the cases of

Dayton v. Free, 162 Pac. 614, 49 Ut. 221 ;
and

Price v. Hanson, 206 Pac. 272, 60 Ut. 29.

They there indicate that the question presented is as to whether the petitioning Intervenors could have started a lawsuit of their own along the lines sought by inter-

vention. Certainly, on January 14, 1953, petitioning Intervenor could not have started any such lawsuit of their own, nor may they claim the benefit of one already started, because they are seeking something entirely different. In other words, there is no community of interest.

Utah Code Annotated 1953, 75-3-12 provides in its pertinent wording,

“Any person who has not contested a will * * * may contest the same or the probate thereof at any time within six months after the admission to probate and not afterwards * * *”

What is a will contest? Bancroft's Probate Practice, Volume 1, page 395 says it appears to be, in usual parlance, merely a designation of any kind of a litigated controversy concerning the eligibility of an instrument to probate. That very properly covers exactly what Contestants had done within the time permitted by law as to the 1939 and 1940 instruments. It also covers exactly what Intervenor was attempting to do, beyond the time permitted by law, as to the 1949 and 1952 instruments.

The New Mexico court, in the case of

In Re Martinez' Will, 132 Pac. 2d 422,

says in substance that the right to contest a will is not a common law right, but a right conferred solely by statute, which should be strictly construed; that it is a new and independent action, the right to prosecute which cannot accrue until there has been an order admitting the will to probate.

The Kansas court in the case of

Pownall v. Connell, 122 Pac. 2d 730,

holds that any cause of action which a pleader can set down on paper which, if established, would necessarily render a will nugatory is a "will contest", and must be brought within the time permitted by statute for will contests.

The Arizona court, in

In Re Hesse's Estate, 157 Pac. 2d 347

holds that a "will contest" is any kind of a litigated controversy concerning the eligibility of an instrument to probate, as distinguished from the validity of the contents of the will.

We have, perhaps unduly, supported with authority what may appear to the court an obvious definition, but we do wish to make doubly clear that what Intervenorors were attempting to do, both in their Answer and Cross Complaint, was to start a new "contest". As previously stated, there could have been no possible objection to Intervenorors filing such answer to the contest as they desired, joining with the contestants if they wished, or opposing them if they preferred, so long as they did not attempt under such guise to bring in a cause of action as to which the statute of limitations had already run.

There is no quarrel with Intervenorors' authorities as to the right to intervene in general or in particular. The sole question here presented is whether, under the guise of intervention, these parties may start a lawsuit of their own. The general rules as to right to intervene, so long as the Intervenor comes within the issues of the pending case, are perfectly clear. Intervenorors' quotation from 2 Bancroft's Code Practice and Remedies, page 1139 well

covers the situation. As there stated, intervention will *not* as a rule be allowed when it will retard the principal suit, or delay the trial, or change the position of the original parties, or the form of the action or issues. We believe it may be safely said that Intervenor's position flies in the face of all these prohibitions. They wanted to start the contest all over, call witnesses (what they expected to learn they did not say), delay the entire proceeding, and change the issues to attack admission to probate of the 1949 and 1952 instruments, which order had never been questioned within the time allowed by law.

Bancroft says, at page 1139,

“it is sufficient that the ultimate issue to be determined remains the same.”

By any stretch of the imagination did Intervenor bring themselves within this requirement? They quote from the Colorado case of

Cache LaPoudre Irrigation Company v. Hawley, 95 Pac. 317,

in which the court says the question to be determined is whether or not “the intervenor has injected a new issue into the case in which he is allowed to intervene.” In other words, does the ultimate issue to be determined remain the same? Counsel attempted to avoid this obvious prohibition by contending that the ultimate question, that is issue, is as to whom the property of Florence P. Howard should be distributed. But this is not an action to construe a will. It is a statutory contest subject to statutory limitations. If attacking the final order of the court admitting certain instruments to probate, which

had never theretofore been attacked, was not raising a completely new issue, and that after the time had expired, it would be difficult to imagine such a case.

The right to intervene and be saved from the bar of the statute of limitations depends on whether there is a community of interest or privity of estate between the would-be Intervenor and the party who commenced the action within the statutory time.

34 Am. Jur. 225-6;

Rockwell v. Junction City, 141 Pac. 299
(Kan.)

In the instant case, the position taken by the Intervenor is exactly opposed that taken by Contestants. Instead of there being a community of interest, Intervenor is seeking to throw Contestants out completely. Their positions are fundamentally and wholly inconsistent. Intervenor cites the Kansas case of

Weichold v. Day, 236 Pac. 649,

which they indicate is an Oklahoma case. That case quotes with approval the trail blazing Kansas case of

Maurier v. Miller, 93 Pac. 596.

in this field. In the *Weichold* case, the Intervenor sought to do exactly what the Contestants were attempting to do; that is, have set aside the order of the court admitting to probate a particular testamentary instrument, not to start a new and entirely antagonistic lawsuit.

The requirement for contest within six months is more than a mere limitation of action. It provides a condition upon which the cause of action itself ceases to exist after the prescribed period.

Woodruff v. Norville, 107 N.E. 2d 911 (Oh.).

The purpose of the condition or limitation is to accelerate the settlement of estates.

Weese v. Weese, 58 S.E. 2d 801 (W. Va.)

Where will contest was not filed until the last day of limitation and the petition so filed was insufficient to invoke the jurisdiction of the court, the court was thereafter without jurisdiction to authorize contestants to amend the petition supplying the necessary averments.

Vought v. Hall, 225 Pac. 2d 822, (Okla.).

There is a conflict of authority as to whether a party may intervene in a "within time" will contest, when the period of limitation has expired. The more liberal rule, with which we have no slightest quarrel, permits such intervention. The question generally arises when the original Contestant attempts to dismiss his contest over the objections of the Intervenor, and it is held that the Intervenor may continue the contest, but all this assumes that he had a right to intervene, and that brings us back to the basic condition. When he intervenes, he must take the contest as he finds it. He cannot start a new lawsuit. Cases cited by Intervenors completely substantiate this position, and it is entirely in keeping with the general rules as to intervention. Intervenors cite the early Kansas case of

Maurier v. Miller, *supra*

In that case, the Kansas court, speaking of the rights of the Contestants to dismiss and the rights of the Intervenor to continue the action, says at page 597-8,

"Pending the final determination, he" (the

contestant) “may see fit to abandon the suit, or he may be found to have no right to maintain it for the reason that he is estopped by having accepted under the will, or some other obstacle may stand in the way of his maintaining the suit; but, if the grounds for setting aside the will alleged in his petition are established, the intervenor *may upon the same grounds maintain the action. The intervenor takes the suit as he finds it. He is not permitted to change the form of the action or the issues, or to raise a new one.*” (Italics supplied.)

Intervenors likewise cite

In Re Butzow's Estate, 68 Pac. 2d 374 (Cal.)

Again, we accept Intervenors' authority. Ennis was the Contestant. The court says:

“Appellant, by her petition or complaint, sought to join in the contest. She also alleged substantially the same grounds of contest as those contained in the Ennis pleading.”

The court holds, and we feel rightly, that she had a right to intervene, even though the time had run as to her, because she took the suit as she found it.

Again, we accept Intervenors' citation of authority in the California case of

Voyce v. Superior Court, 127 Pac. 2d 536.

Again the California court holds that the Contestant may not dismiss over the objections of the Intervenor, but again the court repeatedly adverts to the fact that the Intervenor took the case as he found it. At page 540, the court says:

“The right to file a petition in intervention under the circumstances present here was not barred by reason of the fact that it was not filed

within six months after probate; there was a will contest pending, which was filed in time *and no attempt was made to raise new grounds of contest.*" (Italics supplied.)

Again the Court says on page 541,

"Prior to that dismissal the court had jurisdiction of the subject matter; that is, a contest of the will on the grounds stated in the contest, and the intervention was filed prior to the dismissal, claiming the identical relief involved in the contest then before the court."

and again,

"In the case at bar no new issues, that is, grounds of contest have been raised, and no prejudice has been suffered by petitioners."

and again,

"In the case at bar no new issues are raised, the issues are identical, that is, the validity of the will with reference to the specific grounds of attack. It is not the purpose of the contest to determine heirship, or the rights as between the contestants to the assets of the estate, but the validity of the will is the only issue."

In a later California case,

In Re Walters' Estate, 202 Pac. 2d 89, the court discusses the same question. In this case contestants had dismissed their action wherein Appellant had not obtained the right to intervene. The Court, on page 90, summarizes the remedies originally open to him as follows:

"As far as appellant's rights are concerned, it is clear that he could have pursued any one of three recognized methods of contesting this will. He could have filed a contest (1) before probate (Sec. 370, Pro. Code), or (2) within six months

after probate (id. 380) as did Crann, or (3) he could have become a party to the Crann contest by intervening therein pursuant to sec. 387, Code Civ. Proc., even after the six months had run, *his grounds having been the same as those in the basic contest.*" (Italics supplied.)

INTERVENORS' POINT IV

Intervenors claim they had reasonable cause to believe they would be successful if permitted to intervene. In fairness, we must assume that every litigant who starts an action or attempts to come into one already started would make the same claim. Suffice it to say that Intervenors' good faith is not an issue in the matter before the Court. In the first place, it has not, so far as we know, been questioned, and in any event would be immaterial.

Intervenors are simply attempting, under another guise, to argue the case they presumably would have presented had they been permitted by the Trial Court to contest the validity of the 1949 and 1952 instruments. The law, we believe, does not in any way substantiate their position under statutes such as ours, but this issue has no part in the pending appeal, and we refrain from a by-path excursion. We cannot imagine a method of more completely disregarding Mrs. Howard's evidenced intentions, than to distribute her estate to cousins once removed, whom she had never mentioned in any of her four testamentary instruments.

INTERVENORS' POINT V

Intervenors have given but brief attention to the portion of the court's judgment dismissing their Cross

Complaint in Intervention (R. 247, 249). We commend their brevity and will follow their example.

All the court did was to dismiss this attempted new action, and whether that order remains as a part of the Decree appears immaterial so far as we are concerned. The matter of their right to intervene is before this court on Intermediate Appeal. The decision of the court will control the entire matter, and Intervenor's rights can be in no manner prejudiced by the findings or order in question. Finally, the judgment in the will contest is not before this Court on an intermediate appeal.

CONCLUSION

In summary, as to the correctness of the Trial Court's order denying the motion to intervene, may we say that Intervenor's have cited no authority giving them the right to enter the lists with a different contest after the time for contest has expired. The authorities cited by them fully substantiate Contestants' position that they must take the suit as they find it.

Respectfully submitted,

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