

1954

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

H. F. Lazier; Lazier and Lazier; John D. Rice; James E. Faust; J. Lambert Gibson; Cleon B. Feight; Attorneys for Appellants;

Recommended Citation

Brief of Appellant, *National Trust Company, Ltd. V. Duys*, No. 8019 (Utah Supreme Court, 1954).
https://digitalcommons.law.byu.edu/uofu_sc1/2011

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

SEP 14 1954

Case No. 8019

LAW LIBRARY

U. of U.

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,

Appellants,

-vs-

HELEN DUYS, ETHEL FORREST,
ERNEST HOWARD, THE PROTESTANT
BOARD OF SCHOOL COMMISSIONERS
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.

APPELLANTS' BRIEF

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

Attorneys for Appellants.

FILED

JUN 3 - 1954

Clk. Supreme Court, Utah

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS.....	1
ARGUMENT	6
POINTS TO BE RELIED ON.....	5
POINT NO. I.	
THE FOUR INSTRUMENTS ARE SO INCONSIST- ENT AND IRRECONCILABLE, THEY CANNOT CONSTITUTE A WILL.	6
POINT NO. II.	
THE INTENTION OF THE TESTATRIX WAS TO REVOKE THE PREVIOUS INSTRUMENTS AND TO MAKE ONLY THE INSTRUMENT DATED JANU- ARY 14, 1952, HER LAST WILL AND TESTAMENT....	6
CONCLUSION	16

TABLE OF CASES CITED

Beal's Estate, 117 U. 189, 214 P. 2d 525.....	7
Bjor's Estate (Cal.) 229, P. 2d 468.....	12
Giff's Estate, 232 P. 2d 328.....	13
Kearns v. Roush, 146 S.E. 729, 15 Iowa Law Rev. 232.....	10
Klewer's Estate, Nissen v. Koch (Calif.), 268 P. 2d 544.....	6-8-12
Love's Estate, 75 U. 342, 285 P. 2d 299.....	13-14-15
Phillips v. Smith, 100 P. 2d 244.....	13
Sandford v. Vaughn, 1 Phil. Eccl. Rep. 39, 161 Eng. Reprint, 907	10
Shiel v. O'Brien, Ir. Rep. 7 Eq. 64.....	12
Wallace's Estate, 223 P. 2d 284.....	13
Wupperman's Estate, 300 N.Y. Supp. 344.....	12

STATUTES

74-1-22, Utah Code Annotated, 1953.....	14
74-2-2, Utah Code Annotated, 1953.....	6
75-14-21, Utah Code Annotated, 1953.....	17

TABLE OF CONTENTS—(Continued)

TEXT BOOKS

Page

51 A.L.R. 661, 664, 667, 668, 675 and 683.....	11
51 A.L.R. 684	12
57 Am. Jur., Sec. 34, page 58.....	6
57 Am. Jur., Sec. 1034, page 670.....	4
57 Am. Jur., Sec. 1135, page 731.....	6
68 C. J., Sec. 491, page 803.....	11
69 C. J., Sec. 2052, page 895.....	4
26 Georgetown Law Journal 786.....	9
22 Ky. Law Journal 469 at page 494.....	9
Page on Wills, Lifetime Edition, Vol. 1, Ch. 15, Sec. 445, page 801	13
Page on Wills, Lifetime Edition, Vol. 1, Ch. 15, Sec. 464, page 837	11-15
Page on Wills, Lifetime Edition, Vol. 2, Ch. 22, Sec. 914 page 789	8
Page on Wills, Lifetime Edition, Vol. 2, Ch. 22, Sec. 927, page 852	11
Page on Wills, Lifetime Edition, Vol. 2, Ch. 22, Sec. 916, page 793	8
Page on Wills, Lifetime Edition, Vol. 4, Ch. 49, Sec. 1611, page 602	4

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,

Appellants,

-vs-

HELEN DUYS, ETHEL FORREST,
ERNEST HOWARD, THE PROTESTANT
BOARD OF SCHOOL COMMISSIONERS
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.

Case No. 8019

APPELLANTS' BRIEF

STATEMENT OF FACTS

Florence P. Howard died in Montreal, Canada on the
28th day of January, 1952.

On Petition of Walker Bank & Trust Company,
certain holographic documents, dated February 6, 1939,

June 3, 1940, May 7, 1949 and January 14, 1952, were admitted to probate as the last will and testament of the said decedent.

On November 15, 1952, Walker Bank & Trust Company filed a Petition to Construe Will, in the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah, known as Case No. 34386; National Trust Company, Ltd., as Administrator with the Will Annexed of the Estate of Robert Bown Ferrie, deceased and Colina Ferrie, filed an Answer to said Petition, as others did.

Judge Clarence E. Baker (R. 140) had made an Order, in case No. 34386, consolidating for hearing the Petition to Construe Wills and the Contest of the Order Admitting Wills to Probate.

Thereafter, Notice was given by the Executor that the Petition to Construe the Will and the Contest of the Order Admitting Wills to Probate, had been set by Judge Ray Van Cott, Jr., before himself at 10:00 o'clock A.M. on the 19th day of January, 1953. (R. 123).

After the consolidated hearing on January 19 and 20, 1953, Judge Ray Van Cott, Jr., made a Minute Entry, on February 10, 1953, which states, in effect, that the Motion for construction of wills having been heard on January 20, 1953, it is Ordered that the four instruments mentioned in the Executor's Petition to Construe the Will are declared to be the last will and testament of

the deceased, Florence P. Howard, and that all four wills are valid and constitute the will of the said deceased and should be administered as a whole, except in so far as they are irreconcilable as to particular bequests and each should be given effect in so far as possible. (R. 198).

This was carried into paragraph 3 of the Findings of Fact, in said case No. 34386, signed by Judge Ray Van Cott, Jr., on March 23, 1953:

“3. That said four (4) instruments above described, constitute and are the last will and testament of the said decedent, all subject to probate as such, except in-so-far as they are irreconcilable as to any particular bequests, and said instruments dated February 6, 1939 and June 3, 1940 were not revoked or superseded by the instrument dated May 7, 1949.”

Before the Findings of Fact and Conclusions of Law and Decree were presented to the Court, Appellants herein Petitioned for, and were granted, on March 17, 1953, the right to take an Intermediate Appeal to the Supreme Court, from the Order denying Appellants herein the right to intervene in the will contest, and the Supreme Court denied the Intermediate Appeal on April 29, 1954.

On May 14, 1953, Appellants filed Notice of Appeal to the Supreme Court of the State of Utah, from the Findings of Fact, Conclusions of Law and Decree, dated March 23, 1953, and denial of a Motion for a New Trial. This Appeal bears the No. 8019.

Helen Duys, Ethel Forrest and Ernest F. Howard appealed from that portion of the Decree dismissing their contest, which Appeal bears the No. 8021, and said cases, 8019 and 8021 were consolidated in this Court.

The Record for consolidated cases No. 8019 and No. 8021 is already in the Supreme Court, under Case No. 7970.

The Minute Order of February 10, 1953, construing the will, is carried over almost verbatim into the Findings of Fact, and the Findings and Conclusions of Law and Judgment and Decree were a result of the consolidated hearing, wherein the Court, by its Findings, attempted to construe the instruments. Keeping in mind the Petition to Construe and the issues raised there as to whether any of the instruments are the will of the decedent and whether the last instrument is the will, the parties may be bound by this Judgment.

57 Am. Jur, Sec. 1034, Page 670;

Vol. 4, Page on Wills, Ch. 49, Sec. 1611, Page 602;

69 C. J., Sec. 2052, Page 895.

The Motion of intervention of National Trust Company, Ltd., as Administrator with the Will Annexed of the Estate of Robert Bown Ferrie, deceased, and Colina Ferrie, in the Contest, was denied and they were not admitted as parties to the Contest. They answered the Petition to Construe Wills and by the Findings, Conclusions and Decree therein, were made parties to the

Construction Judgment by Judge Ray Van Cott, Jr., and they are properly here on an appeal from such Findings of Fact, Conclusions of Law and Decree.

The single set of Findings of Fact and Conclusions of Law are a culmination of the consolidated hearing and contain the attempt of the Court to construe the instruments.

The decision of Judge Van Cott on the Petition to Construe the Will and the Answers thereto, fails to find on the issues presented, and leaves to the discretion of the Executor not only the interpretation but the distribution. Unless this Court passes on the attempted construction, there will be uncertainties and ambiguities even on distribution as to the will of the decedent, and the rights of the heirs and legatees will not be protected.

Additional facts, which Appellants herein desire to set out, are contained in Appellant's Brief in Case No. 7970, and particularly Point IV thereof, which facts are hereby incorporated by reference and made a part hereof.

POINTS TO BE RELIED ON:

POINT NO. I.

THE FOUR INSTRUMENTS ARE SO INCONSISTENT AND IRRECONCILABLE, THEY CANNOT CONSTITUTE A WILL.

POINT NO. II.

THE INTENTION OF THE TESTATRIX WAS TO REVOKE THE PREVIOUS INSTRUMENTS AND TO MAKE ONLY THE INSTRUMENT DATED JANUARY 14, 1952, HER LAST WILL AND TESTAMENT.

ARGUMENT

POINT NO. I.

THE FOUR INSTRUMENTS ARE SO INCONSISTENT AND IRRECONCILABLE, THEY CANNOT CONSTITUTE A WILL.

Because this Point was fully presented in the Brief filed by Appellants in Case No. 7970, in Point No. IV thereof, Appellants refer to said Brief and said Point and cite to your Honorable Body, in addition thereto:

In re Klewer's Estate, Nissen vs. Koch, (Calif.),
268 P. 2d 544.

57 Am. Jur., § 34 P. 58.

POINT NO. II.

THE INTENTION OF THE TESTATRIX WAS TO REVOKE THE PREVIOUS INSTRUMENTS AND TO MAKE ONLY THE INSTRUMENT DATED JANUARY 14, 1952, HER LAST WILL AND TESTAMENT.

The fundamental rule of interpretation and construction in testamentary instruments is that the intention of the testator, gathered from the four corners of the instrument, shall govern.

Section 74-2-2, UCA 1953.

57 Am. Jur., Section 1135, p. 731, states:

“All rules of construction are designed to ascertain and give effect to the intention of the testator, for the very purpose of the construction of a will is to ascertain such intention. Accordingly, while the courts are bound to have regard to any rules of construction which have been

established, it is to be remembered that rules and presumptions relating to the construction of wills are subordinate to the intention of the testator where that has been ascertained or is ascertainable, and must yield thereto, however crudely or artificially the will may be drawn. Rules of construction have their legitimate function when they are needed to understand the purpose intended to be embodied in the language used in the will. They take hold only where uncertainty commences and let go where it ends, and cannot control or vary the intent or properly prevent its execution. The one rule of testamentary construction to which all others are servient and assistant, it has been said, is that the meaning intended by the testator is to be ascertained and given effect in so far as legally possible. The testatorial intention will control any arbitrary rule, however ancient may be its origin, and the various accepted canons of construction serve not so much to restrict or constrain the judicial mind as merely to aid or guide it in the discovery of the intention of the testator.”

In the case of *In re Beal's Estate*, 117 U. 189, 214 P. 2d 525, the Supreme Court said:

“The two rules of construction employed in the Hardie case have, in substance, been codified in this state. Sec. 101-2-1, U. C. A. 1943, provides:

‘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.’

Sec. 101-2-10, U. C. A. 1943, provides:

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

In the instant case, the express language of the will covers only two of three possible fact situations respecting the time of the testator’s death in relation to the time of his wife’s death. Had the testator’s wife survived him or had she perished with him in a common disaster, the testator’s intent as to the disposition of the estate is clear. But the testator’s intention in the advent of the death of his wife prior to his demise is not expressly made known nor can it fairly be implied from a language of the will. 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 Klewer’s Estate, (Cal.) 268 P. 2d 544, the Court said:

“In the interpretation of a will, ascertainment of the testator’s intention is the fundamental rule of construction, to which all others are subordinate.”

Page on Wills, Vol. 2, Ch. 22, Sec. 914, p. 789 and Sec. 916, p. 793.

In that respect, see 22 Ky. Law Journal 469, at page 494 and 26 Georgetown Law Journal 786 (These Journals are in the University of Utah Law Library, but are not found in the Utah State Library.)

The instrument dated the 14th day of January, 1952, starts out by the underlined words, "Holographic Will," and the next sentence starts out: "This is the last will of me, Florence P. Howard." In that will she appoints Royal Trust Company, Montreal, as Executor, in collaboration with Walker Bank & Trust Company. In the 1939 instrument, she appointed the Royal Trust Company, if she died domiciled in Canada, but the Guaranty Trust Company of New York City, if she died domiciled in the United States. In the 1949 instrument, she appointed "Walker Bank & Trust Company, Administrator and Executor of my estate" and the Royal Trust Company for Canadian administration.. In the 1940 document entitled, "Appended to holographic will," she said nothing about an executor. In each case, she began the document with the words "Holographic Will," except in the 1940 instrument, where she headed it, "Appended to holographic will." In the 1939 instrument and the 1949 and 1952 instruments, she began the will by stating, "This is the last will of me Florence P. Howard," or "Florence Patterson Howard."

In the 1939 instrument, she stated that after all bequests and expenses had been paid, the balance of the estate was to be divided among certain persons in

proportions. In the 1940 instrument, this division was changed. In the 1949 Instrument, the division again was changed. In the 1952 instrument, some of the persons getting certain 20ths were given specific bequests instead of a certain percentage and specific items were changed in bequests in many ways from one to another.

See *Sandford vs. Vaughn*, 1 Phil. Eccl. Rep. 39, 161 Eng. Reprint 907.

It will be noted that in the 1939 document she said, "at the present writing, there is more than sufficient cash to cover the special cash bequests and expenses of the estate."

In the instrument of 1952, many changes were made in the bequests of jewelry and other things. The manner in which the Testatrix changed the items and objects of her bounty, showed the intent of the Testatrix to revoke the previous instruments and to make a final will on January 14, 1952, which contained provisions wholly inconsistent with the former instruments, and the intent to revoke the former instruments.

The inconsistencies between the last instrument and the previous ones, show a desire to depart from the previous documents and the first three instruments are revoked in their entirety. *Kearns vs. Roush*, 146 S.E. 729, 15 Iowa Law Review 232.

An examination of the original instruments shows that the Testatrix knew the difference between a codicil

and a will, since she had written on the top of one page, "Codicil," although she had not written anything more than that.

Appellants are limited in the amount of money available for writing a Brief in this matter, and therefore respectfully refer the Court to Point No. IV in the Brief filed by Appellants in the Case No. 7970, where the matter of the inconsistent disposition of the various items is fully set forth and which shows provisions in the 1952 instrument which are wholly inconsistent with each and all of the previous instruments.

There is no hard and fast rule which requires the testator to dispose of all of his property.

See Page on Wills, Lifetime Edition, Ch. 15, Sec. 464, p. 837 and Ch. 22, §927, p. 852.

51 A L R p. 661, 664, 667, 668 and 675 and 683.

There are three methods of revoking a former will by a later will: 1. Expressly revoking it, or 2. Disposing of all property by second will, or 3. By provisions so inconsistent that the two cannot stand together.

See 68 C. J., Sec. 491, page 803.

We come under the latter. In the 1952 instrument, the Testatrix attempted to dispose of all of her property. At the bottom of the first page of said instrument is the statement, "If after taxes and estate expenses are paid, there is a surplus of over \$50,000.00; I wish the above

cash (tax free) payments to be doubled, including \$50,000.00 to Rosamond Lamb, Montreal.' This must be given weight and the intention of the Testatrix must have been to dispose of her estate by the 1952 instrument.

It was stipulated that the Testatrix had the three former instruments with her at the time she wrote the fourth instrument. In the case of *Shiel vs. O'Brien, Jr.* Rep. 7 Eq. 64, the Court held that if a person had an earlier will before him, and executed a second will, complete in form, the intention of the testator was obviously to revoke the first. The fact that the entire estate was not disposed of is not governing against the intention of the testator.

In re Wupperman's Estate, 300 N. Y. Supp. 344.

51 A L R 684.

In re Bjor's Estate (Cal.) 229 P. 2d 468.

As is said in the case of *In re Klewer's Estate*, 268 P. 2d 544, at page 546:

"A testator has the right to make a will which does not dispose of all of his property, but leaves a residue to pass to his heirs under the law of succession. * * * To say that because a will does not dispose of all of the testator's property it is ambiguous and must be construed so as to prevent intestacy, either total or partial, is to use a rule of construction as the reason for construction. A will is not open to construction merely because it does not dispose of all of the testator's property. 'Courts are not permitted in order to avoid a conclusion of intestacy to adopt a con-

struction based on conjecture as to what the testator may have intended, although not expressed.”

There can be no question but what a will may be revoked by a later holographic will.

In re Wallace's Estate, 223 P. 2d 284;

Phillips vs. Smith, 100 P. 2d 244;

In re Giff's Estate, 232 P. 2d 328.

A later will may revoke a former will even though there is no express revocation of the former will.

In re Love's Estate, 75 Utah 342, 285 P. 299.

The rationale underlying such a decision is the intention of the testator, as is said in Volume 1, Page on Wills, Lifetime Edition, at page 801:

“Intention is said to be an act of the mind. To be operative as a revocation, this act of the mind must be demonstrated by some outward and visible act of revocation, which must be one of the acts which are given in the statutes which regulate revocation by an act manifest on the face of the will.”

In the instant case, we submit that the intention of the Testatrix was to execute the will dated January 14, 1952 as her last will and testament and to revoke all prior wills. The instrument of January 14, 1952 contains all the formal clauses necessary for a will, together with the dispositive provisions. While the words, “This is the last will of me,” is not conclusive in this case, it does

indicate the intention of the Testatrix, and together with the other indicies of intention shown in the document, establish the Testatrix's intention that the last document, which she executed, was to be her will.

Section 74-1-22, Utah Code Annotated, 1953, states:

“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 remains effectual so far as consistent with the provisions of the subsequent will.”

The provisions of the instrument dated January 14, 1952 are so wholly inconsistent with the provisions of the former instruments, that under the terms of our Statute, it revokes the former instruments. This Statute has been confirmed *in re Love's Estate*, supra.

The Utah Statute provides that if a second instrument contains provisions wholly inconsistent with the first, the second instrument revokes the first. The only time the second instrument does not revoke the first is, “the other cases,” and then, in such event, the prior will remains effectual so far as consistent with provisions of the subsequent will. The words contained in the Statute, “in other cases,” means cases in which there are no provisions of the second will inconsistent with the terms of the first will, or where there is no express revocation clause.

In re Love's Estate, supra, Justice Harris stated:

“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 constructed 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 later, even though there was no express revocation of the former will.”

In the instant case, the provisions of the last document are so inconsistent and antagonistic to the provisions of the former documents, that they cannot be construed together as a harmonious whole, and on the contrary, show that the Testatrix intended to revoke the former instruments by the later. While it is true that *in re Love's Estate* it is stated that the whole residue in each will was given to different people, that is not the controlling point. The residuary clauses were the inconsistent dispositions in the case decided *in re Love's Estate*, supra. In the instant case, we have pointed out many examples of inconsistent dispositions of property, executors and the changing of legatees.

The rule concerning a residual clause and the disposition of all of the testator's property is found at chapter 15, Section 464, page 837, Page on Wills, Lifetime Edition, Volume 1, wherein it is said:

“If the later will dispose of all of testator’s property, and it remains in effect until testator’s death, it necessarily revokes an earlier will. If the first will contains a residuary clause, and the second will attempts to dispose of all of testator’s property, the second will operates as a revocation although it contains neither a residuary clause nor a clause of revocation. If the second will contains a residuary clause which purports to dispose of all of testator’s property, the second will operates as a revocation of the first will, including specific legacies and devises therein.”

CONCLUSION

It is submitted that the Findings of Fact are not supported by the evidence and are contrary to the evidence; that the Conclusions of Law are not supported by the Findings and are contrary to law and erroneous; and that the Findings, Conclusions and Decree are so indefinite that the Executor will be requested to use his own choice and discretion as to what the instruments mean. That the Court did not find on the issues presented by the Petition to Construe and the Answers thereto. That the Judgment of the Court is contrary to law in that all instruments are admitted as the will instead of the 1952 instrument being held to be the last will.

The Judgment should be reversed.

The Court should order that the costs of Appellants on this Appeal be paid out of the assets of the estate, pursuant to Sec. 75-14-21, Utah Code Annotated, 1953.

Respectfully submitted,

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

Attorneys for Appellants.