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

FILED

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Clerk, Supreme Court, Utah

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

**CASE
NO. 8422**

BRIEF OF APPELLANTS

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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 APPELLANTS

STATEMENT OF FACTS

This appeal is taken by George Baum and Oliver Baum (hereinafter referred to as appellants) from the order made by the Honorable R. L. Tuckett, Judge of the District Court of Utah County, sustaining objections to the admission of evidence in support of their petition for construction of will and determination of their interest in testator's estate, and dismissing the said petition (R. 33).

On May 8, 1954, testator died in Provo City, Utah County, State of Utah. Shortly thereafter his will was admitted to probate in the District Court of Utah County (R. 9).

Testator was survived by his six children, Vadis B. McOmber, Ora B. Nielson, George Baum, Murray Baum, Newell Baum, and Oliver Baum, all of whom were mentioned in testator's will (R. 10). On May 28, 1954, the testator's will was duly admitted to probate and letters of administration with will annexed were issued (R. 8, 9). On December 10, 1954, the Administrator filed a Petition for Partial Distribution of testator's estate to some of the devisees and legatees named in the will but excluding appellants (R. 15). On January 13, 1955, the appellants herein filed their objection to the Petition for Partial Distribution and in connection therewith their Petition for Construction of Will and Determination of Petitioners' Interest in Estate of Testator (R. 18). After an answer was filed to the petition for construction of will, a hearing was had thereon (R. 28, 31). At the hearing, appellant Oliver Baum was called and sworn as a witness and offered to give evidence in support of the allegations of the petition for construction of testator's will (R. 31). Thereupon the Administrator objected to the introduction of this evidence on grounds that the evidence varied the provisions of the will (R. 31). After taking the objection under advisement the court made an order sustaining the objection of the Administrator and dismissing the petition of appellants (R. 33).

Appellants' petition alleged the following facts which are admitted by the court's ruling herein complained of (R. 18):

In 1922 and prior thereto, John W. Baum, (hereinafter referred to as testator) owned and operated several farms in the vicinity of Ashton, Idaho. At that time and prior thereto two of his sons, the appellants, worked for the testator in the operation of the aforesaid farms. In 1922 the

testator became financially involved. All of his farms were heavily mortgaged, and his wife was about to commence divorce proceedings against him. In 1923 the testator asked the appellants to take over and operate all of his Idaho properties. It was then agreed between testator and appellants that if they would take the farms, operate them, pay off all mortgage obligations, and taxes, they were to each receive as consideration for their work one farm. Pursuant to this agreement in 1923 the testator transferred all his farm properties in the Ashton, Idaho, vicinity to appellants. They operated these properties from 1923 to 1927. With the proceeds obtained from their working testator's property and property they had leased from others during that period, appellants paid off all the mortgages on testator's property, both principal and interest; paid all the delinquent taxes beginning with the year 1921 and all taxes assessed against the property through 1927; paid out \$5,000.00 on notes which the testator had co-signed with other of his children; and paid over \$6,000.00 in cash directly to the testator. The total amount of payments made on the testator's property, to him directly, and on notes he had signed, exceeded \$30,000.00 in that period.

In 1927, appellants conveyed back to the testator his farm property in the Ashton, Idaho, vicinity. Appellants each retained one farm, of the value at that time of about \$8,000.00 each.

In 1928 appellants entered into a contract of sale with the testator for the purchase of one of the tracts of land they had conveyed back to him in 1927. The total purchase price of \$22,000.00 was paid for same in full to the testator in 1929 by appellants. The purchase price was paid by them by their borrowing money and mortgaging their property.

In 1928 when the aforesaid property was purchased by appellants, the testator claimed that \$3,250.00 was still owed to him by appellants for certain obligations still existing against the property they had conveyed back to him in 1927. Thereupon the testator as party of the first part and appellants as parties of the second part entered into a release and discharge agreement whereby appellants and testator released and discharged any and all claims existing between them in consideration for appellants' payment of the \$3,250.00.

Since 1928 there have been no commercial transactions between testator and appellants. Since then there have been no advancements of money, real or personal property, or property of any kind whatsoever from testator to them. Since 1922 and up to the time of the testator's decease, the relationship between testator and appellants has been cordial, friendly, and characterized by filial love and respect.

The issue to be decided on this appeal is whether the trial court erred in excluding the proffered extrinsic evidence by holding that testator's will is unambiguous, definite and certain.

The following points substantiate appellants' contention that the trial court erred in so holding, and that testator's will is ambiguous and his intention unclear.

STATEMENT OF POINTS

POINT ONE

THE COURT ERRED IN FINDING THAT THE WILL OF JOHN W. BAUM WAS UNAMBIGUOUS, DEFINITE AND CERTAIN AND THAT IT WAS TESTATOR'S INTENTION TO CUT OFF GEORGE BAUM AND

OLIVER BAUM WITH ONE DOLLAR EACH AND NO MORE. THE WILL IS AMBIGUOUS AND TESTATOR'S INTENT UNCLEAR AS SHOWN BY THE PROVISIONS THEREOF.

POINT TWO

THE PROFERRED EVIDENCE IN SUPPORT OF THE PETITION OF APPELLANTS FOR CONSTRUCTION OF THE WILL IS ADMISSIBLE FOR THE PURPOSE OF RESOLVING AMBIGUITIES THEREIN.

THE ARGUMENT

POINT ONE

THE COURT ERRED IN FINDING THAT THE WILL OF JOHN W. BAUM WAS UNAMBIGUOUS, DEFINITE AND CERTAIN AND THAT IT WAS TESTATOR'S INTENTION TO CUT OFF GEORGE BAUM AND OLIVER BAUM WITH ONE DOLLAR EACH AND NO MORE. THE WILL IS AMBIGUOUS AND TESTATOR'S INTENT UNCLEAR AS SHOWN BY THE PROVISIONS THEREOF.

By the following portion of testator's will his intention to treat all of his children alike in the disposition of his property is clearly shown:

XI

"It is also my wish and desire that my aforesaid children accept the provisions of this, my Last Will and Testament in the spirit in which I have made them. It is my desire to treat all my children alike in the disposition of my property and the aforesaid provisions, accomplish this result in as fair and equal a manner as could be done. I direct and request that the affairs of

my estate shall be settled up in a peaceable and in an appreciative manner."

But, by the following provisions of the testator's will appellants were each bequeathed One Dollar and no more:

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."

Paragraph II of testator's will contains the following recital :

"I have already advanced money and property to my sons, George Baum and Oliver Baum which is equivalent to their full share in my estate."

Paragraph III of testator's will provides as follows:

III

"I hereby direct and order that my land, money, or other property advanced or settled by me in my lifetime which I have mentioned in the last preceding paragraph, to or for the benefit of any child of mine, shall be full satisfaction to such child, unless I shall have otherwise declared by writing under my hand."

It is in reference to the above provisions of the testator's will that ambiguities arise. The language used in these

provisions leaves doubt as to whether testator intended that appellants be cut off from participation in testator's estate; whether advancements made to any child of his should be considered in determining their share in his estate; whether any advancement made, aside from the amount thereof, was to be considered a full share; whether testator had made what in law amounts to an advancement to appellants; and whether testator desired that any writing of his be used in determining whether appellants were to be left One Dollar and no more.

The above provisions of testator's will must be construed and interpreted in the light of testator's declaration contained in paragraph XI of his will. Therein testator declared: "It is my desire to treat all of my children alike in the disposition of my property . . .". In light of this provision, testator's bequest to appellants of One Dollar each in paragraphs IV and V raises serious doubt as to whether testator intended to accord like treatment to his children, or whether he intended to exclude appellants from any participation in the distribution of his property.

In paragraph II of the will testator declares that he had already advanced "money" and "property" to the appellants. In paragraph III thereof he refers to the property mentioned in paragraph II and directs that his "land, money, or other property", so settled by him in his lifetime, "to or for the benefit of any child of (his), shall be full satisfaction to such child, unless (he) shall have otherwise declared by writing under (his) hand." This provision sharply qualifies the advances made by testator in his lifetime which "shall be full satisfaction to such child", to advances, "to or for the benefit of any child of mine". This raises the question as to whether any advances have been made by testator

to or for the benefit of any child of his, particularly appellants. But by the final phrase of this paragraph testator says that such advances shall be "full satisfaction" to the child receiving same "unless I shall have otherwise declared by writing under my hand." The paragraph indicates that the testator had doubts in his mind as to:

(1) What advances, if any, he had made to his children?

(2) As to which children advances had been made by him?

(3) What, if any, declarations in writing under his hand he had made with respect to such advances?

Thus the provisions of paragraphs II and III create an ambiguity as to the intended effect of the advances, and reflects the testator's doubts as to whether prior writings may not show that no advancements had been made.

By paragraphs IV and V the testator cuts off his sons Oliver Baum and George Baum with One Dollar, basing his action in each case on the declaration "he having heretofore received in **real property** his full share of my estate." Here again doubt and ambiguity appears from the testator's language. In paragraph II he declared the advances to appellants to be "money and property". In paragraph III he declares same to be "land, money or other property". But in paragraphs IV and V testator limits the advancements to real property.

The foregoing provisions concerning advancements create ambiguities with respect thereto in the following particulars:

(1) Did the testator in his lifetime make any transfers or conveyances to George Baum and Oliver Baum of any or either of the different kinds of property mentioned in paragraphs II, III, IV, or V which amount to advances under the Utah law?

(2) If such transfers and conveyances testator made amount to advancements under our law, what did he intend with respect thereto by his declarations in paragraph III of his will?

(a) Does the language used by the testator herein express doubt as to what property was advanced by him to or for the benefit of which of his children?

(b) To resolve that doubt did the testator provide therein that such advances as he may have made to any child of his shall be full satisfaction "unless (he) shall have otherwise declared in writing under (his) hand"?

(3) What did the testator intend by the provision in paragraph III "unless I shall have otherwise declared by writing under my hand."?

(a) Does this language used mean his written and signed declarations prior to the making of his will?

(b) Or does the language look to the future and a time subsequent to the making of the will?

(c) Or does this language have both a retrospective and a prospective meaning?

(d) If testator has so otherwise declared, does that satisfy his advancement declarations in the will and result in the child or children concerned sharing equally with the others in the disposition of testator's property?

It is to be noted that in each of the above quoted paragraphs of testator's will reference is made to advancements, but in no instance is any amount of money, or item of other property identified. Also, the question arises as to why testator recited "money and property", in paragraph II, "land, money, or other property", in paragraph III, and in paragraphs IV and V states that the advancements to appellants had been in real property. It seems a reasonable interpretation of this will that in providing therein these things the testator desired that advancements of any kind of property to any of his children should be considered in determining their respective shares.

Appellants' contention that it was the testator's desire to consider all advancements made to any of his children in determining their share in his estate, is borne out by the presence in paragraph III of the phrase "to or for the benefit of any child of mine". We submit that there is no other reason for the presence of this phrase in testator's will unless for that purpose. A reading of the will up to the point of this phrase shows exclusive reference to appellants. The phrase broadens the scope of the application of the provisions therein on advancements to include any of testator's children. In light of this the reading of paragraph III raises the question of what the testator intended to result from the fact of an advancement to any one of his six children.

It is submitted that in view of the fact that testator's declared intention was to treat his children alike, and since the will itself declares that advancements have been made to appellants, the following provision of the Utah Code clearly requires that the court must hear all evidence touching upon the question of advancements made by the testator:

Section 75-12-9 Utah Code Annotated (1953)

“Advancements to be determined — Conclusiveness of decree — All questions as to advancements made or alleged to have been made by the decedent to his heirs may be heard and determined by the court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the court is binding on all parties interested in the estate, subject only to be reversed, modified or set aside on appeal.”

In the light of the foregoing statute the trial court erred in refusing to receive or consider the proffered evidence concerning advancements.

Appellants admit that testator could have cut them off simply by stating that such was his desire and leaving each one dollar. However, the testator does not do this. He declares why he leaves one dollar bequests to appellants, his declaration being that he had already given appellants their share of this property. The fact that such a declaration is made shows that testator had no ill feeling toward appellants, and that he did not want them cut off without giving them their full share of his estate.

It is the position of appellants that testator in his apparent desire to treat all of his children alike in the distribution of his estate to them, made the foregoing declarations and provisions in his will which have created serious ambiguities that can only be clarified and resolved by resorting to extrinsic evidence; that appellants' proffered extrinsic evidence would clarify the ambiguities, particularly as concerns the matter of advancements and would give effect to the declared intention of testator to treat all his children alike and that the court erred in refusal to admit and consider such proffered evidence.

POINT TWO

THE PROFERRED EVIDENCE IN SUPPORT OF THE PETITION OF APPELLANTS FOR CONSTRUCTION OF THE WILL IS ADMISSIBLE FOR THE PURPOSE OF RESOLVING AMBIGUITIES THEREIN.

Where ambiguities exist in a will and are incapable of being resolved by its provisions, the law is clear that resort may be had to extrinsic evidence to aid the court in ascertaining the real intention of the testator as evidenced by the language he used.

The above general rule in this connection is stated and discussed by the following authorities:

69 C. J. Section 1173, p. 135: “. . . generally speaking, extrinsic evidence is admissible, when necessary, both to place the court in a knowledge of the condition and circumstances surrounding the testator when he executed his will, and to resolve uncertainties or ambiguities in the will as to the testator's intentions; . . .”

Ibid, Section 1178, pp. 144-146: “While extrinsic evidence is not admissible to remove a doubt or ambiguity which may fairly be resolved by a resort to the context of the instrument, yet where the language of a will is doubtful or ambiguous, parol or extrinsic evidence may be admitted for the purpose of assisting the court in ascertaining its meaning; or as the rule is frequently stated, when it is necessary, in order to enable the court to ascertain the intention of the testator, parol evidence may be admitted for the purpose of showing and explaining a latent ambiguity arising as to the identity of the beneficiary or subject matter of the will.”

4 Page on Wills (Lifetime Edition) Section 1617, pp. 626-7: “The meaning and application of the terms of the will cannot be understood until the property and

beneficiaries have been identified, which can be done only by extrinsic evidence; and, in many instances, until the court understands testator's situation with reference to his property, the natural objects of his bounty, and his contemplated beneficiaries. Evidence of this sort explains the meaning of the will; and, not infrequently, this meaning is varied to the extent that the will evidently means something different, when read in the light of admissible extrinsic evidence, from the meaning which it appeared to have without such evidence. It is said that such evidence is received, not to defeat, but to aid in determining the testator's intent when that intent is uncertain from a reading of the will itself, and to explain or resolve doubts, not to create them."

Ibid, Section 1618, pp. 628-30: "The question of the admissibility of parol evidence, therefore, is generally raised where the will, either upon its face, or by reason of imperfect description of the subject-matter of the gift or the object of the testator's bounty, is ambiguous or uncertain. It is oft stated, as a general principle, that evidence of extrinsic circumstances is admissible to aid in interpreting a will which is ambiguous."

"While in some cases considerable stress is put on the fact that evidence is admissible because of the ambiguity of the will, this is because it is only in such cases that extrinsic evidence needs to be considered in construing the will; and in any case, whether the will appears ambiguous or not, the court is entitled to hear such extrinsic evidence of the surrounding circumstances as will put it in the place of testator."

The foregoing doctrine is recognized in the State of Utah by the case of *In re Pickard's Estate* (1912) 42 Utah 105, 129 P. 353. In that case the testatrix bequeathed her property to a trustee, first to provide for a living income to

her husband, and secondly to be equally divided between her two children, “ . . . 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 shares of my said daughter and son to be determined as of the date of my decease.” Her daughter (executrix) petitioned for final distribution alleging that before the will was made the testatrix advanced to her son the sum of \$2,750 upon the understanding that such sum was paid out of her estate as an advancement, which should be taken into consideration in the distribution of the estate property. This the son denied, and the trial court refused to consider extrinsic evidence of this fact and held that the two children of testatrix share equally in her estate. On appeal the Supreme Court reversed the trial court and held that the evidence pertaining to advancements made by testatrix in her lifetime should have been admitted, since the third clause of the will intended some sort of set-off against the interests the brother and sister would be entitled to under the will. In this connection this court had the following to say: (pp. 110-11 Utah Report)

“We therefore look to the will to see what she did in such particular. The respondent asserts that by the will the two contestants were given equal proportions without qualification of any kind in and to the residue of such property. The appellant asserts the contrary. We think, on the face of the will, the contention of the respondent cannot prevail, for it is clear that the testatrix, by the language used by her, ‘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’, etc., intended some sort of set off against the

respective interests of such legatees. If it be assumed that by such language she meant and intended the sum or sums of money paid by her to one and not to the other, or the excess that the one had received over the other, then was parol evidence admissible to show the amount or amounts thereof. If on the other hand it be assumed that such language is ambiguous and the intention of the testatrix in such particular uncertain when the whole of the will is looked to, then, again, was parol evidence of pertinent facts and circumstances admissible to aid the court in ascertaining and determining the real or actual intention of the testatrix as evidenced by the language so used by her. And it would seem that on the latter, and not the former, theory was such parol evidence admissible."

In the instant case, as indicated above under Point One, the language of the will has created ambiguities more extensive than did the provision in the Pickard will. If it was error to exclude proffered clarifying extrinsic evidence in that case, a fortiori, it was error for the trial court to do so in the instant case. How can effect be given to testator's declared intention to treat all his children alike until the proffered extrinsic evidence has been received and considered on the matter of his conflicting statements as to advancements responsible for the ambiguities which must be resolved?

As pointed out by Professor Page (4 Page on Wills, Lifetime Edition, Section 1623) a great many courts in this connection only allow extrinsic evidence if the ambiguity is latent, as distinguished from its being patent. Appellants submit that their proffered extrinsic evidence was admissible to sustain the allegations of their petition even under this distinction rule. Even though the Utah Supreme Court

has made no such distinction in cases of this character we call attention to Professor Page's criticism of it which follows:

Ibid., pp. 654: "Accordingly, while admitting that many excellent authorities have discussed the law of extrinsic evidence in construction upon the basis of the distinction between patent and latent ambiguities, it undoubtedly would be a step in advance in the development of our law to discard the distinction entirely. No distinction or classification, whether old or new, which cuts across the actual distinctions which courts are forced to make in order to do justice between litigants, should be either accepted or retained. That the distinction is not founded upon sound principle can be seen from the fact that even the courts which have most frequently invoked it, regularly proceed, in deciding cases, so to explain the distinction between the patent and latent ambiguities as to eliminate it practically from the discussion, and instead use the distinction between evidence of testator's intention direct and evidence of the surrounding facts and circumstances as the fundamental distinction to be observed."

The case of *Payne vs. Todd et al*, 43 P2d 1004 (1935), illustrates the modern trend of judicial thought concerning the problem before this Court. In that case the testator declared in paragraph 4 of his will that he forgave a debt owed him by his son, Stanley T. Payne, in the sum of approximately \$3,000.00 plus accrued interest at the date of testator's death and further provided as follows:

"... 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."

In the seventh paragraph of the will the testator left the residue of his property in equal shares to his five children. The executor claimed that Stanley was not entitled to share under the residuary clause and had only the right to receive the documents evidencing the indebtedness. Stanley denied the executor's claim and offered extrinsic evidence of advancements made by testator to his children during his lifetime, and the relationships and circumstances existing at the time they were made, in order to clear up the ambiguities created by the language of the will. The trial court refused to hear the evidence on the ground that the will was clear and unambiguous. On appeal the Supreme Court of Arizona held that the trial court erred in refusing to hear the evidence proffered because the will was ambiguous and required extrinsic evidence to put the court in the position of the testator at the time the will was made so that a proper construction of it could be made.

The following excerpts from that case are particularly germane to the question before this court:

"The difficulty is with clause four. By its terms he specifically forgave to the appellant herein a debt which originally amounted to \$3,000.00. He evidently contemplated that his son would make payments upon the debt, but that it might not be fully paid before his death. If clause four had stopped at the phrase 'if it still exists at the time of my death,' there can be no doubt that a forgiveness of the debt, in addition to participation in the residuary bequest, was intended by the testator. The difficulty arises over the construction of the remaining portion of the clause, which says that the cancellation is a part of appellant's share of testator's estate 'which might otherwise be bequeathed to him.' It is the contention of the executor that these

last words are equivalent to 'which has been bequeathed to him in clause seven of the will.' It is the position of appellant that its meaning is 'which would have been, but because of this clause has not been, bequeathed by this will.' We are of the opinion that a plausible argument can be made, and indeed has been made in the briefs of the respective parties, in favor of each construction suggested. Such being the case we must hold that clause four is ambiguous in its meaning when taken in connection with all the remainder of the will.

"The question then is, is this ambiguity of such a nature that parol evidence is admitted, not to vary or contradict the terms of the will, but to explain the meaning of the testator when he used the words which he did? A good deal of the time is devoted in the briefs to a discussion of the difference between a patent and a latent ambiguity and the rules applying thereto. The older decisions tend to hold that it is only latent ambiguities which may be explained by parol evidence. The more modern cases seem to take the view that any ambiguity which may be cleared up by a showing of the circumstances surrounding the testator at the time he made his will is susceptible of explanation by parol evidence."

After discussing two prior decisions the court concludes:

"We think, following the rules laid down in these two cases, that parol evidence is admissible for the purpose of explaining either a patent or latent ambiguity in the will, but that it can only go to the extent of showing the circumstances surrounding the testator at the time he made the will, such as previous advancements to his children, his desire in regard to an equalization of bequests, the character and value of the property disposed of by the will, and similar matters."

Upon the record before this Court, and based upon the foregoing applicable law, the conclusion is clear that the trial court erred in refusing to admit the proffered evidence, and in dismissing the petition of George Baum and Oliver Baum.

CONCLUSION

We conclude that paragraphs II, III, IV and V of testator's will, when read in reference to paragraph XI thereof, create serious ambiguities as to what the testator intended for his two sons, George Baum and Oliver Baum; also as to what he intended with respect to all advancements he made to any or all of his children; and that it would be impossible to give effect to testator's declared intention to treat all of his children alike without resorting to extrinsic evidence to explain these advancement provisions of his will.

Appellants contend that reading the will in the light of the facts alleged in their petition warrants the conclusion that it was the intention of testator to treat all of his children alike in the disposition of his property at his death. To achieve this result the testator naturally referred in his will to his two sons (appellants) with whom he had had the most to do in connection with his property in his lifetime. Since he no doubt realized that his dealings with them had been complicated and had been long since terminated, it is apparent that he did not remember the full significance of what had transpired between them. He undoubtedly felt that in fairness to the rest of his children those transactions should be considered at the time his estate was settled, so that any property of his that appellants had received without paying any consideration for, in return should be charged against their share of his estate. Also in fairness

to appellants he made provision that if testator either had not given them their share in advancements, or had "otherwise declared in writing" concerning advancements, then appellants would be treated "alike" and share equally with the other children. He also realized that he had had other transactions with other children and therefore intended that they be considered at the time the estate was to be distributed. Since the testator wanted to treat the children "alike" his reference, without identification, to advancements made, clearly shows that what he intended to be accomplished was that when the estate was settled all advancements which he had made in his lifetime to any or either of his six children should be off-set against the respective one-sixth interest of each child.

It is submitted that if the foregoing construction is not adopted the children of testator will not have been accorded like treatment.

Respectfully submitted,

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