

1989

In the Matter of the Estate of Kenneth Dale Ashton, Deceased v. : Brief of Respondent

Utah Supreme Court

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LOCKET NO

900275-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF

KENNETH DALE ASHTON,

Deceased.

Case No. 890550

RESPONDENT'S BRIEF

Appeal from the Third Judicial District Court
Order of the Honorable Raymond S. Uno
declaring Ruth Ashton to be only heir of the estate

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RUTH ASHTON

FILED

APR 16 1991

Clerk Supreme Court Utah

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LIST OF PARTIES TO THE PROCEEDINGS

Appellants - Children of the Decedent

Steven Ashton
Kim Ashton
Mark Ashton
Linda Ashton Manis

Respondent - Personal Representative and Widow of Decedent

Ruth Elizabeth Ashton

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STATEMENT OF JURISDICTION

The Supreme Court is the proper court to hear this appeal from a Third District Probate Order declaring Ruth Elizabeth Ashton to be the only heir of the Estate of Kenneth Ashton (893900184ES).

STATEMENT OF ISSUES

Did the trial court err in finding Ruth Elizabeth Ashton received a fee simple absolute as the sole heir of her husband's Estate when the Will provided:

V

I give, devise, and bequeath all of my property, real, personal, or mixed, of whatsoever nature and wherever situated, which I may own or have the right to dispose of at the time of my death to my beloved wife, Ruth Elizabeth Ashton. She shall have the full enjoyment of the estate for as long as she desires or shall live.

STATEMENT OF CASE

Decedent and Thelma, his first wife, met Ruth Elizabeth Ashton in early 1980 (R138, page 9, line 17). After his first wife died (R137, page 6, line 17), Ken married Ruth on August 30, 1985. Ken and Ruth were married for three years, four months, and five days (R135, page 11, line 8) until, on January 5, 1989, after a short illness, Ken committed suicide (R138, page 19, lines 7ff).

Mr. Ashton died owning probate assets worth \$38,002.85 and non-probate assets of \$163,297.30 (R138, page 45, line 12ff; R 138, exhibit 4; R89-94). His probate was commenced by his son seven weeks after his father's death. The original probate requested that children be appointed Personal Representatives (R4-7). Ruth Ashton objected to the appointment of children as Personal Repre-

sentatives because she was named in the Will and was preferred under the Utah statute (R11-14). Ruth Ashton became the Personal Representative (R28-33), and the trial court (Judge Raymond Uno) found that Kenneth Ashton, through his Will, left his entire estate to his wife, Ruth Elizabeth Ashton, "free and absolute of the claim of any other heir." (R125)

SUMMARY OF ARGUMENT

All of the evidence presented before this court was found by the District Court to result in a fee simple absolute estate in Ruth Ashton as the sole heir. At the trial court level, Appellants never submitted facts to be found by the District Court nor objected to any fact other than the ultimate legal conclusion of heirship.

Appellants' cases (cited in their current Brief) are distinguishable from the present case and set no legal precedent for the Utah courts to apply. These opinions represent eclectic, isolated views on the importance of supporting the trier of fact in its findings of fact and its interpretations of various testamentary language.

Even if the Supreme Court of Utah wishes to express its opinion of the Testator's intent, a fee simple interest would be found in Respondent because it would be most favored, logical construction of the Will as a whole.

ARGUMENT

I. A trier of fact properly has determined heirship from all evidence submitted.

A. Questions of Fact

Appellants state that the trial court erred by finding a fee simple interest when the language in the Will said, "for as long as she desires or shall live" (Brief, page 2, lines 1-5). Appellants contend that this language is clear that "Ruth Ashton was given assets for life" (Brief, page 4, line 13).

This trial court error is of fact or of law. The District Court judges, as triers of fact, have original jurisdiction in all matters not elsewhere provided by statute (Utah Constitution, Article VIII, Section 5). This extends jurisdiction to matters relating to the estates of decedents, including construction of wills and determinations of heirs and successors of decedents (UCA 75-1-302 (1)(a)). Appellants have inferentially argued that there was insufficient factual evidence for the Court's decision, (Brief, page 2, top), and directly argue that the trial court did not correctly find the facts of the Testator's intent which, therefore, would have led the Court to correctly find the life estate that was mandated by the Will's language, the Will's construction, or the testator's intent (Brief, pages 2-3, Bottom).

The scope of the Supreme Court's appellate review is limited. The appellate court cannot act as a trial court and receive new evidence on the facts. The intent of the Testator was a factual issue and not the proper subject matter of appeal without a showing of clear error. For an appellate court to again consider what was

Testator's intent behind the Will's construction or his meaning of words is duplicative and not called for in light of Appellants' failure to show the District Court's decision was "clearly erroneous" Inwood Labs vs. Ives Labs, 456 U.S. 844 (1982). As was stated in Civil Procedure by Friedenthal:

The reason for using the clearly erroneous standard is that the trial judge is thought to have an advantage over the appellate court because of his opportunity to view the witnesses; demeanor evidence is of course unavailable to the appellate court. In addition, the trial judge has been able to sift through the entire case and the ultimate judgment reached may reflect this familiarity which may provide much greater insight into the action than the limited view permitted on appeal of specific issues or rulings.

The court found Ruth Elizabeth Ashton was the sole heir intended by Decedent to receive a fee simple absolute. The trial court judge found a fee simple interest after considering the Will, files, record memorandum, and evidence. He was within the scope of his discretion under 75-2-603 to do this. Also, Respondent believes this was a proper finding because the Will had only one operative section (Section V) with the other non-operative sections (VI and VII) being based upon the unfulfilled contingency of Ruth being dead at the time Ken died. This finding should be affirmed unless a mistake of law was made.

B. Questions of Law

The fullest scope of review, not surprisingly, is for errors of law; the appellate court will decide questions of law de novo.

The Appellants' legal error claim is based on the following:

(1) Mr. Ashton intentionally added this second sentence in Section V from earlier constructions (Brief, page 4, line 14),

(2) an Alabama case held that "during her lifetime" meant a life estate, (Brief, page 4, line 5),

(3) a California case involving a joint and mutual will using the language "for her use and benefit forever" found a life estate (Brief, page 4, bottom),

(4) a New York case held "use" meant less than legal estate (Brief, page 5, line 2),

(5) the construction of Ken's Will indicated his children were to be provided for (Brief, pages 5-8), and

(6) a Georgia case considered interpreting the entire will as a whole (Brief, page 8, bottom) in order to give effect to a limitation.

(1) The Intent of the Second Sentence. Appellants are correct that the second sentence was added to the final version.

I give, devise, and bequeath all of my property, real, personal, or mixed, of whatsoever nature and wherever situated, which I may own or have the right to dispose of at the time of my death to my beloved wife, Ruth Elizabeth Ashton.

But, significantly, the first sentence always has existed in every prior draft. It clearly grants Ruth an absolute fee interest. Who, if anyone, does the second sentence restrict? Ruth is to have the **full enjoyment** of the estate (given by the first sentence) for as long as she desires or shall live. Impliedly, Ruth can fully enjoy the property (by selling it, consuming it, borrowing against it). She can do this until she no longer desires it or until she no longer lives.

Also, having granted Ruth a fee interest by the first sentence, what (if anything) is restricted? Ruth owns this property only until she gives it away or dies. The second sentence does not restrict this. If Ruth's alienation of property is restricted, who is benefited? There is no remainder over on her death. All of Ruth's property will pass under her will.

The Court construed Section V and the Will as creating a fee simple interest not limited by this language. In other words, the Court found Ruth's fee simple interest would be fully enjoyed by her as long as she desired to so enjoy the property or as long as she lived to enjoy the property. No other subsequent interest existed.

(2) The Alabama Case. In South vs. Yager 368 S2d 863 (Ala., 1979), decedent bequeathed all his property to his wife "during her lifetime" even though there was no clear limitation over to remaindermen. The Supreme Court of Alabama sustained the trial court, finding that the will was unambiguous, and that the wife had requested for the testator to insert this language during her lifetime.

Just as the Alabama Supreme Court supported it's trial court after pleadings, briefs, and depositions, the Supreme Court of Utah should support it's District Court decision of a fee simple. Unlike the Alabama case, after weighing the language giving Ruth the fee in the first sentence, and "the full enjoyment" in the second sentence, with all Court "files, records, memorandums, and evidence introduced at trial" (R26), the Court found a fee inter-

est. This Finding of Fact should be supported on appeal for reasons given above.

Appellants cite this Alabama case, which used the words "lifetime," as precedent in Utah for establishing a rule of will construction for omitted remaindermen. Appellants want the operative language to be "or shall live." Appellants want the Will interpreted that Ken's intent is clear (Brief, Page 4, line 19) to show a life estate for Ruth even though no remaindermen are named.

Appellants are wrong on the case. The Alabama court itself said it would not apply rules of construction against the clearly expressed intention of the testator as found by the trial court (Infra at 864).

Further, Appellants' finding of clear intent of Ken is not borne out by the record. Mr. Ashton's language for a life estate was not expressed clearly, nor was his intent to create a life estate expressed to others. In the deposition of the attorney drafting the Will, Carolyn Driscoll, she stated she did not believe the language was intended to create a life estate (R137, page 15, line 7ff). She reiterated that in her testimony in Court (R136, page 16, line 7, to page 20, line 5).

Q. (Mr. Borsos) Did Mr. Ashton know the difference between the life estate and absolute grant in fee?

A. (Carolyn Driscoll) I believe he did. (R136, page 17, lines 12-15)

Q. Did Mr. Ashton in any of his communications to you indicate that he wanted a life estate in Ruth?

A. No. (R136, page 20, lines 2-5)

The judge could have relied on this testimony to show Ken's unclear intent. According to the Will, Carolyn's responsibility was to make any "clarifications concerning the Will" (Will, Section XI, page 8, line 11). The judge could also have relied on the indefinite language of "full enjoyment" and "desires and lives" to find that a life estate was not clearly intended.

(3) The California case. In re Cooper 78 Cal. Rptr. 740 (Calif., 1969), involved a husband and wife executing a joint and mutual will which provided that property went to the survivor "for his or her own use and benefit forever" and then on the survivor's death to named people. Husband and wife also covenanted not to revoke the will. The husband died and the wife claimed a life estate. However, the husband's probate court distribution decree appeared to grant an absolute interest and not a life estate.

The California inheritance tax people again wanted to tax the named people in the wife's estate, but this time as though the wife owned a fee interest and all inheritance came from her and not the former husband. The appellate court found that, under California Inheritance Tax laws, the earlier husband's inheritance tax return with the wife claiming a life estate was proper. Thus, the second tax assessed under a life estate finding was proper.

The trial court found that the husband's estate order distributing all property to the wife did not convey more than a life estate. The trial court agreed with the wife's executrix "on the ground Bessie Cooper had only a life estate in the assets" (at page

742). The appellate court sustained the trial court and allowed the reduced tax assessment.

The California case involved a joint will signed by the husband and wife, a will which was never changed after the husband's death, a promise never to revoke the will, a claim by the wife that she was not more than a life tenant under the joint will, the payment of inheritance taxes as though the wife were a life tenant, and finally, the death of the wife without changing her will, leaving her property to the same remainderman named in the same joint and mutual will that had been declared in her husband's estate to grant her a life estate.

In the present case, Ruth Ashton never has claimed a life estate. There was no joint or mutual will. Ruth has always claimed a fee interest. A probate court found she had a fee interest. No will provision nor contract prevented revocation of the survivor's will nor promised to maintain the will. No irrevocable joint or mutual will provisions existed providing for alternative dispositions to the same beneficiaries on the death of both Ken and Ruth as required under Utah law (UCA 75-2-70).

The California case interpreted final court probate orders for tax purposes holding (a) that trial court orders should be sustained if facts for them exist and (b) that the will as a whole should be used to construe any particular language. Respondent agrees to both positions.

(4) The New York case. In re. Brandstein's Estate 150 NY S2d 911 (New York, 1956) defines the word "use" as a word of art "to mean life estate," but also the New York court found the

word "use" to mean occupancy of property (at 913) and stated, "However, this Testator's intention was to create a trust and not legal life estates" (at 912).

Appellants' analogy of this case to the present is unclear. Ken did not employ the word "use" in his Will. Ruth has the "full enjoyment of the estate for as long as she desires or shall live," and not mere "occupancy" (not full enjoyment) of a home or any other asset. Ken did not write the word "use." If the New York case found the word "use" to be words of limitation, then do Appellants imply that, in the present case involving the words "full enjoyment," we are also limited because "use" means "full enjoyment"? Appellants do not say how the words "use" and "full enjoyment" are related. Finally, if Appellants are right that the word "use" is a word of art implying a less than legal estate, then did Ken's failure to employ that word of art create a fee estate? Certainly it must create more than a life estate.

(5) The structure of the Will. (Appellants' Brief, pages 5 and 6) indicates that only in Section V is there a dispositive grant. Section VI begins with the words: "In the event that my wife, Ruth Elizabeth Ashton, shall die..."; and Section VII begins (page 4) "should my wife... predecease me or die at the same time." Both sections dealing with the contingency of Ruth's death had to have been found by the Trial Court to be inoperative or else someone else would have been found sharing the estate with Ruth.

The Appellants stressed the fact that Decedent had a "detailed scheme to provide for his offspring" (Brief, page 7, line 2), and Ken also had the contingency that, if Ruth could not serve as

Personal Representative, joint alternate Personal Representatives from each family would stand on unequal footing, (eg. the one from Ken's family has a veto power over the other, Brief, page 7). Appellants cite no authority for any inference to be drawn from this anomaly. All these provisions are not effective if Ruth is alive.

Appellants argue (Brief, page 9) that Ken "was concerned about his children being beneficiaries under his Will" and "this concern is incompatible with Ruth's fee interest" (Brief, page 9, line 2). But, there is no incompatibility between the contingent remainder to the children if Ruth were dead and the total grant to Ruth of everything if she lived. The trial court reviewed the whole Will and found a fee interest in Ruth. Respondent agrees with the trial court and finds this interpretation consistent with the structure of the Will. Ken loved his children, Ruth, and Ruth's children. He provided first for Ruth and gave her everything. But, if she were dead, Ken gave the most to his children and then to her children.

Ken could have said that Sections VI and VII remainderman "take after Ruth's life estate," but he didn't say that. What he said was that Ruth gets "all of my property" in Section V, and if Ruth is dead, then property is to go according to Section VI and VII. Ruth is named Personal Representative alive, but if Ruth is dead or does not wish to serve then under Section X, other co-Personal Representatives are to act unequally as instructed. The Trial Court would have been wrong to have ignored the contingency

at the beginning of each Section VI, VII, and X and found an intent to create a life estate from contingency provisions.

(6) The Georgia case. Tucker vs. Black 315 S.E. 2d 910 (Georgia, 1984) involved the testator's provision devising land to his wife and son for life and then "it shall go to the children of my said son." Yet testator in another section devised property to his wife and son "without limitation." The trial court held a life estate was created and the entire will needed to be constructed to reconcile this. The appeals court agreed.

Respondent agrees that the whole Will needs to be considered, and for the reasons expressed in this Brief this would mean Ruth gets a fee interest.

II. The Findings of Fact and Conclusions of Law were not objected to by the Appellants.

On November 22, 1989, Respondent's attorney sent Appellants' attorney the copy of the proposed Findings of Fact and Conclusions of Law. On December 1, 1989, Judge Raymond Uno signed the Findings of Fact and Order. On December 27, 1989, Appellants filed their Notice of Appeal.

Utah Rules of Civil Procedure (Rule 52 (6)) provide that within ten days from entry of judgment, the Findings of Fact may be entered. Appellants did not seek redress of deficiencies in the Findings or Conclusions of Law. Having not contested them earlier, they stand correct. They may be of little weight, but they are not irrelevant. Further, if Appellants wanted certain findings included in the order, the appropriate means to so would have been

by request to the trial court for inclusion of facts or for objection to the facts proposed. Appellants did neither.

III. Legal construction of Will grants a fee simple interest.

A. Most logical construction is of a fee interest:

The grant of a fee interest in the first sentence of Section V is clear. The second sentence may have several interpretations.

(1) First, it may be surplusage. The Utah Supreme Court has indicated that subsequent testamentary expressions limiting a clearly granted estate must be equally clear. In re. Campbell's Estate, [27 UT 361, (1904) (quoted R114)], stated

"Where the intention of the Testator in respect to the particular matter is clearly expressed by the terms of the will any subsequent expression of intent or by the Testator must, in order to limit the prior expression of intention, be equally clear and intelligible, and indicate an intention to that effect with reasonable certainty."

Respondent knows of no case holding the words "full enjoyment" or "desire" as words of limitation. Perhaps the words "or shall live" could be words of limitation. The text and context of those words needs to be reviewed.

In the context of the sentence or section, they appear predicated and not required words of limitation. In the sentence, they form the disjunctive with "desires" modifying "full enjoyment." This could be expressive, as Carolyn Driscoll claimed, of the intent not to create a life estate (R136, page 7, lines 12-15 and lines 2-5). Similarly, the section could have been read to restate the obvious truth that Ruth, having gotten a fee interest from the first sentence, now fully enjoys it for as long as she desires or for as long as she lives.

What happens when Ruth dies? Mr. Ashton doesn't tell us in Section V. Appellants claim Sections VI and VII tell us what happens. Respondent believes these sections do not operate if Ruth is alive at Ken's death, and they certainly could not pass Ruth's property at her death. Her will would do that.

(2) Second, these words "or shall live" do not delimit a traditional life estate. Even if Appellants are right that the language means Ruth enjoys the property for life, she fully enjoys the property. Full enjoyment is more than "use" (as is explained supra). Ruth has everything (i.e. "all") by the first sentence and "full enjoyment" by the second. If "or shall live" are words of limitation, does this mean Ruth can fully enjoy not just income but capital gains? Can she fully enjoy the homes for life and commit waste? Can she fully enjoy the property and make imprudent investments? Can she remarry and fully use the property to support herself and others?

Respondent thinks so. Decedent left no explicit instructions to the contrary and, in fact, repeatedly indicated he wanted his wife well cared for by non-probate transfers. (Consider that, aside from this Will and the first sentence of Section V, the bulk of the assets passed outside of probate directly to his wife through insurance and employment benefits) (R138, Exhibit 4, R89) (R135, page 38, line 24ff).

(3) Third, Appellants' cases cited in their Brief (and discussed by Respondent, *infra*, page 5ff) describe far different life estates than Ken's. The Alabama case involved a clear, unambiguous expression of a life interest (i.e. "during a

lifetime") which had been inserted in the husband's will at the request of his wife. The California case involved an irrevocable joint and mutual will specifying a life estate followed by an irrevocable remainder interest. There the wife actually claimed a life estate in her husband's estate. The New York case defined "use" as a word of art creating a life estate whenever it was employed. The Georgia case gave a life estate and remainder in one section and a fee in another section.

(4) If Ruth gets a life estate, who gets the remainder? According to Section VI, those surviving children of Ken get 93 percent (which percentage is periodically adjusted downward by "Addendum Number 1") and those surviving children of Ruth get 7 percent (upward adjusted). Based on Decedent's formula (R138, page 25, line 13ff, exhibits 2 and 3), Ruth's testimony was that these computations by Ken were based on optimistic and conservative estimates to create family harmony (R138, page 30, lines 2-20).

Appellants claimed Ken's "taking care of his children was a major concern" (Brief, page 8, lines 9 and 10) to him, and this implied Ruth was to get a life estate. However, even under Appellants' view, Ken's Will does not take care of all his children--only those children who survive Ruth.

The remainder (if it is a remainder) is not an absolutely vested remainder. The Will makes the remainder contingent, because the remaindermen do not enjoy their interest whenever and however the prior estate terminates. Rather, they would take (if they survive Ruth and Ken) whatever percentage interest existed at the

moment of their father's death. But suppose at Ken's death Ruth gets only a life estate followed by a remainder to the children. The remainder is still not vested. In other words, the children's interest (if it is a remainder) is not determined until after Ken's and Ruth's deaths when both the percentages of the children's participation (see Amendment No. 1) and the survival (of which children) is determined. If all children died before Ruth, then an intestacy has occurred, because there are no surviving heirs of Ken. If all Ken's children or Ruth's children die, then there is an intestacy of that class.

In construing the language of a will, an interpretation which will prevent a partial intestacy is desirable. For that reason, cases cited in a North Carolina Law Review Article (12 North Carolina Law Review 324) (R110-111), resulted in a finding of a fee interest even though the language indicates a life estate. For example, the language, "to her heirs and assigns for her lifetime," "to be used by her so long as she lives and enjoys the same," "to be in fee simple for life," "to be for her lifetime, to manage and dispose of as she may see cause," all created fee interests.

B. A fee simple absolute interest is the most favored legal construction for this kind of "full enjoyment" life estate (if a life estate is found to have been intended by Ken).

(1) A life estate: Ken granted a fee in one sentence and, under Appellants' view, in the second sentence restricted it to Ruth's full enjoyment during her desires and her lifetime. If this is a life estate, Ruth has the "full enjoyment" of the estate. In Simes on Future Interest, Section 893 (R117),

Simes discusses this situation by giving three possible constructions to the language (e.g., "fully enjoy"):

(a) Find a fee simple was intended if the will does not specify the estate granted and gives an unrestricted, express power to dispose of the fee.

(b) Find a life estate was meant if the will stated only a life estate being given and treat the "fee" language as mere surplusage.

(c) Find a fee simple interest (even if life estate language exists) because the additional language gave the power to dispose of the fee and this is what the testator wanted.

Simes prefers the last construction of life estates to give effect to all the language. In our case, if Appellants' view is correct and the "full enjoyment" granted by the second sentence and the full fee grant of the first are mere surplusage and add nothing to the gift of the life estate, then "it's difficult to see why it was inserted." Therefore, a construction to the effect that the power involves an interest more extensive than the life estate should be presumed," (i.e., a fee simple absolute).

Especially in our case, finding a fee construction invests Ruth with immediate control, prevents intestacy, and gives effect to 99 percent of the words in Section V of the Will, making the contingent sections consistent on the alternative disposition if Ruth had died before Ken.

(2) An Executory Interest. This estate may be granting a fee in Ruth with an executory interest over to the

children which springs into use when the elapsed time has occurred and whenever and however the prior estate terminates.

Appellants make this argument (Brief, pages 9-10) inferentially by claiming that Ruth has a life estate and then, on her death, (depending when it is) those children who survive her will take certain percentages (depending on which year they inherit). Before her death, Ruth could have the power to "fully enjoy" (i.e. consume), but she doesn't have the power to will the property away.

Under this interpretation, how could the children's interests be evaluated with certainty? Disregarding the issue of whether Ruth has the power to change her will (which is the subject of another lawsuit, Ashton vs. Ashton, Civil No. 89090456, Third District Court, Judge Rigtrup, and which may come before this Court at a subsequent time), the executory interest in certain children may be so remote that the trial court was justified in finding a fee in Ruth. Certainly, if all of the children were dead, one Court has found that this ripened the life estate of the wife into a fee [Chambers vs. Shaw, 12 NW 223, 225 (Michigan, 1985)] where testator granted to the wife for her life and then to "heirs of my body" and the testator's only son died without issue.

(3) Similar constructions could have been made of this estate:

(a) A life estate in Ruth and contingent remainder to those children surviving Ruth in varying percentages (depending on when Ruth died) with alternative remainder to heirs of Ken or Ruth if the children did not survive. (This is the children's position.)

(b) A life estate in Ruth with power in her to consume the entire estate and then contingent remainder to the children as in (a).

(c) A determinable fee in Ruth subject to divestment upon her death (if she left property from Ken's estate).

(d) An absolute fee in Ruth with contingent alternative fee dispositions (if Ruth had not survived Ken) to the children (Respondent's position.)

Ken could have helped with finding any of the foregoing. His failure to expressly limit Ruth's estate by remainders over causes confusion. The trial court was within the ambit of its authority to recognize this and find a fee in Ruth. For the Supreme Court to re-write Ken's Will would be very improper.

C. Utah law favors reading a will as unambiguous.

Under the Will, Ruth was granted certain unrestricted enjoyment in Section V. No one else is granted that immediate enjoyment. Others must first survive for a certain number of years and also survive Ruth and each other to enjoy their portion of the contingent share. There is not ambiguity, as the trial court found, if the Will views the grant to the children as contingent and the grant to Ruth as absolute.

As quoted infra, In re. Campbell's Estate requires that, if a clearly expressed intention is found in one place, then this can only be limited by a clearly expressed limitation elsewhere. Ken's Will does not state a limitation of a clearly vested remainder.


CONCLUSION

Appellants claim the Will on its face is clear in granting Ruth only a life estate (Brief, page 12, line 1) or, if the factual situation is looked at, a life estate determination is necessary to have the Testator's concern "more clearly met."

Appellants have lost their mother and father and view the Will as an expression of their father's love for them. But the Will is also an expression of Ken's love for Ruth. Under Appellants' view, Ruth at least receives the full enjoyment of the property, while Ken's and Ruth's children are only contingently provided for in subsequent sections of the Will. Just a legal interpretation of the language of the Will would give Ruth a fee simple absolute. But such an interpretation is consistent with the testimony and background. Clearly Ruth is to be favored by the Will and in all inheritance. Only after her death are percentages to be adjusted between Ken's children and Ruth's children. These "remainders" could be thought of as the trial court might have, as divesting or limiting Ruth, but only as settling Ruth's and Ken's family disputes if both were to die together or close together.

This Court should sustain the trial court's Findings of Fact and Conclusions of Law when no error of finding is alleged and there exists valid rationale for having made a decision within the ambit of authority.

The foregoing Respondent's Brief is FILED and DATED this 13th
day of April, 1990.



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CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies
of the foregoing Respondent's Brief to Appellant by first class
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DATED this 16th day of April, 1990.

