

1953

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

Utah Supreme Court

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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.

Case No. 8010

---

**BRIEF FOR RESPONDENT**

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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. Jeppson, Judge.

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vs

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---

BRIEF FOR RESPONDENT

---

In reviewing the statement of the case made by the appellant, the respondent emphasizes some additional points:

The testator was an unmarried man and left surviving him, only his brother, the contestant of the will and the appellant herein. (R 4)

That the said contestant last saw the testator in 1938 in Salt Lake City, Utah (R 21).

That the will is an olographic will, therefore, in the writing and words of the testator, more clearly expressing his intention than a dictated will would have done.

The will is in three parts:

1. Directing Mrs. Ruth Clayton Haws to take full charge of testator's home and such little business as may exist there.

2. Ruth Clayton Haws is to have testator's complete portion of the estate left by testator's father, Witton W. Ellerbeck.

3. Appointing Mrs. Ruth Clayton Haws to serve as executrix without bond.

The testator was very concerned about some of the orders for gun stocks at his place of residence and wanted to see to it that matter was taken care of. (R 38)

The testator wanted some bills paid, especially his taxes, telephone, lights, etc. (R 39)

His concern about this business and the payment of his bills, prompted the first sentence of the will.

The respondent, Ruth Clayton Haws is a first cousin to the testator and had close relations with him in a social way, (R35), she visited him on several occasions while he was in the hospital (35) and was present at his bedside at the time he made the will. (R36)

The will was given to Mrs. Ruth Clayton Haws, who held it in her possession until the testator returned to his home, when she returned it to him saying: "Well,

here is this will” and he said, “Well, I will show you where I will put it” and he put it in the cupboard (R36). The will was found the day of his death, right where he put it. (R36)

## STATEMENT OF POINT RELIED UPON BY RESPONDENT

### Point 1

THE WILL ADMITTED TO PROBATE WAS ABSOLUTE AND NOT CONDITIONAL OR CONTINGENT.

## ARGUMENT

### Point 1

THE WILL ADMITTED TO PROBATE WAS ABSOLUTE AND WAS NOT CONDITIONAL OR CONTINGENT.

(74-2-1) Utah Code Annotated, 1953. Interpretation of Wills:

A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.

In re Johnson’s Estate, 64 Utah 114, 228 P 748.

recites: “Intention of testator is ultimate object to be kept in mind and to which all rules must yield.

(74-2-2) Utah Code Annotated, 1953.

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.

(74-2-10) Utah Code Annotated, 1953.

Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.

In re Hill's Estate. (Oregon Case) 256 P2nd 735.

"A will is not unnatural because it excludes one's next of kin in preference to those who may have enjoyed a closer and perhaps an affectionate relationship with testator.

Testator has right to dispose of his property by will as it pleases him and without consideration for blood or legal ties.

Through his will, testator is invested by law with substantially all rights he enjoyed in life to make unfettered disposition of his property, and will is not to be set aside in absence of convincing evidence that testator was wanting in testamentary capacity at time will was executed or that testator was subjected to undue influence of another, resulting in substitution of such other's will for testator's own voluntary volition."

In re Holman's Will, 42 Or. 345, 70 Pac. 908.

Justice Wolverton, speaking for the Court, said:

"The right of one's absolute domination over his property is sacred and inviolable, so that he may do what he will with his own, if it is not to the injury of another. He may bestow it whithersoever he will and upon whomsoever he pleases, and this without



regard to natural or legitimate claims upon his bounty; and if there exists no defect of donative capacity, whereby his individual will or judgment does not have intelligent and conscious play in the bestowal, or undue influence or fraud, whereby an unconscionable advantage may be taken of him through the wicked designs of another, the law will give effect to the disposition; and the right to dispose of one's property by will and bestow it upon whomsoever he likes is a most valuable incident to ownership and does not depend upon its judicious use. And this court has held in effect that while it seems harsh and cruel that a parent should disinherit one of his children and devise his property to others, or cuts them all off and devise it to strangers, from some unworthy motive, yet so long as that motive, whether from pride or aversion or spite or prejudice is not resolvable into mental perversion, no court can interfere."

The appellant and contestant last saw the testator in 1938, therefore the relationship between them, although brothers, was very remote and distant; the respondent was a first cousin to the testator and had a close social relationship with him, it is only natural that the respondent should be the object of his bounty. The bequest of testator's complete portion of the estate left by testator's father, Witton W. Ellerbeck, had nothing to do with his concern about his business and the payments of bills, but was intended as an absolute and non-contingent bequest.

Being in the Holy Cross Hospital from digestive and other troubles and being concerned that he might not survive, induced the testator to make the will in

question and he expressed his intention in making unfettered disposition by his own hand of his complete portion of the estate left by his father, namely, Winton W. Ellerbeck.

To say that the present will is a contingent will, even though the bequest to the respondent has no bearing whatsoever on a contingency that may have existed, would destroy the testator's right to his sacred and inviolable right to do what he desired with his own.

57 Am. Jur. p. 454. Sec. 672.

Whether or not a will is to be regarded as contingent depends upon the intention of the testator. Courts will not regard a will conditional or contingent unless the intention of the testator to make it so clearly appears. The Court should not read into a will a condition of its operative effect which upon a reasonable interpretation of the language of the will is not to be found therein. The general rule of construction that favors an interpretation which will prevent intestacy operates to require that a will be construed to be unconditional in case of doubt on that score. A will is not made conditional by statements therein which have no reasonable or logical relation to the testator's property or to the objects of his bounty. A statement in the will of circumstances which merely indicate the necessity of a will does not render the will contingent or conditional. A will is not conditional if the contingency expressed in the instrument is referred to merely as the occasion or inducement for making the will. If the language used in a will can by any reasonable interpretation be construed

to mean that the testator referred to a possible danger or threatened calamity only as a reason for making his will at that time, the courts incline towards holding that the will is not contingent upon the occurrence of such danger or calamity.

Ferguson vs. Ferguson, 121 Tex. 119, 45 SW2, 1090, 79 ALR 1163

Barber vs. Barber, 368 Ill. 215; 13 NE2 257,  
Forquer's Estate, 216 Pa. 331; 66 A. 92

In Ferguson vs. Ferguson, 121 Tex. 119; 45 SW2 1090, 79 ALR 1163

The court is guided at the outset by well recognized rules of construction in arriving at the testatrix' intent. Briefly, these rules are as follows:

(1) The fact that testatrix left a will implies that she did not intend to die intestate. Alexander on Wills, vol. 1, p. 123, Sec. 105.

(2) A will is construed to be a general and not a contingent will, unless the intention to the contrary clearly appears either expressly or by necessary implication from a reading of the language of the will as a whole. Eaton vs. Brown, 193 U. S. 411, 24 S. Ct. 487, 40 Cyc. 1082.

(3) If the event mentioned in the will merely indicates the inducement which caused the testatrix to make the will, and her intent to make it contingent is not apparent, the will is entitled to probate as a general will. R. C. L. 121, p. 166.

(4) If the will is open to two constructions, that interpretation will be given it which will prevent intestacy. Alexander on Wills, vol. 1, p. 123, Sec. 105.

Now referring to the purported will of Ben B. Ellerbeck:

An examination of the will indicates that his main desire was to make the bequest of his complete portion of the estate left by his father, Witton W. Ellerbeck, to the respondent and not to die intestate. His will indicates that he had fixed notions as to who was to receive his property.

In the case of *Eaton vs. Brown*, 193 U. S. 412, 24 S. Ct. 487, 488, 48 L. Ed. 730 Justice Holmes holds that the character of the bequests made may be looked to in deciding whether a contingent will was intended.

The bequest of testator's complete portion of the estate left by his father had nothing to do with his concern about his business and the payments of his bills, but was intended as an absolute and non-contingent bequest.

His expression, "Being in the Holy Cross Hospital from digestive and other troubles, in the event that I do not survive," merely recites the circumstances which induced the testator to make the will.

In *Dougherty vs. Holscheider*, 40 Tex. Civ. App. 31, 88 S.W. 1113, it was said:

"The current of modern authority, seems to be that, if the happening of the event is merely referred to as

giving the reason or inducement for the making of the will, it be held unconditional.”

In the will before the Court, Mrs. Haws by said will was to receive of testator's bounty. If the fact that he was in the Holy Cross Hospital and did not survive this particular illness had been the condition of this bounty, an hypothesis which is to the last degree improbable, it is not to be believed that when he came to explain his will, he would not have explained it with reference to the extraordinary contingency upon which he made it depend, instead of going on to make a bequest which on the face of it, is an unconditional gift.

57 Am. Jur. p. 457, Sec. 677. Where it is doubtful whether the will is contingent upon the occurrence of an event, the circumstances under which the will is executed, as well as the language of the instrument, may be considered. 54 ALR 933. The fact that the testator preserves the document for a long time after the passing of the time for the occurrence of a possible event mentioned in the will is admissible in evidence as tending to show that the possibility of the occurrence was a mere inducement for the making of the will and not a condition precedent to the operation of the will.

Barber vs. Barber, 368 Ill. 216. 13 N.E. 2nd 257.

Now, let us see what actually happened to the will in question. The testator made the will in his own handwriting. The will was given to Mrs. Ruth Clayton Haws, the respondent, who held it in her possession until the testator returned to his home, when she returned it to him saying: “Well, here is the will” and he said,

“Well, I will show you where I will put it,” and he put it in the cupboard where it was found the day of his death.” (R 36)

In answer to the questions put to Mrs. Haws by Mr. Roberts, attorney for the appellant and contestant:

Q. “But in any event he finally recovered from this sickness, did he not?

Answer: I would say yes.

Q. You saw him working around the yard and shop after that didn’t you?

A. Yes.

Q. And he appeared to be all right?

A. Yes.

68 Corpus Juris 631. Wills. Sec. 256.

The condition must appear upon the face of the will and parol evidence is not admissible to show that an instrument which in form is a general or absolute will was intended to take effect only upon a contingency. Parol evidence is admissible, however, to show that the testator’s intention was to make an absolute and not a contingent will, so evidence of the preservation of the document for a considerable time after the non happening of the contingency, or the expiration of the time of impending calamity, is admissible to show that the testator regarded the contingency as relating to the motive inducing the making of the will rather than as a condition to its becoming operative and such evidence has been held to raise a presumption that the will was intended to be absolute and noncontingent.”

Page on Wills, Vol. 1. Section 96. Contingent Wills.

“In one group of cases the problem is whether the language employed makes the will conditional or whether it merely recites the circumstances which have induced the testator to make the will in question. In another group of cases the problem is whether the language employed makes the entire will conditional or whether it attaches a condition merely to the clause of the will in connection with which such conditions is expressed.

The general tendency of the courts is to regard the will as absolute rather than conditional unless the language employed by the testator unequivocally shows his intention to make the entire will conditional.

The problem is presented “Whether testator merely recites such anticipated circumstances of his death as the motives which induced him to make his will.

There is quite a strong tendency to treat such provisions, whether possible as descriptive of the motives which induce testator to make his will and not as conditions on which the validity of the will depends.

The surrounding facts may be considered in determining whether or not testator intended a contingent will, if the instrument is ambiguous.

Barber vs. Barber 368 Ill. 215, 13 N.E. 2nd 257.

In re Will of Tinsley, 18 Ia. 23, 11 A.L.R. 826. It is said that the fact that the testator kept the will for some time after the event happened tends to show that testator did not intend a contingent will.



Page on Wills, Vol. 1, Sec. 100. *Contingency limited to part of will.*

If the language of a will left it fairly in doubt whether testator intends the contingency to apply to the entire will, or to some of the gifts therein, the construction which makes the will as a whole unconditional is preferred.

Massie vs. Griffith, 59 Ky. 364.

Lee vs. Kirby 186 Ky. 603, 217 S.W. 895.

Ganaway vs. Ganaway, 246 Ky. 722, 56 S.W. 2.

Damon vs. Damon, 90 Mass. 192. "Where the first bequest began, "First, if by casualty or otherwise, I should lose my life during this voyage" and the subsequent bequests do not refer to such conditions, it was held that the will as a whole was unconditional,"

Walker vs. Hibbard, 185 Ky. 795. 215 S. W. 800, 11 A.L.R. 823;

recites the rule of construction: "If there is a reasonable doubt as to whether a will is intended to be contingent or permanent, the doubt will be resolved in favor of the permanency.

In Massie vs. Griffith, 2 Met. 364., the will recites:

"It is my wish that all the notes and accounts found among my paper vs. my brothers, should be destroyed or handed over to them. Should I never return. I also desire that each of them should have \$200.00 in addition, and the remainder of my property divided equally between the heirs of Thomas and John M. Massie."



Massie who was a resident of Kentucky made a visit to Missouri and while there wrote the above.

The court states: It will be observed that the words "should I never return" are to be found about the middle of it, and the court rules it was not a contingent will because the only words it contained indicating its contingent nature were not applicable to the whole writing but only to a part of it.

The situation presented by the case at bar, the reference to being in the hospital and "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," is not applicable in any way to the sentence: "Further, she is to have my complete portion of the estate left by my father, namely Witton W. Ellerbeck" or the "P. S. I appoint Mrs. Ruth Clayton Haws, to serve as executrix without bond."

Appellant's own statement of Webster's definition of the word "Further" meaning, "in addition," "moreover," "furthermore" breaks the application of the condition of the first sentence.

In reference to the cases cited by appellant:

Bagnall vs. Bagnall, 225 S. W. 2nd 401, the will shows on its face that it was executed at a time when the testator had in mind an intention to take a trip of some character and was intended to become effective only on condition that something should happen to him while on that trip; that two disinterested witnesses testified without contradiction that Bagnall told them that he wrote the instrument in question just before starting on a fish-

ing trip and that he meant it to apply only for that trip. Bagnall died 18 years after the making of the will in question. Therefore, Bagnall at all times intended that the will was a conditional will.

In *Wilson vs. Higgason*, 207 Ark. 32 178 S. W. 2nd 855, the instrument considered was a letter addressed to a relative and was in no way a direct bequest. At three different places in the instrument the writer states "in case I should die any any time soon." She did not die until 12½ years thereafter. The instrument in question was defeated by its own limited conditions.

In *Wilson vs. Higgason*, 207 Ark. 32 18 S. W. 2nd 855, Civ, App, 31, 88 S.W. 1113, the instruments in question were letters addressed to a friend and not direct bequests. The words of the letters indicate clearly that they were written merely as an expedient in case of death resulting from the operation referred to. In addition to this the property referred to in the letters was disposed of, showing that there was no intention that the letters should be recognized as an unconditional will.

In reference to the case *Walker vs. Hibbard*, 185 Ky. 795, 215 S. W. 800 11 A.L.R. 832 the letter was a conditional paper which was never delivered to the person for whom it was intended. The paper does not contain, as wills usually do, a direct devise or gift of property but is a request or direction to her Aunt to see that Gomersall got all her property in the event she died as the result of the operation. If she survived the operation, it is clear that the request could have no force or effect whatsoever as it was only to be effective in the

event she died under the operation. Because the direction to her Aunt and the devise to Gomersall are so coupled together that when one failed or became inoperative so did the other.

In the case of *Davis vs. Davis* 107 Miss. 245. 65 S.O. 241 the instrument in question is a letter to the mother of the writer depriving his estranged wife of any participation in his estate. The letter referred to in fact was not a will, the contingency upon which its validity depended had never happened. In the letter he expressly states that he loved his wife dearly and he hoped she would return to him, and that he would not have "to give her up." The whole gist of the instrument was contingent.

In *Ellison vs. Smoot's administrator*, 286 Ky. 768, 151 S. W. 2nd 1017, the sentence referred to was only a casual statement and not intended as a will. Mrs. Lucas the writer did survive and lived for 2 years and 4 months before being killed in an accident.

None of these cases are in point with the document before this court, as the will of Ben B. Ellerbeck is in form a will, making a direct bequest to Mrs. Haws and finally appointing her as executrix of said instrument.

## CONCLUSION

The finding of the trial court is supported by competent evidence, therefore it is binding on this court on appeal.

Beagley v. Gypsum Co., (Utah) 235 P. 2d 783,  
Knudsen Music Co. v. Masterson, (Utah) 240 P. 2d  
973.

Respectfully submitted,

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