

1954

National Trust Company, Ltd. V. Helen Duys et al : Petition for Rehearing

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 PROTEST-
ANT 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.

PETITION FOR RE-HEARING

H. F. LAZIER of LAZIER & LAZIER,
JOHN D. RICE, JAMES E. FAUST, J.
LAMBERT GIBSON, and CLEON B.
FEIGHT,

*Attorneys for Petitioners in Interven-
tion and Appellants.*

TABLE OF CONTENTS

| | <i>Page</i> |
|--|-------------|
| ARGUMENT | 2 |
| STATEMENT OF POINTS | 2 |
| POINTS TO BE RELIED ON..... | 2 |
| POINT NO. I. | |
| RULE 24 SHOULD GOVERN. | 1 |
| POINT NO. II. | |
| INDEMNITY OF GROUNDS NOT TEST OF RIGHT TO INTERVENE. | 3 |
| POINT NO. III. | |
| FOUR DOCUMENTS WERE ORDERED ADMITTED AS THE WILL AND CONTEST MUST BE ON ONE ORDER AND INDIVISIBLE WILL. | 4 |
| CONCLUSION | 8 |

TABLE OF CASES CITED

| | |
|---|---|
| Barber v. Anderson, 73 U. 357, 274 P. 136..... | 2 |
| Bradford v. Andrew, 20 Ohio State 208, 5 Am. Rep. 645..... | 7 |
| Butzow's Estate (Calif.), 68 P. 2d 374..... | 3 |
| Carothers v. O'Brien, 150 A. 585, 69 A.L.R. 1127..... | 5 |
| Houston Real Estate Investment Company v. Hechler, 44 U. 64, 138 P. 1159..... | 2 |
| Lasier v. Wright, 136 N.E. 545, 28 A.L.R. 674..... | 6 |
| McArthur v. Scott, 28 L. Ed. 1015, at page 1029..... | 7 |
| McCarthy v. Fidelity National Bank and Trust Company, 30 S.W. 2d 19, 69 A.L.R. 1122..... | 5 |
| Powell v. Koehler, 39 N.E. 195, 26 L.R.A. 480..... | 4 |
| Voyce v. Superior Court (Cal.), 127 P. 2d 536..... | 3 |
| Weichold v. Day, 236 P. 649..... | 3 |

TABLE OF CONTENTS—(Continued)

STATUTES

| | <i>Page</i> |
|--|-------------|
| Section 74-1-2, Utah Code Annotated, 1953..... | 7 |
| Section 75-3-7, Utah Code Annotated, 1953..... | 7 |
| Section 75-3-10, Utah Code Annotated, 1953..... | 7 |
| Section 75-3-11, Utah Code Annotated, 1953..... | 7 |
| Section 75-3-12, Utah Code Annotated, 1953..... | 7 |
| Section 75-14-14, Utah Code Annotated, 1953..... | 3 |
| Rule 24, Utah Rules of Civil Procedure..... | 2 |

TEXT BOOKS

| | |
|--|------|
| 57 Am. Jur., Sec. 757, page 518..... | 7 |
| 57 Am. Jur., Sec. 774, page 528..... | 6 |
| 57 Am. Jur., Sec. 782, page 532..... | 6 |
| 57 Am. Jur., Sec. 795, page 540..... | 4 |
| 8 A.L.R. 46..... | 7 |
| 69 A.L.R., 1122 | 4, 5 |
| 67 Corpus Juris Secundum, Sec. 55, page 97..... | 7 |
| 67 Corpus Juris Secundum, Sec. 61, page 99..... | 7 |
| Page on Wills, Lifetime Edition, Sec. 608, page 151..... | 4, 5 |
| Page on Wills, Lifetime Edition, Sec. 637..... | 6 |
| Page on Wills, Lifetime Edition, Sec. 669, page 272..... | 5 |

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the Estate of Florence P. Howard, also
known as F. P. Howard, Deceased,

Respondents.

Case No.
7970

PETITION FOR RE-HEARING

Appellants respectfully petition for a re-hearing of
the decision of the Supreme Court of the State of Utah,
in the above entitled case.

POINTS TO BE RELIED ON
POINT NO. I.

RULE 24 SHOULD GOVERN.

POINT NO. II.

IDENTITY OF GROUNDS NOT TEST OF RIGHT TO
INTERVENE.

POINT NO. III.

FOUR DOCUMENTS WERE ORDERED ADMITTED AS
THE WILL AND CONTEST MUST BE ON ONE ORDER AND
INDIVISIBLE WILL.

ARGUMENT

POINT NO. I.

RULE 24 SHOULD GOVERN.

Appellants wish to point out to the Court that its decision made no reference to Point No. II of Appellant's Brief, which relates to Rule 24 of the Rules of Civil Procedure, Volume 9, Utah Code Annotated, 1953. It is contended that the Supreme Court did not give due effect to the Rule. That the Court did not determine whether or not said Rule is limited by the provisions of Section 75-3-12, Utah Code Annotated, 1953. It is submitted that the decision of the Supreme Court renders nugatory and ineffectual, the said Rule 24, and does not follow the rationalization of the following cases :

Barber v. Anderson, 73 U. 357, 274 P. 136;
Houston Real Estate Investment Company v.
Hechler, 44 U. 64, 138 P. 1159.

That said decision does not take into consideration Section 75-14-14, Utah Code Annotated, 1953.

POINT NO. II.

IDENTITY OF GROUNDS NOT TEST OF RIGHT TO INTERVENE.

This Court deduces from the following cases cited by Appellants:

Voyce v. Superior Court (Cal.), 127 P. 2d 536;

In re: Butzows Estate, 68 P. 2d 374;

Weichold v. Day, 236 P. 649.

that because the grounds of contest raised by intervenors were the same as in the contest, that the rule would have been different had the intervenors raised different grounds of contest. A reading of these cases shows that decision was not based upon that premise, but the rule, as clearly stated in the *Voyce* case, supra, to be that a proceeding to contest a will is in the nature of a proceeding in rem, and when once the jurisdiction of the court to determine the validity of the will attaches by the filing of a timely contest, it does not lose jurisdiction thereof until disposition has been made of the matter, or, stating it another way, the order admitting the will to probate does not become final within the six months if a contest is filed. And, as stated at page 540 of the "*Voyce*" case:

“We believe that it is equally clear that an interested person, as mentioned in Section 380 of the Probate Code, may intervene in a will contest, initiated by another interested person within six months after the probate, even though the intervention is filed after the expiration of the six months period.”

This rule is clear and unambiguous and is not beclouded by any suggestion that the contest has to be made on the same grounds as brought by the original contest. And as said at 57 *Am. Jur.*, Section 795, page 540:

“A party in interest may intervene in proceedings to probate or contest a will and should do so in order to protect their interests against an adverse judgment or decree.”

See *Powell v. Koehler*, 39 N.E. 195, 26 L.R.A. 480.

POINT NO. III.

FOUR DOCUMENTS WERE ORDERED ADMITTED AS THE WILL AND CONTEST MUST BE ON ONE ORDER AND INDIVISIBLE WILL.

It appears that the decision is based upon the determination by the Supreme Court that the contestants had limited the issue of invalidity to part of the will. This position attempted to be buttressed by a statement from Page on Wills, Lifetime Edition, Section 608, page 151, and Section 669, page 272, and upon an annotation in 69 A.L.R. 1122.

Appellants respectfully call the Court's attention to the case of *McCarthy v. Fidelity National Bank and Trust Company*, 30 S.W. 2d 19, 69 A.L.R. 1122, which, with the case of *Carothers v. O'Brien*, 150 A. 585, 69 A.L.R. 1127, provide the note referred to in the decision. Both of these cases, and the note following, are cases involving undue influence, and the *McCarthy* case, because of the Statute in the State of Missouri relating to the issues in a will contest, is that the requirement in the State of Missouri is that the issue is as to whether or not the will in toto is valid, or the will in its entirety is invalid.

In the *Carothers* case, the Court held that where part of a will was caused by undue influence, and the remainder not effected by it, the later can be so separated as to leave it intelligible and complete in itself. The note following thereon, is based upon whether or not part of a will may be upheld, if other parts are held invalid for undue influence.

The Contest of Helen Duys, et al, was entitled, "Contest of Order Admitting Wills to Probate." While the prayer is limited, the Contest is of the Order of Judge Larson admitting the four documents as the last will of the decedent, dated May 14, 1952.

The Court, in its decision, quotes from Sections 608 and 669 of Page on Wills, which are discussions of an exception, to-wit: Undue influence on a particular bequest, and not in point in the instant case.

Section 637 of the same work says that in a number of jurisdictions the issue is fixed by statute and is practically the old common law issue *devisavit vel non*; is the instrument in question the last will and testament of the testator or not. And later on in the Section, it states:

“A statute, which provides that the issue is whether the instrument is the testator’s last will or not, has been held to prevent the probate of part of the will, while probate of the rest of the will is refused.”

And as said in 57 *Am. Jur.*, in the third sentence of Section 782, page 532:

“Generally speaking, it is the validity of the will as a whole, and not the validity of particular bequests contained in the will, which is involved in a proceeding to probate; * * *”

And in Section 774, page 528 of the same work, is a discussion as to the question involved in a contest of a will. At Section 774, *supra*, it is stated:

“Jurisdictional questions in reference to the particular court vested with power to hear and decide probate and contest cases, and the question of who is entitled to maintain a contest having been determined, the sole question to be decided, where an application to probate a will is opposed by a proper pleading, or where it is sought to contest a will after probate, which is designated as the issue of *devisavit vel non*, is whether the instrument offered is the valid last will and testament of the decedent.”

See *Lasier v. Wright*, 136 N.E. 545, 28 A.L.R. 674.

The State of Utah has adopted the common law, and its statutes on contest, Section 75-3-7 and Section 75-3-12, Utah Code Annotated, 1953, refer to a contest of *the* will in one case, and *a* will in the other. The only exception made to the common law rule is Section 74-1-2, Utah Code Annotated, 1953, which allows a decision that a will, or *part* of a will be declared void because of duress, menace, fraud or undue influence. Such Section emphasizes the common law rule that the will is a single entity, to stand or fall as a unit with the single exception carved out by the Statute. Sections 75-3-10 and 75-3-11, Utah Code Annotated, 1953, both refer to *the* will.

See Section 757, 57 *Am. Jur.*, page 518.

The question in the case before the Court was as to whether the four instruments constituted *the* will of the decedent. The Order admitting the instruments as *the* will, is indivisible, and it is either established as a whole, or it is wholly set aside, and in this case, the whole order was attacked by the contest. The proceeding is a proceeding in rem and the Court cannot take jurisdiction of the subject matter by fractions.

McArthur v. Scott, 28 L. Ed. 1015, at page 1029;

Bradford v. Andrew, 20 Ohio State 208, 5 Am. Rep. 645;

8 *A.L.R.* 2d, page 46;

67 *Corpus Juris Secundum*, Sec. 55, page 97 and Sec. 61, page 99.

The Order of the lower Court did not decide that the 1949 and 1952 instruments were the will of the decedent. It held that all four instruments were the will.

The Answer of Mildred Black, et al, was made in response to a citation of the Court brought about by the filing of the contest by the original contestants. While it is true that the "Black's" pleading was filed after the six month period had elapsed, the decision of the Court brings about the effect, that if a contest were brought a day or two before the six month period, and a citation issued, that an answering party, who appeared in answer to a citation on the contest, could but affirm or deny in the answer.

CONCLUSION

We respectfully submit that a re-hearing should be granted.

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