

1953

# Witton B. Ellerbeck v. Ruth Clayton Haws : Brief of Appellant

Utah Supreme Court

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Rawlings, Wallace, Roberts & Black; Attorneys for Contestant and Appellant;

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

---

IN THE MATTER OF THE ESTATE  
OF

BEN B. ELLERBECK, also known as B.  
B. ELLERBECK,

*Deceased.*

WITTON B. ELLERBECK,  
*Contestant and Appellant,*

— vs. —

RUTH CLAYTON HAWS,  
*Proponent and Respondent.*

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**BRIEF OF APPELLANT**

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Appeal from the District Court of the Third Judicial  
District, in and for Salt Lake County, State of Utah

HONORABLE JOSEPH G. JEPSON, *Judge*

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**RAWLINGS, WALLACE  
ROBERTS & BLACK**

*Attorneys for Contestant and  
Appellant*

530 Judge Building  
Salt Lake City, Utah

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# IN THE SUPREME COURT of the STATE OF UTAH

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BEN B. ELLERBECK, also known as B.  
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*Deceased.*

WITTON B. ELLERBECK,  
*Contestant and Appellant,*

— vs. —

RUTH CLAYTON HAWS,  
*Proponent and Respondent.*

Case No. 8010

## BRIEF OF APPELLANT

### STATEMENT OF THE CASE

This is an appeal from an order admitting the will of Ben B. Ellerbeck to probate (R. 46, 48).

Mrs. Ruth Clayton Haws on May 2, 1952, petitioned the court for the probate of an olographic will in the matter of the estate of Ben B. Ellerbeck, deceased. Thereafter, Witton B. Ellerbeck, brother and only heir of the deceased, filed his petition in opposition to the probate

of said will. His opposition to the probate of the will was based upon two grounds: First, that the said Ben B. Ellerbeck was not competent to make a Last Will and Testament because of unsoundness of mind and second, because the will was a contingent or conditional will and was only to take effect if he did not survive the sickness then being experienced by him in the Holy Cross Hospital.

A pretrial was held January 5, 1953, and the court took under advisement the contention of contestant that the will was contingent. On January 7, 1953, the court ruled that "the will is not ambiguous and that the will is absolute, and is not conditional" (R. 25).

At the time set for trial the contestant did not submit any evidence concerning the mental incompetency of the deceased, but still asserted that the will was conditional (R. 31).

The court thereupon ruled that the will should be admitted to probate (R. 42) and signed the Findings of Fact, Conclusions of Law and Order Admitting Will to Probate (R. 44 to 46).

The only contention here made by the contestant is that the will is conditional or contingent and should not have been admitted to probate.

The testimony established that the deceased, Ben B. Ellerbeck, was admitted to the Holy Cross Hospital

about 2:00 p.m. on September 27, 1951 (R. 38). The proponent went to the hospital to see Mr. Ellerbeck. She testified that he was very sick and:

“Q. And he was afraid he was going to die, wasn’t he?”

A. Well, I guess he was; I don’t know.” (R. 38)

The will was made on September 29, 1951 (R. 36). Examination of the will discloses that it is on the front side of a statement from the Granite Mart, Inc. to R. Clayton Haws, the proponent, for ladies shoes apparently purchased August 17th.

The will is short and we quote it for the convenience of the Court:

“Sept. 29, 1951

“To whom it may concern:

Being in the Holy Cross Hospital from digestive and other troubles, in the event that I do not survive, Mrs. Ruth Clayton Haws is to take full charge of my home and such little business as may exist there. Further, she is to have my complete portion of the estate left by my father, namely Witton W. Ellerbeck.

Signed —

Ben B. Ellerbeck

P.S. I appoint Mrs. Ruth Clayton Haws to serve as executrix without bond.

Signed B. B. Ellerbeck”

The deceased was in the hospital about one week (R. 35), recovered from his illness and later was seen to work around his yard and shop and appeared to be all right during that period of time (R. 39). He died on the 30th day of April, 1952 (R. 46).

## STATEMENT OF POINT RELIED UPON BY APPELLANT FOR REVERSAL OF JUDGMENT

### POINT I.

THE TRIAL COURT ERRED IN RULING THAT THE WILL ADMITTED TO PROBATE WAS ABSOLUTE AND WAS NOT CONDITIONAL OR CONTINGENT AND IN ADMITTING SAID WILL TO PROBATE.

## ARGUMENT

### POINT I.

THE TRIAL COURT ERRED IN RULING THAT THE WILL ADMITTED TO PROBATE WAS ABSOLUTE AND WAS NOT CONDITIONAL OR CONTINGENT AND IN ADMITTING SAID WILL TO PROBATE.

The courts are unanimous in holding that if a will is contingent or conditional it should not be admitted to probate unless the condition set forth in the will has occurred as therein contemplated. In 57 *Am. Jur.* 453, *Wills*, Sec. 671, the foregoing rule is set forth as follows:

“A conditional or contingent will is one which is dependent for its operation upon the happening of a specified condition or contingency. If the condition fails, the will is inoperative and void thereafter, unless it is republished.”

The following definition of a contingent will is given in 1 *Page on Wills* (Lifetime Edition), page 204, Sec. 92:

“A contingent or conditional will is one, by the terms of which, the will is not to take effect unless some condition precedent has happened, or which is not to take effect, if some specified condition has happened. Because of statutory requirements as to the form in which a will must be drawn, this condition must appear upon the face of the will itself.”

In determining whether or not this is a conditional will the intention of the maker of the will is controlling. 57 *Am. Jur.* 454, Sec. 672, sets forth the rule as follows:

“Whether or not a will is to be regarded as contingent depends upon the intention of the testator.

\* \* \*

“To hold a will contingent or conditional, it must reasonably appear that the testator intended the will not to take effect unless a stated condition was fulfilled.”

In *Bagnall v. Bagnall*, (Texas) 225 S.W. 2d 401, the court clearly set forth the considerations controlling a determination of whether or not the will is conditional. That court stated at page 402:

“In determining whether a will is contingent or otherwise, the thing to be determined is whether the happening of the possibility referred to is a condition precedent to the operation of the will,



or whether the possibility of the happening was only a statement of the motive or inducement which led to the preparation and execution of the instrument. If the condition mentioned is a condition precedent to the validity of the will, such contingency must have taken place in order to entitle the will to probate; if the possibility mentioned is only the inducement which prompted the making of the will then such will is effective upon the testator's death even though such event does not take place."

Illustrations of contingent wills are given at 57 *Am. Jur.* 455, *Wills*, Sec. 673:

"\* \* \* Perhaps the clearest illustration of a conditional or contingent will is where the testator refers in the will to his possible death upon a trip contemplated by him, especially a prospective voyage overseas, from the dangers consequent upon military service, from a sickness with which the testator was afflicted when he executed the will, or from a surgical operation to which it was then in prospect he would be required to submit, as a condition of the effectiveness of the will. The will becomes unconditional upon the occurrence of the testator's death in the manner or under the circumstances stated in the condition."

The situation presented by the case at bar is one which clearly demonstrates that the will in question is a conditional one. Mr. Ellerbeck was very sick and was taken to the hospital two days before the will was made. The Record shows that he was very concerned about his business and some of the things that should be done in connection with it (R. 38, 39). The will itself is on a

statement. Undoubtedly the will was hurriedly written. Otherwise more formalities would have been taken and certainly at least a blank piece of paper would have been obtained. We submit that this is some indication that the will was regarded merely as a thing to take care of the situation if Mr. Ellerbeck died while in the hospital and from the illness he then had. The language of the will clearly discloses an intent that it was not to take effect in the event he did survive or, to put it as it is in the will, it was only to take effect "in the event that I do not survive". It is hard to believe that there could be stronger language used by the deceased to express the thought and intention that he was only taking care of the situation if he should die while there at the hospital.

The subject of contingent wills has been annotated at 11 *A.L.R.* 846, supplemented at 79 *A.L.R.* 1168. One of the **things that becomes apparent** upon reading the cases and these annotations is that wherever the purported testator has been ill when he makes the will and has placed therein words referring to such illness and that the bequests are made in the event he does not survive, the courts have held the wills conditional.

Where such matters as journeys, voyages or military service are involved the courts have sometimes held the wills conditional — sometimes not conditional. One of the most recent cases on this matter is the case of *Bagnall*

*v. Bagnall*, (Texas) 225 S.W. 2d 401, reversing 222 S.W. 2d 1015. In that case the testator was anticipating a hunting and fishing trip. Before he left he made the following will:

“Remember me W. W. Bagnall by this. If anything happens to me. While gone. All my belongings and estate goes to James B. Bagnall Brother of mine.”

He returned from the trip. He died some little time later while performing the usual duties of his occupation. The court held that this was a contingent will and denied it probate. In reaching this result the court stated:

“In this case the writer of the instrument begins the conditional clause with the conjunction ‘if’, which clearly expresses a condition; it means ‘provided’ or ‘in case that’. Then, as if to emphasize what he has in mind, the testator adds as a separate sentence the words ‘while gone’. In this connection it is to be noted that the word gone has a well defined meaning. It means ‘departed’, ‘absent’, ‘to depart or pass from one station in space to another which is implied as farther away’.”

Analyzing the language of the will in the case at bar, a similar result must be reached. No stronger words could be used showing a condition than the words here used, “in the event that I do not survive”.

*Wilson v. Higgason*, 207 Ark. 32, 178 S.W. 2d 855, is a case involving a situation where the individual was

ill and in the hospital. The purported testator wrote a letter to one Lillie Higgason. He referred to the fact that he was in the hospital sick and that there were a number of things that he should do. He then stated:

“\* \* \* Now Lillie since I have made you my beneficiary in all my insurance I want you, in event that I should die any time soon, to collect all my insurance and if I have any money left anywhere I would want you to get it and divide it equally \* \* \*.

\* \* \*

“\* \* \* I’m just doing this so in case I should die any time soon you would know how I would want my little mite disposed of \* \* \*”.

This will was made March 10, 1929 and the testator died September 8, 1941, some twelve and one-half years later. It was held that this will showed an intent that distribution should be made in accord with it only in case of the death of the testator “any time soon”.

Another case involving sickness is that of *Dougherty v. Holscheider*, 40 Tex. Civ. App. 31, 88 S.W. 1113. The will there involved provided as follows:

“Friend Jim I am going to start to Monterey tomorrow to have a surgical operation performed on me, and possibly I may never get back alive. The doctors have said that it would not be dangerous, but in case anything should happen I want you to see what I have left.”

A second letter involved stated as follows:

“I wrote you some weeks ago and told you that I intended undergoing an operation, and that before doing so that I would write you and tell you what to do with my stuff in case anything happened to me.”

This was held to be contingent, and the court stated:

“We think the words of the letter indicate clearly that it was written merely as an expedient in case of death resulting from the operation. In both letters he desires certain things done ‘in case anything happened’ evidently in connection with the operation.”

One of the best discussions of this subject is found in the case of *Walker v. Hibbard*, 185 Ky. 795, 215 S.W. 800, 11 A.L.R. 832. The following will was considered:

“June 8, 1917

“Dear Aunt Mintie: — On Sunday evening I go to St. Elizabeth’s Hospital to have a slight operation. I do not anticipate any trouble, but one never knows. If anything should happen to me, I want you please to do this for me. See that everything I have in the world goes to George B. Gomersall. He is dearer to me than anything in this world, and he deserves it. You may think this is too much, but I don’t believe you will, and it is my wish. If there is anything around the house you want, of course it is yours. The sideboard belongs to Sam Long. You have been far better to me than I deserve, and I love you better than you will ever know.

With very much love,  
Mame S. Long.”

She recovered from the operation and did not die until December, 1917.

The will was dated June 8. She went to the hospital June 10th, left the hospital June 21st and finally delivered the purported will to the beneficiary Gomersall on June 24th, a date after she had recovered from the contemplated operation. After reviewing many authorities the court concluded that the will in question was contingent and, therefore, the lower courts were correct in refusing to admit it to probate. In so far as material here, the court concluded the law to be as follows :

“It may also, as we think, be fairly gathered from all the authorities that, if the will is so phrased as to clearly show that it was intended to take effect only upon the happening of the particular event set forth in the paper as the reason for writing it, or, putting it in other words, if it was written only to make provision against a death that might occur on account of or as a result of the specific thing assigned as a reason for writing the will, it will be a contingent will; but if the causes assigned for writing it are merely a general statement of the reasons or a narrative of conditions that induced the testator to make his will, it will not be a contingent will, although it may set forth probable or anticipated dangers or conditions that induced the testator to write it.”

In the case at bar the conditional character of the language of the will is more certain than in the *Walker* case. In the case at bar the deceased referred to the fact

that he was in the Holy Cross Hospital and, again, he used that very strong language "in the event that I do not survive". Considering the language in the *Walker* case in relation to the will being considered by us it at once becomes apparent that under the *Walker* case this is a contingent will. The court there said:

"\* \* \* She did not intend, when this paper was written, that it should be a permanent disposition of her property, or that it should be her last will, no matter when or where she died, or from what cause, but only that it should be her last will in the event she died in St. Elizabeth's Hospital as a result of the operation. Fear of the fatal result that might follow the operation was the moving cause, and the only cause, that influenced her to write it, and it was only this probable calamity that she wanted to provide her. It was a temporary disposition, intended to meet a present emergency, and when the emergency it was intended to provide against passed, the paper ceased to have any force or effect. This letter is not susceptible of any other construction."

The court then used the strongest language that it could think of for a contingent will and it reads like the will in the case at bar. The court stated:

"If she had said in the letter, 'I only intend this disposition of my estate to be effective in the event I do not survive the operation I am about to submit to,' it would not manifest her purpose in writing it more clearly than the words she employed."

The proponent here testified that she kept the will until after Mr. Ellerbeck returned home and that when she returned it to him he told her that he would show her where he would put it, which he did (R.36). This *Walker* case completely answers any contention that could be made on behalf of the proponent because of this conduct. As noted above the testator delivered the will to the beneficiary after recovery and this was held not to be a republication and that the intent at the time of making the will would be controlling with particular significance being given to the language of the will itself.

In *Davis v. Davis*, 107 Miss. 245, 65 So. 241, the testator while lying in a hospital awaiting an operation wrote a letter to his mother which stated in part:

“Should I not get over this operation I want you and Papa to take charge of everything I’ve got.”

The court held that this will was contingent.

In *Ellison v. Smoot’s Adm.*, 286 Ky. 768, 151 S.W. 2d 1017, the testatrix wrote a letter to her sister in which she expressed despondency and stated that she didn’t feel very strong. She then wrote:

“If I can’t live through it and anything happens to me I want you to have what I have.”

The testatrix did not die until two years and four months later. It was held that the will was conditional and should not be admitted to probate.



The two annotations above cited are subdivided with reference to the occasion of peril which it was contended would make the will contingent. It is to be noted that there are five cases cited having relation to "death from sickness or operation" and in each instance the occasion being referred to with particularity was held to constitute a conditional will. *Re Cook*, 173 Cal. 465, 160 Pac. 553, *Davis v. Davis*, 107 Miss. 245, 65 So. 241, *Dougherty v. Holscheider*, 40 Tex. Civ. App. 31, 88 S.W. 1113, *Underwood v. Rutan*, 101 Ohio St. 306, 128 N.E. 78, *Ellison v. Smoot's Adm.*, 286 Ky. 768, 151 S.W. 2d 1017.

Many other cases could be cited where the contingency relied upon was a return from a trip, voyage or military service, but we submit that the foregoing cases relating to recovery from a particular illness are the cases in point. The other cases are contained in the annotations heretofore referred to.

Contingency of a will depends largely upon whether the peril in question is referred to as the occasion or inducement for making the will or whether it is made a condition on the happening of which the will is to be operative.

The will at bar refers to the hospitalization and sickness as both. In other words, it was not only the occasion or inducement, but also failure to survive therefrom was the condition necessary to make the will op-

erative. This is pointed up in the case of *Dougherty v. Dougherty*, 4 Met. (Ky.) 25. The will there involved read in part as follows:

“I, James Dougherty, of the county of Franklin and state of Kentucky, hath this day made this my last will and testament, as I intend starting in a few days to the state of Missouri, and should anything happen that I should not return alive, my wish is that all of my land and negroes, and all I leave behind me, after paying my just debts, be kept in the hands of the bishop of the diocese of Scott county, as trustee \* \* \*”.

The testator made the contemplated trip to Missouri and returned home and died later. The court held the will to be contingent and, in doing so, stated:

“The words in relation to the trip to Missouri contain two ideas: the one a reason for making a will, and the other the condition upon which the paper is to take effect as a will. The expression, ‘as I intend starting in a few days to the state of Missouri,’ refers to the contemplated trip as the reason for making the will; and the remainder of the language, ‘and should anything happen that I should not return alive, my wish is,’ etc., makes, in unequivocal terms, a contingency or condition upon which the paper was to operate as his will.”

Let us turn to a closer analysis of the will in the light of the foregoing authorities. The first words establish the inducement or motive for the making of the will. “Being in the Holy Cross Hospital from digestive and

other troubles". It refers with particularity to the place and troubles he was experiencing. Next comes language which has nothing to do with motive or inducement. These next words refer to the particular event of his hospitalization and the causes thereof. These are the words of condition. They clearly show upon what condition this will is to become effective, "\* \* \* in the event I do not survive". This could only refer to a failure to survive from his then hospitalization and sickness. It could not refer to the general proposition of survival. In such sense none of us will survive. But he particularized the survival of which he was writing and that was his hospitalization in the Holy Cross Hospital and his sickness there.

After the foregoing he states that the proponent is to take charge of his home and such little business as might exist there. He then writes: "*Further*, she is to have my complete portion of the estate left by my father \* \* \*". We submit that the first words of the will establish the inducement for making it and the condition upon which it is to be effective. Any doubt of this is dispelled by the use of the word "further". The only sense that can be given to this word ties the balance of the language in with the preceding language. Further, according to Webster, means, as here used, "in addition", "moreover", "furthermore". Its use establishes the intention of the

deceased to make this dependent upon the condition of his survival and to make the entire will stand or fall upon such condition.

As a P.S. he writes "I appoint Mrs. Ruth Clayton Haws to serve as executrix without bond." All this does is place in legal language that which is already set forth in the first of the will. She is to be in charge of his estate—but in what event. That has been made conditional upon his survival from the particular hospitalization and sickness referred to.

We submit that the will must be considered as a whole. It was made to take care of a particular emergency which had arisen in the life of Ben B. Ellerbeck whereby he sought as clearly as he could to make disposition of his property in the event he did not survive that emergency.

We submit that this will is contingent and that it was meant only for the purpose of making a temporary disposition of property to meet a particular condition which existed, to wit, his fear that he might not survive his then hospitalization.

The evidence establishes that he survived and recovered from this hospitalization and since the condition upon which the effectiveness of this will depended did not occur it did not become the will of Ben B. Ellerbeck and it should not have been admitted to probate.

## CONCLUSION

We respectfully submit that this Court should reverse the order of the trial court, directing the lower court to refuse to admit said will to probate.

Respectfully submitted,

RAWLINGS, WALLACE  
ROBERTS & BLACK

*Attorneys for Contestant and  
Appellant*

530 Judge Building  
Salt Lake City, Utah

Received.....copies of the within Brief of Appellant

this.....day of....., A. D. 1953

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*Attorneys for Proponent and Respondent*