

1954

Witton B. Ellerbeck v. Ruth Clayton Haws : Respondent's Petition and Brief on Rehearing

Utah Supreme Court

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Recommended Citation

Petition for Rehearing, *Ellerbeck v. Haws*, No. 8010 (Utah Supreme Court, 1954).
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IN THE SUPREME COURT

of the

STATE OF UTAH

WITTON B. ELLERBECK,
Appellant,

— vs. —

RUTH CLAYTON HAWS,
Respondent.

} Case. No.
8010

RESPONDENT'S PETITION AND BRIEF ON
REHEARING

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REHEARING

Comes now the petitioner, Respondent herein, and moves this Honorable Court for a rehearing and reconsideration of its opinion and judgment in the above entitled cause, and for grounds and as a basis for such motion respondent relies upon the following:

1. The Court erred in refusing to apply the rule as it applies to will cases, that all reasonable presumptions are to be indulged in favor of the correctness of the findings.

2. The Court erred in its decision in holding the document written and signed by Ben B. Ellerbeck as conditional.

3. The Court erred in refusing to consider the evidence on the question of intent of the testator.

4. The Court erred in refusing to treat the several parts of the will as separate and distinct, and in considering the argument of respondent as to same amounting to a splitting of hairs.

5. The Court erred in applying the principals of law as laid down in the case of *Walker v. Hibbard* to the instant case.

6. The opinion and judgment of the Court as rendered, predicated upon the erroneous determination of the foregoing propositions is erroneous and should be vacated and set aside.

ARGUMENT

The trial court found in its pre-trial order (R.) paragraph 6 that the will is absolute, and is not conditional, and in its Findings of Fact it found the document offered to be an olographic will and the last Will and Testament of the deceased; that it was executed in all respects and particulars as required by law, and that the testator at the time of the execution of said document, was of sound mind and not under any restraint, duress, menace, fraud, undue influence or fraudulent misrepres-

sentations. As Conclusions of Law, the trial court ordered the document admitted to probate as the last Will and Testament of said deceased. The judgment of the trial court is amply supported by these findings.

In holding that the will of Ben Ellerbeck is conditional the Court places the same meaning and construction on the words used by Ellerbeck, namely; "in the event I do not survive" as have been given in some cases to words used by testators who are about to embark on a trip and say "if I should not return." This application is erroneous. A clear distinction can be made as to the question of intent of the maker. In the one case a particular time or event is named, in the other there is no specific time or particular event named, the words are general in their character.

The Courts have held wills to be not conditional even where the will is as follows:

"If any accident should happen to me and I die from home," and testator died at home. *Likefield v. Likefield*, 82 Ky. 589 cited in *Walker v. Hibbard* in which the will was made on January 14, 1859 and testator died at home March 28, 1881 leaving his widow and no children. The evidence shows testator and his wife lived together for over 30 years, he kept the paper in contest in a small tin box. In the latter part of the year of his death, and in the presence of his wife, testator examined his papers including the document and after reading it over replaced it in the box and directed his wife to take care of it.

Testator's brothers and sisters, and the children of a deceased brother contested the writing contending it was a contingent will and never became effective, as he died at home.

The court said the rule is that court will not be inclined to regard a will as conditional, if it can be reasonably held that the maker was simply expressing an inducement to make it.

So, "in case I should die on my travels," was held not conditional although testator returned home, *it being shown that he recognized the paper as his will shortly before his death. Strauss v. Schmidt*, 3 Phill. 209, cited in *Likefield* supra.

In re: *Tilden*, 18 Jurist, 136 the language of the will was: "If it please Almighty God to call me suddenly from this mortal life, and during my absence from home, I leave, etc." It was sustained although the testator died at home.

In the *Likefield* case, the court was influenced by testator's having done the very thing as did Ben Ellerbeck, viz: having his attention directed to the document after it had been written and preserving it. This is evident from the following language:

"It is shown in this case that the testator carefully preserved the paper in contest, that he examined it the year prior to his death; and while these facts can not constitute a statutory republication of it, yet they illustrate the intention of the maker of the instrument, as they tend to show

that he believed he had disposed of his property by it." (Italics added)

We think the language used by the testator in *Forquer's Estate*, 216 Pa. 331, 8 Ann. Cas. 1146, is much more deserving of being construed as a conditional will than is that in the instant case. Here too the court considered the fact that the will was not destroyed when directed to the attention of the testator but his oral expression in reaffirming some constituted republication although not in conformity with legal requirements. The testator said:

"I intend starting tomorrow morning to Montana to see my brother. Knowing the uncertainty and risk of a journey, Know All persons that I do hereby will and bequeath my real and personal property to my wife. xxxx And should anything befall me while away as that I should die, then in that event all my estate is conveyed and set over to my wife."

Held not merely contingent upon testator's death on his journey but continued operative after his safe return and his death thereafter.

The facts of that case are much like those of the instant case. The will when made was committed to the keeping of testator's wife while on the journey to Montana. On testator's return he made inquiry of his wife for the will, read it to her and then placed it in his office safe.

In *Redhead v. Redhead*, 83 Miss. 141, the will read:

"Realizing the uncertainty of life at all times and the dangers incident to travel, I leave this as

a memorandum of my wishes, *should anything happen to me during my intended trip to Buffalo and other places.*" etc. (Italics added)

The court said:

"It cannot be overlooked that in every will that ever was written, or ever will be written, there is an occasion for making the will. It is always present and without it no will would ever be made."

Testator took his trip and returned home and lived some six months thereafter. The will was admitted. The court said:

"The dangers incident to his journey together with the uncertainties of life were the occasion of his execution of the instrument, and its validity was not contingent upon his death abroad."

So too in the Ellerbeck will is it evident that Ellerbeck was prompted to make a will because he was in the hospital and because of the uncertainties of life. They were clearly the occasion of his writing the document. It is our position that had Ellerbeck written the document just prior to his going to the hospital and said he was about to go to the hospital and should I not survive, then a stronger case would have been made by contestant, but here is a case where Ellerbeck had been in the hospital for six days. He was getting better and about to leave the hospital, he left the hospital two days after writing the will. There is nothing in the evidence indicating any emergency or alarm — nothing more than a statement of where Ellerbeck was at the time of the writing. The

fact that he said "in the event I do not survive" is nothing more than the great majority of such documents recite "Upon my death." The words used by Ellerbeck meant nothing more than had he said "upon my death" and to give them any other meaning is reading something into the words clearly not intended by the testator. To give the words the meaning which the Court would do requires the addition thereto of the words "but die in the hospital" or 'die of digestive and other troubles.'

The court appears to be influenced in its decisions by the *Walker v. Hibbard* case. We will hereinafter point out wherein that case can be distinguished from the instant case. However, before doing so we call the attention of the court to the fact that even in Will cases, courts have repeatedly gone very far in placing such construction on testamentary documents as will entitle them to be admitted to probate. This is especially true in those cases where it appears most unjust and inequitable to hold otherwise. This is particularly noticeable in those cases where the recipient is the widow as against others.

In the instant case the court has gone directly against that well established principal of law requiring the construction to be placed on the words in favor of the will. This court has shown that it is impressed with the fact that testator most likely did intend that Mrs. Haws take under Ellerbeck's will as expressed in the following language:

"Were we at liberty to guess what the intention of the testator was at the time of death, we

likely would conclude that he desired to give his property to Mrs. Haws."

Courts have in not such favorable cases as this one, considered it unnecessary to guess at what the intention of the testator was, they have placed such construction on the words as to give them the meaning intended by the writer.

Let us analyze this case from a logical and reasonable point of view. Let us put ourselves in the place of the testator. This we have a right to do in order to determine the intent of the testator. In so doing we can find no reason by word or action which could lead one to believe that Ellerbeck intended that his will should take effect only upon his death in the hospital, or from the very illness which put him there, as the court has construed. Ellerbeck was not certain as to what his illness really was as expressed in his own words. Therefore because of this uncertainty he could not have made the will conditioned on his dying from an ailment which hospitalized him and nothing other than that for he said he was hospitalized because of digestive and other troubles. This court has refused to give consideration to the words "and other troubles" but it places a limitation on the words used.

Why would Ellerbeck have intended that the will take effect only, as this Court has construed? The record shows his desire that his relative who had shown an interest in him should have, not all of his property, but his interest in his father's estate. It is evident the only

natural heir of Mr. Ellerbeck was his brother whom he had not seen nor heard from for many years. The cases hold that the intent of the testator comes not from a dictionary meaning of the words used by the testator but from all of the facts and circumstances and the conditions existing at the time the will is made. To hold as the Court has done in reversing the trial court, all of the circumstances and conditions inducing Mr. Ellerbeck to make his will must be disregarded, this including testator's actions a few days after its execution and after having returned from the hospital, in placing the writing in the cupboard at his home and advising Mrs. Haws where it could be found.

From a reading of a great many cases involving the question here concerned, it seems the courts have decided them both in favor of the will and against its admission where language very similar has been used, but the decision has been made upon a consideration of the circumstances surrounding the making of the will and the relationship of the recipient to the testator, whether it would be reasonable for the court to construe the intent the one way or the other. We believe this statement is born out by the decision in the *Walker vs. Hibbard* case. There is a case in which it would seem to have been most unfair and unjust for the court to have decided otherwise than as it did decide. There is a man who was practically a stranger to testator as compared with her family whom she had expressed love for, especially as to one, was the recipient under the will. Gomersall had contributed to the weaknesses and bad habits of testatrix as against

her family who did everything possible to correct these habits. Mrs. Long, testatrix had made the writing, not at the hospital but prior to entering the hospital. The writing was not a devise of property but nothing more than an instruction to her Aunt Mintie to see that certain things were done. Three days after testatrix left the hospital she handed the writing to Gomersall. Gomersall, not testatrix thereafter kept the document in his possession at all times until after the death of testatrix when he produced the document for probate. There testatrix had no opportunity to destroy the document. Neither is it evident that she did anything by word or deed which would indicate her intention to republish the will or to ratify and confirm that which she had done, or to pronounce it again as her will. These facts are most important in considering the intent of testator. None of these facts are present in the instant case but all evidence is to the contrary.

In addition to Mrs. Long having written the document prior to her entering the hospital to undergo an operation, it is clearly evident that she makes each expression conditioned upon the other. This is evident by taking the writing sentence by sentence as follows:

“On Sunday evening I go to St. Elizabeth's Hospital to have a slight operation.”

In the above words it is evident that Mrs. Long, being mindful of the fact that the act of an operation might prove to be fatal, she desires to act because of this situation with which she is confronted. Not so in the Ellerbeck case.

Then Mrs. Long, expressing the condition on which the writings is made says:

“I do not anticipate any trouble, but one never knows.”

Here again the time and condition which Mrs. Long is about to face is definitely and clearly brought out. As a further condition she says:

“If anything should happen to me.”

If anything should happen to me from what? From the operation of course, the intent is practically as clearly expressed as if it were to contain the additional words, “from the operation.”

The Appellate Court in its comparison of the language used by Mrs. Long in the *Walker* case with that of Mr. Ellerbeck in the instant case makes a substitution of those words used by Mr. Ellerbeck, viz: “in the event I do not survive” for the words used, “if anything should happen to me” and states “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.” In this we are in agreement. However, in the above we have a definite condition other and different than exists in the instant case. In the above example this court says:

“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.*” (Our italics)

The above is a very good example of that which we attempt to point out in the comparison of the cases and the basis of our argument that even in the instant case had the Ellerbeck will been written prior to his going to the hospital and not after he had recovered to such extent that he left the hospital two days after having written the will, then appellant would have had a much stronger case. In the above example it is clearly evident that the intent was conditional, this because Mrs. Long was about to undergo an operation which might prove fatal.

It further appears from a reading of cases, that a distinction has been made even when precisely the same words are used under different circumstances, the question of intent is the controlling factor.

This court states that some of our argument amounts to a splitting of hairs. Numerous authority support our position that words can apply to portions of a writing and not to the whole of it, including the *Massie* case cited in the *Walker v. Hibbard* case. We say without intending to be repetitious and where the court concludes that the first sentence makes the will conditional that it is clearly evident the intent if it can be construed at all as conditional was to have Mrs. Haws take total charge of the home and such little business as may exist. Not to the bequest to Mrs. Haws. Such is the only reasonable construction which can be placed upon the words from a consideration of all of the circumstances and conditions attendant upon testator at the time he made the will.

We think the *Bradford v. Bradford* case which is cited in the *Walker v. Hibbard* case is much more applicable than the *Walker* case. In the *Bradford* case the testator used the words "about to start upon a long journey, I deem it prudent to provide for the disposition of my property, in case I should not return." The court holding that the words did not constitute a condition upon which the will is dependent said:

"In connection with the other words quoted, they simply set forth the circumstances which induced him to make his will before his departure, for fear he might never return."

This same reasoning can be well adapted to the instant case. The court further said in the *Bradford* case:

"The supposed condition is alone connected with the motive and reasons for the prudence he deemed it his duty to exercise, and it is evident he did not intend to say 'In the event I do not return, then I make the following disposition of my property, or wish it disposed of in a particular mode,' but that he had doubts of his return, which arose from his physical condition, the long journey he was about to take, and the casualties which so often occur to travelers, and for these reasons he absolutely disposed of the whole of his estate without any conditions whatever."

The court refuses to give any consideration whatsoever to the act of Ellerbeck in his placing the document in the cupboard advising Mrs. Haws where she might find same, upon the will being directed to his attention after

he returned from the hospital and states that "neither his parol declaration as to what he would do with it, nor his placing it in the cupboard would fulfill the statutory requirements for executing a will. If what he did was intended as an attempted revival or republication, it was ineffective for such purpose." This reasoning is contrary to other well considered cases several of which are hereinabove cited, and in which while the courts have recognized that the act of testator did not comply with statutory requirements, still it most strongly showed the intent of the testator and had the effect of announcing again and under changed conditions that which is contained in the writing.

We have felt and still feel the act and deed of Ellerbeck after returning to his home from the hospital is practically as conclusive of our position in contending that Ellerbeck's intention was to not make a conditional will as had he re-written the document at that time. Why would Ellerbeck have preserved the will when it had been directed to his attention and directed Mr. Haws' attention to the place where it could be found, had he intended the will to be conditional? There is just no answer to such question. For the court to maintain its position that a statutory republication of the will was necessary is erroneous. We cannot presume for the purpose that Ellerbeck was informed on the law of republications of wills. Ellerbeck in this case considered the document to be his will and expected and desired Mrs. Haws to take under it. Ellerbeck believed he had disposed of his property by it.

In Forquer's Estate, 216 Pa. 331, 8 Ann. Cas. 1148;

Strauss v. Schmidt, 3 Phill. 209;

Likefield v. Likefield, 82 Ky. 589.

In each of the above cited cases the court was influenced by the fact that testator had an opportunity to destroy the writing at a later date, and having his attention directed to the writing, by his act and deed constituted a reaffirming of the writing and a republication although not in conformity with legal requirements.

If precedent is against justice, then a bold stroke for right must, as has been frequently done in our federal supreme court many times in the past few years, be made.

CONCLUSION

Wherefore, petitioner prays that a rehearing and re-argument be granted, that the judgment of the trial court be sustained and that the opinion and judgment of this court be vacated and set aside.

Respectfully submitted,

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