

1953

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

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *National Trust Company, Ltd. V. Duys*, No. 7970 (Utah Supreme Court, 1953).
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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,
Deceased, and COLINA FERRIE,

*Petitioners in Intervention
and Appellants,*

vs.

HELEN DUYS, ETHEL FORREST,
ERNEST F. HOWARD, THE PRO-
TESTANT BOARD OF SCHOOL COM-
MISSIONERS and MCGILL UNIVER-
SITY, 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 RESPONDENTS THE
PROTESTANT BOARD OF SCHOOL COM-
MISSIONERS AND MCGILL UNIVERSITY**

**GUSTIN, RICHARDS & MATTSSON
and FRED H. EVANS**

Attorneys for Respondents
**The Protestant Board of School
Commissioners and McGill
University**

FILED
JUN 30 1953
Supreme Court, Utah

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COMPANY, a Utah Banking corporation,
Executor of the Estate of Florence P.
Howard, also known as F. P. Howard,
Deceased,

Respondents.

Case No.
7970

REPLY BRIEF OF RESPONDENTS THE
PROTESTANT BOARD OF SCHOOL COM-
MISSIONERS AND MCGILL UNIVERSITY

STATEMENT

Respondents The Protestant Board of School Commissioners and McGill University accept the facts stated in the brief filed by Walker Bank & Trust Company and have joined in the brief of the respondents Helen Duys, Ethel Forrest and Ernest P. Howard, but are of the opinion that further comment should be made in connection with point IV of appellants' brief. These respondents will limit their brief to that point.

STATEMENT OF POINTS

THE FOUR DOCUMENTS WERE PROPERLY ADMITTED TO PROBATE AS THE LAST WILL AND TESTAMENT OF THE SAID FLORENCE P. HOWARD.

ARGUMENT

THE FOUR DOCUMENTS WERE PROPERLY ADMITTED TO PROBATE AS THE LAST WILL AND TESTAMENT OF THE SAID FLORENCE P. HOWARD.

The four documents executed by Florence P. Howard on February 6, 1939, June 3, 1940, May 7, 1949 and January 14, 1952 were properly admitted to probate as the Last Will and Testament of the said Florence P. Howard.

Section 74-1-19, Utah Code Annotated 1953, which is as follows:

“Revocation and alteration of written wills.—Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

(1) By a written will, or other writing of the testator declaring such revocation or alteration executed with the same formalities with which a will should be executed by such testator; or,

(2) By being burned, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by some person in his presence and by his direction.”,

sets forth the only manner in which a will can be revoked, while *Section 74-1-22, Utah Code Annotated 1953*, which is as follows:

“Effect of subsequent will on prior will.—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 remain effectual so far as consistent with the provisions of the subsequent will.”,

sets forth the effect of a subsequent will on a prior will. None of the instruments admitted to probate were revoked in accordance with the terms of *Section 74-1-19*.

To have a will revoked under *Section 74-1-22* the subsequent will would have to dispose of the entire

estate of the testator in a manner absolutely inconsistent with the provisions of an earlier will. *In re Love's Estate*, 75 Utah 343, 285 Pac. 299, at page 301:

“The two documents here offered as one will are so completely inconsistent or antagonistic in their provisions, in that Exhibit D undertakes to give all the residue of the estate to the Taylors while Exhibit E undertakes to give it all to the Wilsons, that there appears to be no way that these could be construed together as a part of a harmonious whole will. On the contrary, had they both been legally executed, the former will would have been revoked by the latter, even though there were no express revocation of the former will. See annotation in 51 A. L. R. 652, where, at page 657, the annotator says: ‘From the time of earliest reported cases down to the present, the courts, English and American, have held that the *execution of a will disposing of the entire estate of a testator in a manner absolutely inconsistent with the provisions of an earlier will* revokes by implication the earlier will, though the will later in time contains no words of revocation, and no mention of the earlier will’—and at page 669: ‘A holographic (or olographic) will containing no clause of revocation, but disposing of the whole estate inconsistently with a prior formal will, is a revocation of the former one.’” (Italics ours).

In addition to the deceased having failed to revoke any of the instruments or former wills by subsequent wills in accordance with our statutory law, she has clearly indicated by the terms of the respective wills

that it was not her intention to revoke any one of the same. This is pointed out by the fact that in the will dated the 7th day of May, 1949, at the bottom of page 6 thereof, she has written:

Sept. 14th, 1949: On September 7th, 1949, Mrs. Mildred M. C. Black died. - I wish the bequest to her (\$2,000.00) to be equally divided between her daughters Mildred, and Hilda. - F. P. Howard."

The \$2,000.00 bequest mentioned was originally made in her will of February 6, 1939. This will was still in effect as the instrument of June 3, 1940 appears to be a codicil to the 1939 document and does not revoke the same.

The intention of the testator to have all four instruments construed as her will is borne out by the stipulation made, wherein it was stipulated that deceased sent Rosamond Lamb to the Walker Bank & Trust Company to pick up her wills, at which time they included the instrument dated May 7, 1949. Then after deceased had executed the instrument dated January 14, 1952, all of them were found at the time of her death with her effects in Canada (R. 267-269).

Appellants cite the case of *Shiel v. O'Brien*, IR. Rep. 7 Eq. 64, for an authority holding that if a person with an earlier will before him executed a second will, complete in form, the intention of the testator was obviously to revoke the first. We have been unable to

locate this report but notice that the case is cited in 51 *A. L. R.* at page 684. The annotator makes the following statement and then cites this authority:

“If testator repeats in a new will the substantial and formal clauses of the old one, lying before him at the time, without reference in the new one to the old, a presumption arises that he intended a substitution, as distinguished from an addition to, or qualification of, the earlier will, but that presumption does not arise so strongly, if at all, where the earlier document is not actually present to the testator, and the repetitions may be the result of accident or forgetfulness.”

This comment by the annotator is certainly different from the expression put in appellants' brief. The only other comment we have found in connection with this authority is found in *Mews Digest of English Case Law*, 1924, Volume 15, Second Edition, page 466, wherein the annotator stated:

“A testator, having executed a will, completely disposing of his own property and also of other property over which he had a disposing power, subsequently executed a latter will by which he disposed of his own property but not of that which he had the power. Held that the latter will alone should be admitted to probate and therefore the power was revoked.”

Even though the *Shiel* case holds as contended for by appellants, there is nothing in the record in this case to show that Mrs. Howard had the former wills before her when she drafted the will of 1952. We also

doubt very seriously that Ireland had statutes similar to ours concerning the revocation of wills.

Whereas, some of the provisions of the respective instruments may be inconsistent, the four instruments can be construed as a whole as provided by *Section 74-2-4, Utah Code Annotated 1953*, which reads as follows:

“Several wills to be construed as one.—Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument.”,

and *Section 74-2-5, Utah Code Annotated 1953*, which reads as follows:

“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.”

By considering each of the provisions in the four instruments, a proper and orderly distribution of the estate could be made in the manner shown in the appendix to this brief. This would carry out each and every wish of the testator as expressed in the four documents where no inconsistent conflict has occurred.

It is true in the interpretation of the will that the same shall be construed according to the intention of

the testator, but this must be ascertained from the instruments themselves. *Section 74-2-2, Utah Code Annotated 1953*, provides as follows:

“Intention to be ascertained from words of will.—In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the testator’s intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.”

To place a different construction on the instruments other than that expressed in the instruments would be contrary to our statutes and the law of this state. *In re Beal’s Estate*, Utah, 214 Pac. 2d 525:

“The rule of construction that the intent of the testator must be carried out does not authorize courts to make a new will to conform to what they think the testator intended, but the intent of the testator must be ascertained from the will as it stands. *In re Estate of Sowash*, 62 Cal. App. 512, 516, 217 P. 123. Nor does the rule that testacy rather than intestacy is preferred relieve courts from the obligation to construe the language of the will according to the legal effect of the words used. *In re Searl’s Estate*, 29 Wash. 2d 230, 186 P. 2d 913, 173 A. L. R. 1247.”

We cannot see what benefit would have been derived from the introduction of evidence suggested in appellants’ brief as a person may in one will make a special bequest to a person and in a later will make that same

person a residuary legatee or vice versa. Neither case would indicate the desire or intent to revoke the former will, nor would it be inconsistent with the former will, and as heretofore indicated, under our statutes and court decisions, the two wills should be construed together and the respective bequests given full effect.

In *51 A. L. R.* at page 682 the annotator makes the following comment:

“The general rule is that if legacies to the same individual are given by different instruments, the second gift is to be treated as additional to the first, in the absence of anything signifying a different intention; therefore, clauses of an earlier will giving specific sums of money, pieces of property, etc., are not ordinarily revoked by the gift of different sums, property, etc., by a later will, which does not operate as a complete revocation of the former one, but are to be regarded as cumulative, in the absence of a different intention expressed in, or implied from, the will, * * * .”

Appellants contend that the blood heirs of a testator may not be cut off without clear and unequivocal language. We do not believe that this is a true statement of the law. The law stated in *In re Clark's Estate*, (Cal.) 149 Pac. 2d 465, cited by appellants, is that if a testamentary provision is capable of two interpretations, that is to be preferred which passes the inheritance to the legatees of the blood of a testator, rather than to a stranger. In this case, however, appellants

were never named in any one of the four instruments by name or by class and only one construction can be taken from this fact, and that is that the testator did not intend to leave to them any portion of her estate.

CONCLUSION

In conclusion we respectfully submit that the four instruments offered as the Last Will and Testament of Florence P. Howard were properly admitted to probate and that appellants' petition in intervention was properly denied.

Respectfully submitted,

GUSTIN, RICHARDS & MATTSSON
and FRED H. EVANS

Attorneys for Respondents

The Protestant Board of School
Commissioners and McGill
University

APPENDIX

ITEMIZED STATEMENT OF CASH REQUESTS

<u>BENEFICIARY</u>	<u>INSTRUMENT DATED</u>		
Hilda Black	Feb. 6, 1939....	\$ 500.00	
#3 West 19th Avenue	May 7, 1949....	2,000.00	
Vancouver, B. C.	Jan. 14, 1952..	5,000.00	
As partial successor to Mrs. Mildred M. C. Black	Sept. 14, 1949	1,000.00	\$ 8,500.00
Mildred Black	Feb. 6, 1939....	500.00	
#3 West 19th Avenue	May 7, 1949....	2,000.00	
Vancouver, B. C.	Jan. 14, 1952..	5,000.00	
As partial successor to Mrs. Mildred M. C. Black	Sept. 14, 1949	1,000.00	8,500.00
Roger Black	Feb. 6, 1939....	500.00	
Port Alice, B. C.	May 7, 1949....	2,000.00	
	Jan. 14, 1952..	5,000.00	7,500.00
Mrs. Rachel Black Helps	Feb. 6, 1939....		500.00
#1054 East 20th Ave. Vancouver, B. C.			
Mrs. Isobel Budden	Feb. 6, 1939....	2,000.00	
Apt. 114, 1575 Sum- merhill Avenue	May 7, 1949....	3,000.00	5,000.00
Montreal, Canada			
Patricia Budden	Jan. 14, 1952..		1,000.00
Apt. 114, 1575 Sum- merhill Avenue			
Montreal, Canada			
Mrs. W. Lyon (Ellen) Browne	Feb. 6, 1939....	500.00	
Apt. #100, Maxwelton 900 Sherbrooke Street West Montreal 2, Canada	May 7, 1949....	1,000.00	1,500.00

<u>BENEFICIARY</u>	<u>INSTRUMENT DATED</u>		
Mr. P. D. P. Hamilton 19 Glenview Avenue West Toronto, Ontario, Canada	May 7, 1949....		1,000.00
Mrs. P. D. P. Hamilton 19 Glenview Avenue West Toronto, Ontario, Canada	May 7, 1949....		1,000.00
Legal Heirs of Cavie P. Howard	Feb. 6, 1939....		2,000.00
Mrs. Cavie P. Howard 418 Claremont Avenue Westmount, Quebec, Canada	Jan. 14, 1952..		4,000.00
Mrs. Ovie (Dorothy Ogilvie) Howard Knowles 82 Pleasant Street Cohasset, Massachusetts	May 7, 1949....	1,000.00	5,000.00
	Jan. 14, 1952..	4,000.00	
Mrs. Rosamond Lamb 4090 Beaconsfield Avenue, Montreal, Ontario, Canada	Feb. 6, 1939....	1,000.00	53,000.00
	May 7, 1949....	2,000.00	
	Jan. 14, 1952..	50,000.00	
McGill University Scholarship in metal- lurgy and geology	Feb. 6, 1939....	10,000.00	35,000.00
Scholarship in metal- lurgy or chemical engineering	May 7, 1949....	25,000.00	
Marie Petry 415 King Street Port Hope, Ontario, Canada	Jan. 14, 1952..		10,000.00

<u>BENEFICIARY</u>	<u>INSTRUMENT DATED</u>		
Gertrude Petry Lewis Trinity College School Port Hope, Ontario, Canada	Jan. 14, 1952..		6,000.00
Mrs. William T. Stewart 32 Edgehill Road Montreal, Canada	Jan. 14, 1952..		2,000.00
Miss Annie H. Phillips 14 St. Joseph Street Chambly Canton Quebec, Canada	Feb. 6, 1939....		1,000.00
Protestant Board of School Commissioners to be added to the Edward A. Oliver prize McTavish Street Montreal, Canada	Feb. 6, 1939....	2,000.00	5,000.00
	May 7, 1949....	3,000.00	
Percy E. Radley 1386 Nicola Street Vancouver, B. C. Canada	Feb. 6, 1939....	3,000.00	6,000.00
	May 7, 1949....	3,000.00	
Mrs. Charlotte Smith 451 Grosvenor Avenue Montreal 6, Canada	May 7, 1949....		1,000.00
William T. Stewart 636 Grosvenor Avenue Westmount, Quebec, Canada	May 7, 1949....		1,000.00
Lindsay Suter 329 Locust Street Winnetka, Illinois	May 7, 1949....		2,000.00
Mrs. C. W. (Mary S.) Tinling 1321 Sherbrook St. West Montreal, Canada	Feb. 6, 1939....	3,000.00	12,000.00
	May 7, 1949....	3,000.00	
	Jan. 14, 1952..	6,000.00	
	TOTAL.....		<u>\$179,500.00</u>

STATEMENT OF SPECIFIC REQUESTS

	<u>INSTRUMENT DATED</u>	<u>APPRAISED VALUES</u>
Mrs. Isobel M. Budden Apt. 114, 1575 Summerhill Avenue Montreal, Canada Solitaire diamond ring.....	Jan. 14, 1952.....	\$ 300.00
Mrs. William T. Stewart 32 Edgehill Road Montreal, Canada Diamond circle brooch.....	Jan. 14, 1952.....	230.00
Mildred Black #3 West 19th Avenue Vancouver, B. C. Diamond watch	Jan. 14, 1952.....	75.00
Ernest Howard Flag Road, Dongan Hills Staten Island, New York "Portrait of his grandfather".....	Jan. 14, 1952.....	—0—
Helen Howard Duys Center Island, Oyster Bay Long Island, New York Diamond pendant	Jan. 14, 1952.....	530.00
Henry Howard Petry 459 Landsdowne Avenue Westmount, Quebec, Canada A small island near St. Andrews East.....	May 7, 1949.....	200.00
Rosamond Lamb 4090 Beaconsfield Avenue Montreal, Canada Emerald and diamond ring.....	Jan. 14, 1952.....	180.00
Mary Stewart Tinling and Rosa- mond Lamb as tenants in common Remaining personal effects.....	Jan. 14, 1952.....	1,338.50
TOTAL.....		\$2,853.50

DISTRIBUTION OF RESIDUARY ESTATE

Mrs. Dorothy Burleigh.....	May 7, 1949.....	3/20ths
Mrs. Helen Howard Duys.....	May 7, 1949.....	3/20ths
Mrs. Ethel Howard Forrest.....	May 7, 1949.....	3/20ths
Ernest Howard.....	May 7, 1949.....	3/20ths
Mrs. Gertrude Petry Lewis.....	May 7, 1949.....	3/20ths
Henry Howard Petry.....	May 7, 1949.....	2/20ths
Marie Petry	May 7, 1949.....	3/20ths