

1956

# Theo Swan Hendee v. Walker Bank & Trust Co. et al : Brief in Opposition to Petition for Rehearing

Utah Supreme Court

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Ray, Quinney & Nebeker; Attorneys for Respondent;

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Case No. 8246

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

FILED  
APR 10 1956

In the Matter of the Estate of WILDA  
GAIL SWAN, deceased, THEO SWAN  
HENDEE,

*Plaintiff and Respondent,*

— vs. —

WALKER BANK & TRUST COMPANY,  
Executor of the Last Will and Testament  
of WILDA GAIL SWAN, deceased;  
GRANT MACFARLANE; DANIEL  
KOSTOPULOS and ADA BRIDGE,

*Defendants and Appellants.*

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**BRIEF IN OPPOSITION TO PETITION  
FOR REHEARING**

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**RAY, QUINNEY & NEBEKER**

*Attorneys for Respondent.*

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Salt Lake City, Utah

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# IN THE SUPREME COURT of the STATE OF UTAH

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KOSTOPULOS and ADA BRIDGE,

*Defendants and Appellants.*

Case No.  
8216

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## BRIEF IN OPPOSITION TO PETITION FOR REHEARING

By its affirmance of the trial court's judgment in this case this court has aligned itself with substantially all of the courts of last resort in the United States which have dealt with similar cases. Our research revealed no case, and appellants cited no case, in which it was held that facts similar to those here involved were insufficient to sustain a judgment setting aside a will for fraud and undue influence.

In their petition for rehearing appellants greatly labor the contention that because this court, in its decision, announced the rule that the presumption of fraud

and undue influence arising from the basic facts in evidence can be overcome by a preponderance of the evidence they are entitled to a new trial. Their contention is met and completely overcome by the language of the opinion itself.

After a full discussion of the presumption involved, together with the nature and effect of the basic facts which gave rise to the presumption, this court announced the rule which, in its judgment, should apply. It did so in the following language:

“After careful study and consideration we conclude that this presumption shifts the burden onto the confidential adviser of persuading or convincing the fact finder by a preponderance of the evidence that no fraud or undue influence was exerted, or in other words, he has the burden of convincing the fact finder from the evidence that it is more probable that he acted perfectly fair with his confidant; that he made complete disclosure of all material information available and took no unfair advantage of his superior position than that he exerted fraud or undue influence to obtain the benefits in question.”

Following such announcement this court said:

*“Under such a rule we must affirm the trial court’s findings, for clearly findings that the evidence failed to convince by a preponderance of the evidence, that no fraud or undue influence induced these legacies, or that the existence of such inducement was more improbable than it was probable was not unreasonable in view of all of the evidence.” (emphasis ours)*

The foregoing is a clear decision that, measured by the rule of "preponderance of the evidence" as distinguished from the "clear and convincing rule," the evidence was ample to support the trial court's findings and that they must be affirmed.

With *Pilcher's Estate*, 114 Utah 72, 197 P. (2d) 143, and *Jardine v. Archibald*, 3 Utah (2d) 88, 279 P. (2d) 454, as guides it was quite natural and altogether proper for counsel for appellee to rely upon those cases. But it will be noted that neither in his long memorandum decision nor in his findings and conclusions did the trial court ever mention the measure of proof he was applying. He made detailed findings of the basic facts which gave rise to the presumption, but he never even mentioned the presumption itself. Substantially all of such basic facts in the case came into the record upon examination of appellants. They cannot, as held by this court, be brushed aside, and they are ample to support the judgment.

The only issues raised for consideration upon this appeal were those specified by appellants in their original brief on appeal. Their "Statement of Points" is quoted:

"Point I. The evidence is insufficient to support the findings and conclusions of the trial court that Gail Swan lacked testamentary capacity at the times she executed the will and codicils.

"Point II. The evidence is insufficient to support the findings and conclusions of the trial court that Gail Swan was under the force of undue influence at the times she executed the will and codicils."

Appellants' "Statement of Points" constituted their assignments of error, and they are significant at this time because of what they do not embrace.

No point was ever made, and no argument was ever made, that the trial judge erroneously failed to apply the "preponderance of evidence" rule. What appellants did argue was that they had made a prima facie case which destroyed the presumption as well as the effect of the basic facts which gave rise to the presumption. That argument was clearly rejected by this court.

No point was ever made by appellants that there was any error in the receipt or exclusion of evidence. A point should not be raised for the first time upon a petition for rehearing, and yet appellants now complain for the first time about reference during the trial to the Becker case. And such complaint is in the face of the fact that Macfarlane admitted upon his examination without any objection whatsoever from counsel that he had drawn Becker's will; that he was a beneficiary in the will; and that a will contest had been filed. (Reporter's Transcript 132)

The trial court in his memorandum opinion and his extensive findings of fact set forth in great detail all of the facts which led him to his decision, and nowhere did he ever mention the Becker case.

Rule 76(e) (1) Utah Rules Civil Procedure is based in part upon 104-41-26 of the 1943 Code. That section has been construed by this court. In *Dahlquist v. D. & R. G.*, 174 Pac. 833, 52 Utah 438, at page 469, the court said:

"Propositions 1 and 2, above stated, cannot be considered on this application. They are new points entirely, now brought to our attention for the first time notwithstanding they were just as available at the hearing on appeal, and, if relied on, should have been presented at that time. In 4 C.J. 627, 628, the rule is stated thus:

“ ‘A hearing will not be granted on the ground that petitioner has failed to argue an important point on the hearing. All points relied upon in support of the case must be presented by the briefs and arguments on appeal, and the practice of reserving certain points to be argued subsequently, in the event of an adverse decision, is condemned by the courts.’ ”

See also, *Harrison v. Harker*, 44 Utah 541, 142 Pac. 716, and *Garner v. Thompson*, 75 P. (2d) 168, 95 Utah 295, 298, 299.

Appellants seem to contend that because this court held the evidence was insufficient to support a finding of lack of testamentary capacity, the finding of fraud and undue influence must also fail. This court gave full consideration to that aspect of the case in arriving at its final conclusion. The point should be held to have no merit.

We have read all of the cases cited by appellants in their last brief. One half of them were cited by either appellants or respondents in their original briefs and were considered by the court. None of the others furnishes any justification for a rehearing in this case.

The decision of this court was announced after many months of deliberation. It reflects an objective and most temperate approach. It should not be disturbed.

Wherefore respondent prays that appellants' petition for rehearing be denied.

Respectfully submitted,  
 RAY, QUINNEY & NEBEKER  
 PAUL H. RAY,  
*Attorneys for Respondent.*