1982

In the matter of the estate of Louis A. Grossen : Brief of Appellants

Utah Supreme Court

Clark R. Nielsen; Attorneys for Appellants;
William L. Crawford; Parsons, Behle & Latimer; Attorneys for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of LOUIS A. GROSSEN, a/k/a LOUIS GROSSEN, MILTON GROSSEN, L. E. GROSSEN, LARRY GROSSEN and EDWARD GROSSEN, Deceased.	)	No. 18075

BRIEF OF APPELLANTS MAE ELEANOR GROSSEN VINCENT AND LUCILLE M. GROSSEN TAYLOR

Appeal from an Order of the Third Judicial District Court of Salt Lake County, State of Utah, Honorable Kenneth Rigtrup, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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NATURE OF THE CASE

Appellants petitioned for a determination that their father, Louis A. Grossen, died intestate since his purported will was invalidly witnessed by a person under 18 years of age. Appellants also petitioned for appointment as personal representative, having priority under Section 75-3-203, U.C.A., 1953 (as amended). Respondent Earl Grossen objected and filed his petition for probate of the invalid will and for appointment as the personal representative named in the will.

DISPOSITION IN LOWER COURT

At an evidentiary hearing on September 21, 1981, before the Honorable Kenneth Rigtrup, District Judge, the lower court denied Appellants' petition and granted the petition of the Respondent Earl Grossen, admitted the invalid will to probate and appointed Respondent as personal representative. Appellants, Mrs. Vincent and Mrs. Taylor, appeal from that Order.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the order admitting the alleged will to formal probate and appointing Earl Grossen as personal representative. Appellants also seek a determination that the decedent died without a valid will and for appointment as personal representative. In the alternative, Appellants seek a rehearing in the lower court.

STATEMENT OF FACTS

At the time of his death on April 17, 1981, Louis Auer Grossen was 80 years of age, a resident of Salt Lake County, Utah, where he owned real and personal property. (R. 6) Appellants, Mae Eleanor Grossen Vincent and Lucille M. Grossen Taylor, are daughters of the decedent by his first wife, Mae Grossen.

On November 25, 1929, the decedent married Vivian Anderson in Farmington, Utah. The Respondent Earl Grossen is the son of the decedent by his second wife, Vivian. (R. 37; Exh. 2) In July, 1943, Vivian was awarded a decree of divorce from the decedent. (Exh. 1) Although Vivian and the decedent resided together at his death, there was no subsequent valid marriage. (R. 6, 7; Exh. 2)

On several occasions shortly before his death, the decedent stated to his daughters that he had no last will and testament and wanted to find a lawyer to have one made. This proffer of testimony by Appellants was rejected by the trial court. (R. 19-20) On July 10, 1974, the decedent purportedly executed a document entitled his "Last Will and Testament." (R. 10) It is interesting to note that while Earl Grossen is the nominated

personal representative in the alleged will, he never presented the document to the court for probate until Appellants filed their petition for determination of intestacy in August, 1981. (R. 18, 23)

The lower court specifically found that on the date that the document was allegedly executed and witnessed, Scott Hill was only 16 years old. (R. at 33) Scott Hill testified that he has no present recollection of having signed the alleged testamentary document, nor can be recall Mr. Grossen's signing of the document or any declaration by Mr. Grossen that the document was, in fact, his will. (R. at 13-14, 69)

Mr. Richard Hill testified that he witnessed the decedent's signature on the document and that Mr. Grossen said it was his will. (Tr. 56-57) However, Mr. Hill also admitted that he had stated on prior occasions that he had no such recollection. (Tr. 61-63)

Upon hearing the testimony of the "subscribing witnesses" and rejecting the proffered testimony of Appellants, the Honorable Kenneth Rigtrup, District Judge of the Third Judicial District Court, ruled that the alleged will should be admitted to formal probate and that Mr. Grossen be appointed personal representative. (R. 36-38) The court held that the former probate code was applicable and that a witness need not be 18 years of age. (R. 29)

The court entered its Order and Findings of Fact and Conclusions of Law on September 30, 1981. (Tr. 32, 36) Letters testamentary were issued to Earl Grossen on October 2, 1981. (Tr. 40) On October 30, 1981, Appellants filed their Notice of Appeal. (R. at 41-42)

QUESTIONS PRESENTED

1. Whether the trial court erred in admitting to probate a document not witnessed by two valid witnesses, as required by Sections 75-2-502 and 75-2-505 of the Utah Uniform Probate Code.

2. Whether the requirements of the Utah Uniform Probate Code apply to the will of a decedent dying after July 1, 1977, even though his will was executed in July, 1974.

3. Whether the trial court erred in failing to grant Appellants' petition for a determination of decedent's intestacy when the document offered for probate was invalidly executed under the requirements of the Utah Uniform Probate Code.

SUMMARY OF THE ARGUMENT

When Mr. Louis Grossen died on April 17, 1981, the requirements of execution of a will under the Utah Uniform Probate Code were in effect and applicable to the alleged will. The present statute expressly provides that its requirements are applicable to the wills of all decedents dying after July 1, 1977. The privilege of distributing one's property by a will is a purely statutory privilege and no rights become vested under a will until the death of the testator. The Utah legislature was entirely within its authority when it made the provisions of the Utah Uniform Probate Code applicable to previously executed wills. Such being the case, the Utah Uniform Probate Code is controlling on the question of validity of Mr. Grossen's alleged will, since Mr. Grossen died in 1981.

Sections 75-2-502 and 75-2-505 of the Utah Uniform Probate Code address the formalities required for the execution of a valid

will. Because the statutory formalities for valid execution of a will are mandatory requirements, there must be strict compliance. Those requirements include that there must be two valid witnesses over 18 years of age. Contrary to the code requirement, Scott Hill was only 16 years old at the time of the alleged execution of the document.

The invalidity of one of the witnesses to Mr. Grossen's alleged will results in the invalidity of that document as a will since the requirement that a will be witnessed by two valid witnesses was not complied with. This result is the same as that reached by the Supreme Court of Idaho, addressing the identical issue under identical provisions of the Idaho Uniform Probate Code.

Since no other testamentary document has been presented for formal probate, the trial court should have granted Appellants' petition for appointment and determination of intestacy.

ARGUMENT

POINT I. THE REQUIREMENT OF THE UTAH UNIFORM PROBATE CODE THAT WITNESSES TO A WILL BE OVER EIGHTEEN YEARS OF AGE APPLIES TO THE ALLEGED WILL OF A DECEDENT WHO DIED IN 1981.

The question of which law is controlling over the will of Louis Grossen is answered by Utah Code Annotated, Section 75-8-101(2)(a) (1953, as amended, 1976):

> This code [the Utah Uniform Probate Code] applies to any wills of decedents dying [after July 1, 1977].

This language, when coupled with the further provisions of Section 75-8-101, evidences a legislative intent that the Utah Uniform Probate Code controls the validity of a will of any person dying after July 1, 1977.

Although Subsections (2)(b) and (2)(d) of Section 75-8-101

provide that earlier statutory provisions may be applied in pending proceedings if justice demands and also that the new probate code will not interfere with any rights vested before its effective date, neither of these provisions apply. This probate proceeding was not initiated until 1981, well after the effective date of the Utah Uniform Probate Code, and none of the rights contested in the present case had vested as of July 1, 1977.

In addition to the express language of the Utah Uniform Probate Code, important policy considerations require that the sufficiency of execution of a will be determined by the law in force at the time of the testator's death. Primary among these considerations is the need to show deference to the state legislature in its determination of state probate procedures.

> [T]he disposing of one's property by will in a manner different than it would descend by law is not a natural inherent right which arose out of common law, but is a privilege granted by the legislature under specific conditions which must be strictly complied with.

In Re Baxter's Estate, 16 Utah 2d 284, 399 P.2d 442, 443 (1965). It cannot be argued that the former law, effective in 1974, automatically validates the decedent's will. The will does not "speak," nor do rights under a will become vested until the time of the testator's death. See, also, In Re Zimmerman's Estate, 207 Kan. 354, 485 P.2d 215 (1971); In Re Fernandez, 173 N.J. Super. 240, 413 A.2d 998 (1980). The validity of the will is determined by the law in effect at the death of the decedent. In Re Estate of Buffi, 98 Ida. 354, 564 P.2d 150 (1970); In Re Estate of Lane, 99 Ida. 850, 590 P.2d 577 (1979).

There is nothing unusual or unconscionable about requiring

that the applicable statutory provisions be met in order for a court to recognize the validity of a testamentary document. The new probate code was designed to avoid the very problem encountered here to insure the responsibility, integrity and maturity of witnesses.

When initially approached regarding their execution of the document, neither witness had any recollection of the situation or circumstances. (R. 10-12) The sixteen-year-old still has no recollection of what occurred or even if the document was ever signed by the decedent. Mr. Richard Hill's recollection, and consequently his testimony, improved after communications with the Respondent and Respondent's counsel. (R. 10-11) This must be considered in light of the trial court's erroneous refusal to admit as evidence statements by the decedent prior to his death that he did not have a valid will and wanted to make one.

We submit that the provisions of the Uniform Probate Code, effective in 1977, are fully applicable to this case. The lower court erred in refusing to apply the provisions and statutory requirements of the Uniform Probate Code for the valid execution of the decedent's will.

POINT II. THE TRIAL COURT ERRED IN ADMITTING TO PROBATE AN ALLEGED WILL WHICH WAS NOT WITNESSED BY TWO VALID WITNESSES.

Section 2-505 of the Uniform Probate Code, as enacted by the Utah legislature, was specifically changed upon adoption to require that a valid witness to a will be eighteen years of age. Utah Code Annotated, Section 75-2-505 (1973, as amended, 1976). "Any person of the age of eighteen years or over who is generally

competent may act as a witness." The language of the statute is clear and unambiguous.

This Court has held that the right to dispose of property by will is governed and controlled entirely by statute. Such statutes are mandatory; and unless strictly complied with, the instrument, as a will, is void. In Re Walcott's Estate, 54 Utah 165, 180 Pac. 169, 170 (1919); see, also, In Re Alexander's Estate, 104 Utah 286, 139 P.2d 432 (1943).

The "eighteen-year-old" requirement was inserted by the legislature in adopting provisions of the Idaho Probate Code. Presently only Utah and Idaho have such a requirement. The Supreme Court of Idaho has addressed its identical age-limiting provision incorporated in the 1971 Idaho Uniform Probate Code. In In Re Estate of Lane, 99 Ida. 850, 590 P.2d 577 (1979), the Idaho Supreme Court considered a will, one of the witnesses to which had been a married person but only 17 years of age at the time of witnessing the will. In invalidating the will, the court held that the requirement that a witness be 18 or more years of age was mandatory. 590 P.2d at 577.

The court in Lane noted particularly that the age requirement had been added to the language of the Uniform Probate Code by the Idaho legislature and that the addition evidenced a legislative intent that the requirement be strictly applied. Id. The analysis used by the Idaho Supreme Court in Lane is directly applicable to Utah's age requirement for witnesses to a will. Such an inclusion in Utah is an affirmative manifestation of legislative intent that the age requirement of witnesses to wills in Utah be strictly

complied with.

The prior statute, Utah Code Annotated, Section 74-1-5 (1953), and the Uniform Probate Code, Section 75-2-505, U.C.A. (1953, as amended, 1976), both require that in order for a will to be valid, it must be witnessed by two competent and qualified witnesses. In addressing Utah's earlier statute, the Utah Supreme Court held:

> It is within the province of the legislature to prescribe whatever formalities in the execution of a will which its judgment dictates; and where such formalities are prescribed a failure to comply therewith may not be excused by showing that in a particular case there was no fraud, nor indeed, by demonstrating that a less stringent requirement would as effectively prevent fraud. The provision under discussion is a definite prescription. To attempt to construe it other than literally would amount to a substitution of our judgment for that of the legislature as to legislative policy.

In Re Alexander's Estate, 104 Utah 286, 139 P.2d 432, 434 (1943).

The analysis with respect to the number of witnesses to a will is the same as to the age requirements of those witnesses. The statute is mandatory and a failure to satisfy its provisions results in an invalid will. This reasoning is consistent with the result in Lane above. There the Supreme Court of Idaho found the will invalid upon the failure of one witness to meet the statutory requirements even though the other witness was fully qualified and no other irregularities in the document itself were noted. 590 P.2d at 577. The present case is factually identical to the situation addressed by the Supreme Court of Idaho in Lane. The statutory language is identical. Therefore, the result should also be identical. The alleged will of the decedent is invalid for want of sufficient, valid and qualifying witnesses.

POINT III. THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANTS' PETITION TO DETERMINE DECEDENT'S INTESTACY AND TO APPOINT MRS. VINCENT AS PERSONAL REPRESENTATIVE.

The invalidity of the propounded document, coupled with the fact that no other testamentary document has been produced, leads to the conclusion that the court's denial of Appellants' petition for a determination of Louis Grossen's intestacy was erroneous. There is no evidence or facts in the record to dispute the allegations of Appellants' petition except as to the dispute over the validity of the alleged will.

Mrs. Vincent qualifies for priority of appointment as personal representative under Utah Code Annotated, Section 75-3-203(3) (1953, as amended, 1976). Any allegation that Vivian Grossen has priority for appointment as personal representative under Section 75-3-203(d), as surviving spouse of Louis Grossen, is defeated by the fact that at the time of Louis Grossen's death, Vivian was not, in fact, married to Mr. Grossen. The documentation of Vivian's divorce from Louis Grossen was offered and accepted as evidence in the trial court below. (R. at 72-73)

CONCLUSION

Pursuant to the law in effect at decedent's death, the requirements for the valid execution of a will include: (1) that the will be witnessed by "at least two persons;" and (2) that the witnesses to the will be at least 18 years of age. Both of these provisions are mandatory, and failure to satisfy either or both of them is sufficient to invalidate a will. Therefore, the decision of the lower court should be reversed and the case should be remanded with an order that the trial court grant Appellants'

petition for appointment and determination of intestacy.

Respectfully submitted this 1st day of March, 1982.

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CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Appellants' Brief to William L. Crawford, attorney for Respondent Earl Louis Grossen, at 79 South State Street, P. O. Box 11898, Salt Lake City, Utah 84147, postage prepaid, this 1st day of March, 1982.

FILED IN CLERK'S
Salt Lake County,
SEP 30 1981
W. Sterling Evans, Clerk of Court
By Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

* * * * * * *

IN THE MATTER OF THE ESTATE OF LOUIS A. GROSSEN, Deceased	FORMAL PROBATE OF WILL AND APPOINTMENT OF PERSONAL REPRESENTATIVE Probate No. P81-671

* * * * * * *

Upon consideration of the Petition of Earl L. Grossen for Formal Probate of the Decedent's Will dated July 10, 1974, and for Formal Appointment of Earl L. Grossen as Personal Representative of the decedent, filed with the Court by Earl L. Grossen on September 7, 1981, and the Court having entered its Findings of Facts and Conclusions of Law in this matter, the Court further finds that:

1. The required notice has been given or waived.

2. The proceeding was commenced within the time provided by law.

3. The decedent died on April 17, 1981, in Salt Lake County, State of Utah.

4. Venue is proper.

5. The testamentary instrument to which the petition relates is the decedent's Last Will.

6. Earl L. Grossen is entitled to appointment as the decedent's Personal Representative to act without bond.

7. The heirs of the decedent are as follows:

Name	Relationship
Vivian H. Anderson Grossen	Spouse
Mae Eleanor Grossen Vincent	Daughter
Lucille M. Grossen Taylor	Daughter
Earl Louis Grossen	Son

THEREFORE:

1. The Will of the decendent dated July 10, 1974, is hereby formally probated.

2. Earl L. Grossen is hereby formally appointed as the Personal Representative of the decedent to act without bond.

3. Upon qualification and acceptance, Letter Testamentary shall be issued to the said personal representative.

DATED this 30th day of September, 1981.

BY THE COURT:

The Honorable Kenneth Rigtrup
District Judge

ATTEST
W. STERLING EVANS
Clerk
By _____
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

* * * * * * *

IN THE MATTER OF THE ESTATE OF	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
LOUIS A. GROSSEN,	)	
Deceased	)	Probate No. P81-671

* * * * * * *

The Petition of Mae Eleanor Grossen Vincent and Lucille M. Grossen Taylor for Appointment of Personal Representative and Determination of Intestacy and the petition of Earl L. Grossen for Formal Probate of Will and Formal Appointment of Personal Representative, and the Objections to said Petitions on file herein, came on for hearing before the Honorable Kenneth Rigtrup, Judge of the above-entitled Court, sitting without a jury, on the 21st day of September, 1981. Petitioner Earl L. Grossen was represented by his counsel, William L. Crawford, of and for Parsons, Behle & Latimer. Petitioners Mae Eleanor Grossen Vincent and Lucille M. Grossen Taylor were represented by their counsel Clark R. Nielsen, of Nielsen and Senior. Richard B. Hill and Scott Hill, as subscribing witnesses to the Last Will and Testament of Louis Grossen, testified as to the circumstances surrounding the execution of the Will. The Court having heard testimony introduced by the parties and the Court being fully advised in the premises, now makes and enters the following:

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FINDINGS OF FACT

1. The document filed with this Court under Probate No. P81-671 captioned "Last Will and Testament of Louis Grossen" and dated July 10, 1974, is the Last Will and Testament of Louis Grossen, deceased.

2. Said Last Will and Testament was executed at the end thereof by Louis Grossen who wa then over the age of 18 years, the execution of the Will by the decedent was made in the presence of Richard B. Hill and Scott Hill as attesting witnesses, the decedent at the time of execution of the Will indicated to the subscribing witnesses that it was his will and requested them to execute the same, and the two attesting witnesses signed their names at the end of the Will at the testator's request, in his presence, and in the presence of each other.

3. At the date of the execution of the Will, one of the witnesses, Scott Hill, was only 16 years of age.

4. At the time of the execution of the Will the decedent was acting of his own free will and choice and did not execute his Will as the result of fraud, duress, undue influence, mistake, or any other condition that would cause the Will not to be valid.

5. The decedent at the time of the execution of his Will had the capacity to dispose of his property by will.

Based upon the foregoing Findings of Fact the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The Last Will and Testament of Louis Grossen dated July 10, 1974, which Will has been filed with this Court,

is valid and is entitled to be admitted to probate as the Last Will and Testament of Earl Grossen, deceased.

DATED this 30th day of September, 1981.

BY THE COURT:

Kenneth Rigtrup

The Honorable Kenneth Rigtrup,
District Judge

ATTEST
W. STERLING EVANS
Clerk
By _____
Deputy Clerk