

1954

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

Utah Supreme Court

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Gustin, Richards & Mattsson; Fred H. Evans; Attorneys for Respondents;

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

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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,
Deceased, and COLINA FERRIE,

*Petitioners in Intervention
and Appellants,*

vs.

HELEN DUYS, ETHEL FORREST,
ERNEST F. HOWARD, THE PRO-
TESTANT BOARD OF SCHOOL COM-
MISSIONERS and MCGILL UNIVER-
SITY, 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.

BRIEF OF RESPONDENTS THE PROTES-
TANT BOARD OF SCHOOL COMMISSION-
ERS AND MCGILL UNIVERSITY

FILED JUSTIN RICHARDS & MATTSSON
AUG 4 1954 and FRED H. EVANS
Attorneys for Respondents

Clerk, Supreme Court, Utah. The Protestant Board of School

Commissioners and McGill
University

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*Petitioners in Intervention
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HELEN DUYS, ETHEL FORREST,
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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.

Cases No.·
8019-8021

BRIEF OF RESPONDENTS THE PROTES-
TANT BOARD OF SCHOOL COMMISSION-
ERS and MCGILL UNIVERSITY

STATEMENT

Respondents The Protestant Board of School Commissioners and McGill University accept the facts stated in the brief filed by the respondents and contestants, Ellen Duys, Ethel Forrest, Ernest Howard, with the following addition:

It was stipulated that the instruments dated 1939, 1940 and 1949 were taken from Walker Bank and Trust Company and given to Mrs. Howard at the Hotel Utah. Then, after her death, all four of the instruments, including the 1952 instrument, were sent to Walker Bank and Trust Company by the Royal Canadian Trust Company (R. 267-269).

These respondents also join with the contestants in their brief filed in reply to appellants brief.

STATEMENT OF POINTS

1. All four testamentary documents were properly admitted to probate as the Last Will and Testament of Florence P. Howard, deceased.
2. The testamentary documents dated February 6, 1939 and June 3, 1940 were properly admitted to probate.
3. Complete disposition of all of decedent's property in one instrument does not revoke a former will, unless the testator's intent to do so is shown or the latter document is entirely inconsistent with the former.
4. Complete and orderly distribution can be made under all of the four instruments in the instant case.

ARGUMENT

All of the points stated above are grouped together in one argument. The previous decision of this Court in ruling upon the instrument date May 7, 1949 and the instrument of January 14, 1952 is found in *Howard et al. v. Duys et al.* (April 29, 1954), 269 P.2d 1049. The remaining question to be determined is whether the instrument dated February 6, 1939 and the instrument dated June 3, 1940 were properly admitted to probate, making all four documents the Last Will and Testament of the decedent.

The four documents executed by Florence P. Howard on February 6, 1939, June 3, 1940, May 7, 1949 and January 14, 1952 were properly admitted to probate as the Last Will and Testament of the said Florence P. Howard.

Section 74-1-19, Utah Code Annotated 1953, which is as follows:

“Revocation and alteration of written wills.
—Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

(1) By a written will, or other writing of the testator declaring such revocation or alteration executed with the same formalities with which a will should be executed by such testator; or,

(2) By being burned, torn, cancelled, obliterated or destroyed, with the intent and for the

purpose of revoking the same, by the testator himself or by some person in his presence and by his direction.”,

sets forth the only manner in which a will can be revoked, while *Section 74-1-22, Utah Code Annotated 1953*, which is as follows:

“Effect of subsequent will on prior will.—
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.”,

sets forth the effect of a subsequent will on a prior will. None of the instruments admitted to probate were revoked in accordance with the terms of *Section 74-1-19*.

To have a will revoked under *Section 74-1-22* the subsequent will would have to dispose of the entire estate of the testator in a manner absolutely inconsistent with the provisions of an earlier will. *In re Love's Estate*, 75 Utah 343, 285 Pac. 299, at page 301:

“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 construed 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

latter, even though there were no express revocation of the former will. See annotation in 51 A.L.R. 652, where, at page 657, the annotator says: 'From the time of earliest reported cases down to the present, the courts, English and American, have held that the *execution of a will disposing of the entire estate of a testator in a manner absolutely inconsistent with the provisions of an earlier will* revokes by implication the earlier will, though the will later in time contains no words of revocation, and no mention of the earlier will'—and at page 669: 'A holographic (or olographic) will containing no clause of revocation, but disposing of the whole estate inconsistently with a prior formal will, is a revocation of the former one.' '' (Italics ours).

In addition to the deceased having failed to revoke any of the instruments of former wills by subsequent wills in accordance with our statutory law, she has clearly indicated by the terms of the respective wills that it was not her intention to revoke any one of the same. This is pointed out by the fact that in the will dated the 7th day of May, 1949, at the bottom of page 6 thereof, she has written:

Sept. 14th, 1949: On September 7th, 1949, Mrs. Mildred M. C. Black died. - I wish the bequest to her (\$2,000.00) to be equally divided between her daughters Mildred, and Hilda. - F. P. Howard."

The \$2,000.00 bequest mentioned was originally made in her will of February 6, 1939. This will was still in

effect as the instrument of June 3, 1940 appears to be a codicil to the 1939 document and does not revoke the same.

The intention of the testator to have all four instruments construed as her will is borne out by the stipulation made, wherein it was stipulated that deceased sent Rosamond Lamb to the Walker Bank & Trust Company to pick up her wills, at which time they included the instrument dated May 7, 1949. Then after deceased had executed the instrument dated January 14, 1952, all of them were found at the time of her death with her effects in Canada (R. 267-269).

The complete disposition of a decedent's property by a second will does not in and of itself revoke the first will. Testator's intention is the paramount object to be considered.

In Re Shute's Estate (Cal.), 131 P.2d 54 at page 56 the court states:

"While the court also approved and applied the rule that 'the complete disposition contained in the second must, unless controlled by the context, wholly revoke the first' (196 Cal. 333, 238 P. 75), this cannot be taken as holding that a complete disposition of a decedent's property in a second will necessarily serves to wholly revoke a first will under other facts and circumstances.

* * *

The governing principle is therefore the intention of the testator. It does not necessarily follow from the fact of the new will that full and entire revocation was intended. The purpose may have been to make supplemental provisions, consistent with the former will in whole or in part, to dispose of other property, or to amend and alter the prior disposition only. Hence a complete revocation by implication will not follow unless the general tenor of the later will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together.

* * *

In other cases a question is presented as to whether both of two existing wills should be accepted as constituting the last will of the deceased, with an appropriate adjudication with respect to any conflicting portions. In such cases, it may be necessary to decide whether the second will is so wholly inconsistent with the first will as to constitute, under the terms of the statute, a revocation of the first, in which event it alone constitutes the last will. In deciding that question the fact that the second will provides a complete disposition of the testator's property may be an important consideration, but it is not necessarily controlling.

A different situation is presented in the instant case where both wills purported to make a complete disposition of the decedent's property and where it appears, without conflict, that the second will was later destroyed by the decedent with the intent to revoke the same. It is not a question of whether the act of revoking the second will served to revive or restore the first one,

but of whether the act of executing the second will in and of itself had the effect of revoking the first will.”

The California Supreme Court in the case of *In Re Benson's Estate*, 145 P.2d 668, quotes with approval from the Shute case, but at page 671 its holding states:

“In the present case we consider the provisions of the subsequent will ‘wholly inconsistent’ with the former will.”

Likewise in the case of *In Re Mallon's Estate* (Cal.), 81 P.2d 994, the court holds:

“Not only does the second will dispose of the entire estate, which the first will did not do if Mrs. Barrett predeceased the sister, but the complete change from the trust provisions of the earlier will makes the terms of the second will entirely inconsistent with those of the prior will. Under these facts it must be held that the will of July 1, 1936, amounted to and was a complete revocation of the will of June 8, 1934.”

Whereas, some of the provisions of the respective instruments may be inconsistent, the four instruments can be construed as a whole as provided by *Section 74-2-4, Utah Code Annotated 1953*, which reads as follows:

“Several wills to be construed as one.—Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument.”,

and *Section 74-2-5, Utah Code Annotated 1953*, which reads as follows:

“All parts to be harmonized, if possible.—All the parts of a will are to be construed in relation to each other, and, if possible, so as to form one consistent whole; but where several parts are absolutely irreconcilable, the later must prevail.”

By considering each of the provisions in the four instruments, a proper and orderly distribution of the estate could be made in the manner shown in the appendix to this brief. This would carry out each and every wish of the testator as expressed in the four documents where no inconsistent conflict has occurred.

It is true in the interpretation of the will that the same shall be construed according to the intention of the testator, but this must be ascertained from the instruments themselves. *Sections 74-2-2, Utah Code Annotated 1953*, provides as follows:

“Intention to be ascertained from words of will.—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.”

To place a different construction on the instruments other than that expressed in the instruments would be contrary to our statutes and the law of this state.

In re Beal's Estate, 117 Utah 189, 214 Pac. 2d 525:

“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 Searl's Estate*, 29 Wash. 2d 230, 186 P. 2d 913, 173 A.L.R. 1247.”

A person may in one will make a special bequest to a person and in a later will make that same person a residuary legatee or vice versa. Neither case would indicate the desire or intent to revoke the former will, nor would it be inconsistent with the former will, and as heretofore indicated, under our statutes and court decisions, the two wills should be construed together and the respective bequests given full effect.

In 51 *A.L.R.* at page 682 the annotator makes the following comment:

“The general rule is that if legacies to the same individual are given by different instruments, the second gift is to be treated as additional to the first, in the absence of anything signifying a different intention; therefore, clauses of an earlier will giving specific sums of money, pieces of property, etc., are not ordinarily revoked by the gift of different sums, property,

etc., by a later will, which does not operate as a complete revocation of the former one, but are to be regarded as cumulative, in the absence of a different intention expressed in, or implied from, the will, * * * .”

CONCLUSION

In conclusion we respectfully submit that the four instruments offered as the Last Will and Testament of Florence P. Howard were properly admitted to probate. They should be construed together as one will. Distribution can be made thereunder in accordance with the appendix attached hereto.

Respectfully submitted,

GUSTIN, RICHARDS & MATTSSON
and FRED H. EVANS

Attorneys for Respondents

The Protestant Board of School
Commissioners and McGill University

APPENDIX

ITEMIZED STATEMENT OF CASH REQUESTS

<u>BENEFICIARY</u>	<u>INSTRUMENT DATED</u>		
Hilda Black	Feb. 6, 1939....	\$ 500.00	
#3 West 19th Avenue	May 7, 1949....	2,000.00	
Vancouver, B.C.	Jan. 14, 1952..	5,000.00	
As partial successor to	Sept. 14, 1949	<u>1,000.00</u>	\$ 8,500.00
Mrs. Mildred M. C. Black			
Mildred Black	Feb. 6, 1939....	500.00	
#3 West 19th Avenue	May 7, 1949....	2,000.00	
Vancouver, B.C.	Jan. 14, 1952..	5,000.00	
As partial successor to			
Mrs. Mildred M. C. Black	Sept. 14, 1949	<u>1,000.00</u>	8,500.00
Roger Black	Feb. 6, 1939....	500.00	
Port Alice, B.C.	May 7, 1949....	2,000.00	
	Jan. 14, 1952..	<u>5,000.00</u>	7,500.00
Mrs. Rachel Black Helps	Feb. 6, 1939....		500.00
#1054 East 20th Ave.			
Vancouver, B.C.			
Mrs. Isobel Budden	Feb. 6, 1939....	2,000.00	
Apt. 114, 1575 Sum-	May 7, 1949....	<u>3,000.00</u>	5,000.00
merhill Avenue			
Montreal, Canada			
Patricia Budden	Jan. 14, 1952..		1,000.00
Apt. 114, 1575 Sum-			
merhill Avenue			
Montreal, Canada			
Mrs. W. Lyon (Ellen)	Feb. 6, 1939....	500.00	
Browne	May 7, 1949....	<u>1,000.00</u>	1,500.00
Apt. #100, Maxwelton			
900 Sherbrooke Street			
West Montreal 2,			
Canada			

<u>BENEFICIARY</u>	<u>INSTRUMENT DATED</u>	
Mr. P. D. P. Hamilton 19 Glenview Avenue West Toronto, Ontario, Canada	May 7, 1949....	1,000.00
Mrs. P. D. P. Hamilton 19 Glenview Avenue West Toronto, Ontario, Canada	May 7, 1949....	1,000.00
Legal Heirs of Cavie P. Howard	Feb. 6, 1939....	2,000.00
Mrs. Cavie P. Howard 418 Claremont Avenue Westmount, Quebec, Canada	Jan. 14, 1952..	4,000.00
Mrs. Ovie (Dorothy Ogilvie) Howard Knowles 82 Pleasant Street Cohasset, Massachusetts	May 7, 1949....	1,000.00
	Jan. 14, 1952..	<u>4,000.00</u>
Mrs. Rosamond Lamb 4090 Beaconsfield Avenue, Montreal, Ontario, Canada	Feb. 6, 1939....	1,000.00
	May 7, 1949....	2,000.00
	Jan. 14, 1952..	<u>50,000.00</u>
McGill University Scholarship in metal- lurgy and geology	Feb. 6, 1939....	10,000.00
Scholarship in metal- lurgy or chemical engineering	May 7, 1949....	<u>25,000.00</u>
Marie Petry 415 King Street Port Hope, Ontario, Canada	Jan. 14, 1952..	10,000.00

<u>BENEFICIARY</u>	<u>INSTRUMENT DATED</u>		
Gertrude Petry Lewis Trinity College School Port Hope, Ontario, Canada	Jan. 14, 1952..		6,000.00
Mrs. William T. Stewart 32 Edgehill Road Montreal, Canada	Jan. 14, 1952..		2,000.00
Miss Annie H. Phillips 14 St. Joseph Street Chambly Canton Quebec, Canada	Feb. 6, 1939....		1,000.00
Protestant Board of School Commissioners to be added to the Edward A. Oliver prize McTavish Street Montreal, Canada	Feb. 6, 1939....	2,000.00	
	May 7, 1949....	<u>3,000.00</u>	5,000.00
Percy E. Radley 1386 Nicola Street Vancouver, B.C. Canada	Feb. 6, 1939....	3,000.00	
	May 7, 1949....	<u>3,000.00</u>	6,000.00
Mrs. Charlotte Smith 451 Grosvenor Avenue Montreal 6, Canada	May 7, 1949....		1,000.00
William T. Stewart 636 Grosvenor Avenue Westmount, Quebec, Canada	May 7, 1949....		1,000.00
Lindsay Suter 329 Locust Street Winnetka, Illinois	May 7, 1949....		2,000.00
Mrs. C. W. (Mary S.) Tinling 1321 Sherbrook St. West Montreal, Canada	Feb. 6, 1939....	3,000.00	
	May 7, 1949....	3,000.00	
	Jan. 14, 1952..	6,000.00	12,000.00
	TOTAL.....		<u>\$179,500.00</u>

STATEMENT OF SPECIFIC BEQUESTS

	<u>INSTRUMENT DATED</u>	<u>APPRAISED VALUES</u>
Mrs. Isobel M. Budden Apt. 114, 1575 Summerhill Ave. Montreal, Canada Solitaire diamond ring.....	Jan. 14, 1952.....	\$ 300.00
Mrs. William T. Stewart 32 Edgehill Road Montreal, Canada Diamond circle brooch.....	Jan. 14, 1952.....	230.00
Mildred Black #3 West 19th Avenue Vancouver, B.C. Diamond watch.....	Jan. 14, 1952.....	75.00
Ernest Howard Flag Road, Dongan Hills Staten Island, New York "Portrait of his grandfather"....	Jan. 14, 1952.....	—0—
Helen Howard Duys Center Isand, Oyster Bay Long Island, New York Diamond pendant.....	Jan. 14, 1952.....	530.00
Henry Howard Petry 459 Landsdowne Avenue Westmount, Quebec, Canada A small island near St. Andrews East.....	May 7, 1949.....	200.00
Rosamond Lamb 4090 Beaconsfield Avenue Montreal, Canada Emerald and diamond ring.....	Jan. 14, 1952.....	180.00
Mary Stewart Tinling and Rosa- mond Lamb as tenants in common Remaining personal effects.....	Jan. 14, 1952.....	1,338.50
TOTAL.....		\$2,853.50

DISTRIBUTION OF RESIDUARY ESTATE

Mrs. Dorothy Burleigh.....	May 7, 1949.....	3/20ths
Mrs. Helen Howard Duys.....	May 7, 1949.....	3/20ths
Mrs. Ethel Howard Forrest.....	May 7, 1949.....	3/20ths
Ernest Howard.....	May 7, 1949.....	3/20ths
Mrs. Gertrude Petry Lewis.....	May 7, 1949.....	3/20ths
Henry Howard Petry.....	May 7, 1949.....	2/20ths
Marie Petry	May 7, 1949.....	3/20ths