

1955

In the Matter of the Estate of John W. Baum : Brief of Respondent

Utah Supreme Court

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Arnold C. Roylance; Attorney for Respondent;

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**In the Supreme Court of the
State of Utah**

FILED

JAN 10 1955

Clerk, Supreme Court, Utah

**In the Matter of the Estate of
JOHN W. BAUM,**

Deceased.

**CASE
NO. 8422**

BRIEF OF RESPONDENT

**ARNOLD C. ROYLANCE,
Attorney for Respondent**

NEW CENTURY PRINTING CO., PROVO, UTAH

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In the Supreme Court of the State of Utah

In the Matter of the Estate of
JOHN W. BAUM,
Deceased.

CASE
NO. 8422

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondent agrees with the statement of facts as set forth in appellants' brief except the following, which has been omitted, and which respondent feels is a pertinent fact in the case: At the hearing in the District Court before the Honorable Judge R. L. Tuckett the parties entered into an oral stipulation that any technical objections to the petition for partial distribution would be waived and that the hearing would be held solely upon the construction of the will and the determination of the interests of George Baum and Oliver Baum in the said estate (R. 33.)

STATEMENT OF POINTS

POINT ONE

THE WILL OF JOHN W. BAUM IS UNAMBIGUOUS, DEFINITE AND CERTAIN AND THE INTENTION OF THE TESTATOR CAN DEFINITELY BE ASCERTAINED FROM THE PROVISIONS CONTAINED IN THE WILL ITSELF, AND THE COURT DID NOT ERR IN SO HOLDING.

POINT TWO

EXTRINSIC EVIDENCE IS INADMISSIBLE TO VARY, CONTRADICT OR EXPLAIN THE TERMS OF A WILL UNDER THE FACT SITUATION AS PRESENTED BY THE WILL OF JOHN W. BAUM.

THE ARGUMENT

POINT ONE

THE WILL OF JOHN W. BAUM IS UNAMBIGUOUS, DEFINITE AND CERTAIN AND THE INTENTION OF THE TESTATOR CAN DEFINITELY BE ASCERTAINED FROM THE PROVISIONS CONTAINED IN THE WILL ITSELF, AND THE COURT DID NOT ERR IN SO HOLDING.

In analyzing the argument of appellants it appears that they have quoted isolated paragraphs of the testator's will and attempted to ascertain the intention of the testator from such isolated paragraphs. We have been unable to find any case allowing such to be done. On the contrary there are numerous cases holding that the intention of the testator is to be collected from the entire will and not from

any one paragraph contained therein. We cite as sustaining this principle of law:

In Re: Northcutt's Estate
16 Calif. 2d 683
107 P. 2d 607

We invite the Court to read the entire will of John W. Baum and after doing so we submit that there can be no doubt as to the intention of the testator to cut George Baum and Oliver Baum off with the sum of one dollar and no more.

We think there can be no dispute as to the rule of law that the intention of the testator governs and with that the further rule that if that intention can be ascertained from within the four corners of the will itself there can be no room for introduction of parol or extrinsic evidence.

Section 74-2-1, Utah Code Annotated (1953

"Testator's intention governs.—A will is to be construed according to the intention of the testator. Where his intention can not have effect to its full extent, it must have effect as far as possible."

We also refer to the following authorities:

In Re: Poppleton Estate.
34 Utah, 285, 97 P. 138,
and particularly Paragraph 1135.

↙ Also: Vol. 57, Am. Jur.

Appellants in their brief have quoted Section 75-12-9, Utah Code Annotated, 1953, and seem to lay great stress upon the provisions of that section. We wish to point out that this section in no way alters the rule that the intention of the testator must govern and that if that intention can be determined from the will itself no extrinsic evidence is

admissible. This section only operates when questions have been raised by the will itself with respect to the amount of advancements.

With respect to appellants' averment of the friendly relations between the testator and his two sons, the law is definitely settled that evidence of friendly or unfriendly relations between testator and the beneficiary is not admissible to show intention of the testator to include or exclude such beneficiary.

Vol. 4, Page on Wills,
(Lifetime Edition)
Section 1627, page 676

Moffatt vs. Heon,
136 N. E. 123

Appellants, at Page 7 of their brief, quote the following clause from paragraph XI of the will of John W. Baum, "It is my desire to treat all of my children alike in the disposition of my property." Appellants lay great stress upon this clause at various places in their brief in an attempt to show that the testator was confused or that there was some ambiguity in the will with respect to his intention. However, appellants did not include the remainder of the sentence, which reads as follows, "and the aforesaid provisions accomplish this result in as fair and equal a manner as could be done."

When this paragraph is taken in light of the dispositions made by the testator of his property in the will as contained in paragraphs IV, V, and VI, no stretch of the imagination can conceive of any ambiguity.

We submit that the testator, without question, intended George Baum and Oliver Baum to receive the sum of one

dollar each and no more. We further submit that the entire will, when read as a whole, definitely shows such intention, and the various paragraphs therein cited by appellants in an attempt to show some ambiguity, are merely explanations by the testator for doing what he has clearly done.

POINT TWO

EXTRINSIC EVIDENCE IS INADMISSIBLE TO VARY, CONTRADICT OR EXPLAIN THE TERMS OF A WILL UNDER THE FACT SITUATION AS PRESENTED BY THE WILL OF JOHN W. BAUM.

In examining appellants' brief and the record on appeal, and particularly the petition of appellants for construction of the will, we note that they lay great stress upon their contention that the testator was mistaken as to the amount of property which he had previously given to various ones, and particularly to the appellants. The law is well settled that error or mistake on the part of the testator as to the fact or amount of advancements alleged to have been made in the will does not permit the introduction of extrinsic evidence to vary or contradict the terms of the will.

We have found no case contrary to that statement, but we find numerous authorities in support thereof. We cite the following representing such decisions:

Vol. 4, Page on Wills,
(Lifetime Edition)
Section 1627, page 676

Hopper vs. Sellers (Kan.)
139 P. 365

In Re: Woelk's Estate (Kan.)
296 P. 359

Am. Jur. Vol. 57,
Page 674 and page 680

In Re: Tompkins (Cal.)
64 P. 268
Buchanan vs. Hunter, (Iowa)
148 Northwestern, 881

Lavenue vs. Lewis, (Ark.)
46 S. W. 2d 649

Bimslager vs. Bimslager, (Ill.)
154, Northeastern, 135

LaFlore vs. Handlin, (Ark.)
240 Southwestern 712

We further refer the Court's attention to the annotation in

94 A. L. R., commencing at Page 26

In further establishing Point Two we wish to discuss some of the cases cited above more in detail. With respect to the allegation of appellants that the testator was mistaken when he said that they had had their share of his property we wish to refer to Hopper vs. Sellers, cited above. In that case testatrix recited in her will that two sons were indebted to her in stated amounts and that if such amounts were not paid before her death they should be deducted from their distributive shares. The sons offered proof that testatrix was mistaken and that they were not indebted in such amounts. Held, as a matter of law that such proof is not admissible.

In Re: Woelk's Estate, cited above, is to the same effect.

In *Buchanan vs. Hunter*, cited above, the testator, in attempting to equalize the distribution between his daughters stated that one daughter had received advancements amounting to \$40,000.00. The daughter claimed such to be a mistake, and that she had actually received not to exceed \$15,000.00. Held, that such evidence, as a matter of law, was inadmissible.

In *Bimslager vs. Bimslager*, cited above, the Court said, "The main object in construing a will is to find the intentions of the testator. Extrinsic evidence is never admissible for the purpose of varying the intention of the testator as expressed in the will itself."

No words can be added to or taken from a will which change the plain meaning of the testator. No will can be reformed because of a mistake made therein by the testator.

We refer the Court to *Lavenue vs. Lewis*, cited above. In that case the will stated that the testator made no provision for certain named sons because of previous advancements equal to their interests in his estate. It was held that evidence regarding such advancements were inadmissible.

Also, *LeFlore vs. Handlin*, cited above, where a will giving \$100.00 to a son and each of his children stated that the testatrix purposely made no further provision for them because the son had received a larger share of the father's estate than the other children. Evidence was not admissible to show that testatrix was mistaken as to the amount received by the son from his father's estate.

Appellants rely strongly upon the case of *In Re: Pickard's Estate*, 41 Utah 145; 129 P. 353. We have no argument with the rule laid down in that case, but wish to point out that the fact situation in that case is wholly different

from that in the case at bar. We quote from the portion of the will in the case of: *In Re: Pickard's Estate*, as follows:

"all of the residue of my property I give and bequath in trust for the benefit of my said daughter and of my son equally, except so far as sums have been or shall be set off against the interests which either would be entitled to under the provisions of this will, respectively, in case such sums had remained a part of the assets of the estate; **THE SHARE OF MY SAID DAUGHTER AND SON TO BE DETERMINED AS OF THE DATE OF MY DECEASE.**" (emphasis supplied.)

Obviously in that case testimony had to be introduced to indicate what, if any, amount should be set off as against the interests which either the daughter or the son would be entitled to. In the case at bar there is no such ambiguity. The will definitely states that George and Oliver have had their share and hence there is no room for any extrinsic evidence to contradict that statement.

In their statement of facts ,at Page 4 of appellants' brief, reference is made to a certain discharge agreement between appellants and the testator alleged to have been executed sometime around 1928. We refer the Court's attention to the case of: *In Re: Tompkins*, above cited. In this case there was an instrument executed many years previously and which the court refused to allow in evidence and which, we feel, very nearly proximates the situation in the Baum estate.

We refer the Court's attention to the language in 64 P. at Page 270, as follows:

"It would render the entire clause inoperative if it should be held that its provisions could be defeated by

an inference to be drawn from an instrument executed many years previously, and to which the will makes no reference."

Appellants have spent considerable time in their brief pointing to the various authorities with respect to latent and patent ambiguities. We submit that there is neither type to be found in the John W. Baum will. Counsel cites the case of *Payne vs. Todd*, 43 P. 2d, 1004 (1935). We submit that this case is very similar to the Utah case of: *In Re: Pickard's Estate*, cited above, but that the fact situation is entirely distinguishable from that of the case at bar.

We refer to Page 1004 of 43 P. 2d and quote from the will as follows:

"Fourth: I release and forgive my son Stanley T. Payne, whether living at my death or not, the sum of approximately \$3000.00 and interest which may be unpaid at the date of my death, or such part of said principal sum and interest as shall remain unpaid; the said sum being the amount loaned by me to my said son, it being my purpose to have the said debt cancelled, if it still exists at the time of my death, and this cancellation is made as a part of the share of my estate which might otherwise be bequeathed to him, and my said son will understand this arrangement."

"Seventh: All the rest and residue of the property of which I die possessed, I bequeath and devise unto my said five children, to be distributed equally among them, share and share alike."

Let us compare the two paragraphs above from the will of Edwin C. Payne to paragraphs IV, V, and VI of the will of John W. Baum, which are as follows:

"IV. I hereby give, devise and bequeath to my son, Oliver Baum, the sum of One Dollar (\$1.00) and no more, he having heretofore received in real property his full share of my estate.

"V. I hereby give, devise and bequeath to my son, George Baum, the sum of One Dollar (\$1.00) and no more, he having heretofore received in real property his full share of my estate."

"VI. I hereby devise, give and bequeath all the rest, residue and remainder of my property and estate, wheresoever it may be situate, whether it be real, personal, or mixed, to Newell H. Baum and Vadis B. McOmber, and Ora Baum Nielson, and Murray Baum, each to share and share alike."

We submit that after reading the above paragraphs there could be little question that the fact situation in the Payne vs. Todd case is wholly distinguishable from that of the case at bar. In the former the intention of the testator is not clear, whereas in the Baum case the testator has left no room for conjecture as to his intention, and hence parol evidence is inadmissible to vary the same.

CONCLUSION

In conclusion we submit that from a reading of the entire will of John W. Baum there can be no question but that the intention of the testator was clearly set out to bequeath to Oliver Baum and George Baum one dollar each and no more. And, further, a reading of the entire will shows the same to be clear and unambiguous.

We also submit that the law is well settled in such cases that no extrinsic or parol evidence is admissible to vary or

contradict the terms of the will or the intention of the testator as contained therein. It necessarily follows that the findings and order of the Trial Court should be sustained and affirmed.

Respectfully submitted,

ARNOLD C. ROYLANCE,
Attorney for Respondent