

1982

Lois Jean Osborn et al v. Carol Smith et al : Respondent Osborn's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of :
GRACE M. ANDERSON, : Case No. 18159
Deceased. :
CAROL SMITH and ELLA A. JOHNSON, :
Appellants. :
LOIS JEAN OSBORN and NINA O. :
SCALLEY, :
Respondents. :

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STATEMENT OF THE CASE

This appeal is from two cases that were consolidated on appeal, one a guardianship proceeding and the other a probate proceeding, for trial of issues determinative of the validity of a will executed November 28, 1977 by Grace M. Anderson, deceased.

DISPOSITION IN LOWER COURT

After trial on the merits to the court, the court, Honorable J. Duffy Palmer, entered its Findings of Fact and Conclusions of Law and Order, Judgment, and Decree declaring the validity of the will of November 28, 1977, of Grace M. Anderson and admitting said will to probate.

RELIEF SOUGHT ON APPEAL

Affirmance of the decision below.

STATEMENT OF FACTS

Inasmuch as the sole issue raised on appeal is whether the trial court erred in not holding itself bound by the prior order of Judge Swan (G., pp. 98-101), the pertinent facts are as follows:

1. Two cases were consolidated for trial in the court below. (R., p. 228) One was a Guardianship proceeding, Probate No. 1-3347, and the other a Probate proceeding, Probate No. 2827.

(The record in the Guardianship proceeding is denoted by the letter "G" and a page number; in the Probate proceeding by the letter "R" and a page number.)

2. Grace M. Anderson executed a will on November 28, 1977. That will was declared valid and admitted to probate by the trial court. (R., p. 251-52, Findings of Fact No. I)

3. On or about the 17th day of May, 1977, Lois Jean Osborn petitioned the court in the Guardianship proceeding for the removal of Kenneth O. Smith as guardian for Grace M. Anderson, an aged person, and for the substitution of herself. (G., p. 30, R., p. 252)

4. Kenneth O. Smith and Lois Jean Osborn agreed that that issue would be resolved by the wishes of Grace M. Anderson. (R., p. 252)

5. Grace M. Anderson chose Lois Jean Osborn to be guardian.

6. Gerald Hess, Smith's attorney, prepared a stipulation to the change of guardian, which was executed by Kenneth O. Smith and Lois Jean Osborn on or about July 30, 1977. (G., p. 50; R., p. 252)

7. On or about August 11, 1977, the Court issued an order incorporating the terms of the stipulation. (G., p. 54; R., p. 252)

8. On or about August 11, 1977, Lois Jean Osborn was appointed conservator for Grace M. Anderson, an aged person. (G., p. 62; R., p. 252)

9. The actual purpose of the stipulation and Court Order referred to above was to satisfy Kenneth O. Smith's desire to receive notice of any subsequent wills or deeds of Grace M. Anderson rather than to raise any question regarding the competency of Grace M. Anderson to execute such documents. (R., p. 252)

10. On or about February 14, 1978, Kenneth O. Smith petitioned the court in the Guardianship proceeding to set aside the will of November 28, 1977, and two deeds that had also been executed by Grace M. Anderson on that date, because there had been no prior court approval. (G., p. 63; R., p. 253)

11. David B. Boyce, attorney for the proponent, Lois Jean Osborn, had intended to present the deeds and will of November 28, 1977, to the court for approval but such had not been done prior to February 14, 1978. (G., p. 63; R., p. 253)

12. Because there had not been prior court approval and with the understanding that a hearing would eventually be held to determine the competency of Grace M. Anderson to execute the deeds and will of November 28, 1977, or any other such documents, counsel for the proponent, Lois Jean Osborn, entered into a

Stipulation that resulted in the Court Order that they were void.
(G., pp. 73, 98; R., p. 253)

13. On April 27, 1978, Lois Jean Osborn filed a petition with the court to have the court determine the competency of Grace M. Anderson to have executed the deeds and will of November 28, 1977, or any other such documents, praying that "an order be entered approving testamentary [sic] devises executed by Grace M. Anderson and giving her the right to execute trusts, testamentary [sic] devices, deeds or similar instruments in the future without further Court approval." (G., pp. 81-82, R., p. 253).

14. A demand for jury trial was made by Petitioner Osborn on September 27, 1978. (G., p. 87)

15. On October 12, 1978, Judge Swan ordered the issues raised by the Petition to be assigned to the trial calendar.
(G., p. 94)

16. On October 18, 1978, Judge Swan entered his written order voiding the 1977 will (G., pp. 98-101), and in that same order included a provision ordering Objectors to answer the Petition and ordering the case to be set for pretrial (§ 4, G., p. 99).

17. Judge Swan's order voiding the Grace M. Anderson will of November 28, 1977, was issued summarily, upon stipulation,

and in the absence of any prior hearing as to the competency of Grace M. Anderson. (G., pp. 73, 100 ; R., p. 253)

18. Appellants herein, who were Objectors in the Guardianship proceedings, answered the Petition (G. pp. 102-06), alleging the evil designs of Mrs. Osborn and the incompetency of Grace, and praying for a hearing on the matters raised in the Petition (G. p. 105).

19. The case was set for trial on April 11, 1979 (G., p. 138) ; Grace died without trial having be held. (R., p. 253)

20. Trial was had on the Petition on September 28 and 29, 1981. (R., p. 251)

ARGUMENT

Appellants' arguments, boiled down, are that Judge Swan's order of October 18, 1978 (G., pp. 98-101), voiding the Grace Anderson will of November 28, 1977, was a final determination which as a matter of law prevents that will from being admitted to probate. The appeal must fail for several reasons.

I. THE APPEAL MUST FAIL BECAUSE IT RESTS UPON THE
ASSERTED INVALIDITY OF CERTAIN FINDINGS OF FACT,
WHICH ARE UNASSAILABLE ON APPEAL.

Appellants' Points I and II argue the inaccuracy of the trial court's Findings of Facts Nos. II(j) and II(n), in which the court found that Judge Swan's order was based upon

stipulation, which was entered into with the understanding that a hearing would eventually be held on Grace Anderson's competency (R., p. 253). Appellants also argue in Point II of their Brief that Finding II(g) is contrary to the evidence.

Appellants cannot attack these Findings of Fact, or any other for that matter, because this Court does not have before it the transcript of the evidence offered from which these Findings are drawn. McDonald v. Shaw, 581 P.2d 1016, 1018 (Utah 1978) ("The findings of fact are unassailable where there is no transcript for us to consider."). The transcript of the pre-trial motion hearing does not suffice; evidence was offered at trial by competent witnesses as to the circumstances giving rise to Judge Swan's order, and the underlying stipulation, and without the transcript of that testimony before it, this Court cannot review those findings.

II. THE APPEAL MUST FAIL BECAUSE JUDGE SWAN'S ORDER WAS AN INTERIM ORDER SUBJECT TO FURTHER REVIEW AT A TRIAL ON THE COMPETENCY OF GRACE M. ANDERSON.

The Guardianship proceedings concerning Grace M. Anderson, Probate No. 1-3347, were headed for a trial on the merits when Grace died. On February 14, 1978, the parties appeared before Judge Swan and stipulated to an order voiding Grace Anderson's will of November 28, 1977 (G., p. 73). Two months later, on April 28, 1978, Lois Jean Osborn filed a Petition

praying that "an order be entered approving testamentary [sic] devises executed by Grace M. Anderson and giving her the right to execute trusts, testamentary [sic] devices, deeds or similar instruments in the future without further Court approval." (G., pp. 81-82). A demand for jury trial was made by Petitioner Osborn (G., p. 87) on September 27, 1978. On October 18, 1978, Judge Swan entered his written order voiding the 1977 will (G., pp. 98-101), and in that same order included a provision ordering Objectors to answer the Petition and ordering the case to be set for pretrial (§ 4, G., p. 99). Thus Judge Swan contemplated a trial on the issue of the validity of Grace's 1977 will as set forth in the Petition at the very time he entered his order voiding the will. Indeed, Judge Swan just six days prior to entry of his written order voiding the will, had ordered the issues raised by the Petition to be assigned to the trial calendar (G., p. 94). Appellants herein, who were Objectors in the Guardianship proceedings, answered the Petition (G. pp. 102-06), alleging the evil designs of Mrs. Osborn and the incompetency of Grace, and praying for a hearing on the matters raised in the Petition (G. p. 105). The case was set for trial on April 11, 1977 (G., p. 138); Grace died before trial could be held.

What would have been determined at the trial in Probate No. 1-3347 if it had gone to trial: Whether Grace M. Anderson lacked capacity to make her will of November 28, 1977, and whether

she was unduly influenced by Lois Jean Osborn. And if the answer to those issues was no, then the court would have entered an order approving Grace's will of November 28, 1977. Otherwise, the Petition and Answer, the court's setting the case for trial, and the holding of a trial would all have been nonsense.

Actually, a trial was held in Probate No. 1-3347. The case was consolidated for trial (R., p. 228) with Probate No. 2827, in which Grace's will of November 28, 1977, was sought to be admitted to probate, and tried to the court on September 28 and 29, 1981, Judge Palmer presiding (Judge Swan having retired). At the trial, the very issues raised by the Petition of Mrs. Osborn and ordered to be tried in Probate No. 1-3347 were tried and resolved, and an order entered approving Grace's will of November 28, 1977. (R., pp. 256-58)

Thus Appellant's appeal is groundless in the face of the undisputed scenario of these cases. The order of Judge Swan was an interim order, the subject matter of which had already been set for trial on the merits. It was entered upon stipulation, summarily, without any hearing or the taking of any evidence. It was vacated in the same case in which it was entered, after a trial on the merits, by a Judge who replaced the previous Judge upon the latter's retirement. Thus Judge Swan's interim order was in no way dispositive of the validity of Grace's will of November 28, 1977, and Objectors' motion to dismiss the probate petition was properly denied.

III. THE APPEAL MUST FAIL BECAUSE JUDGE SWAN'S ORDER DID NOT BAR THE LITIGATION OF THE ISSUE OF THE VALIDITY OF GRACE M. ANDERSON'S WILL OF NOVEMBER 28, 1977 BY RES JUDICATA OR COLLATERAL ESTOPPEL.

The doctrines of res judicata and collateral estoppel are wholly inapplicable to the case for a few fundamental reasons. First, there is lacking a final judgment in one case disposing of a matter sought to be litigated in a subsequent case. See, e.g., Re West Jordan, Inc., 7 Utah 2d 391, 326 P.2d 105 (1958). Judge Swan's order was not and did not become a final judgment, and preliminary or interim rulings do not rise to the dignity of res judicata. Richardson v. Grand Central Corporation, 572 P.2d 395, 397 (Utah 1977).

Second, there was no litigation of an issue in one case later sought to be relitigated in another case. See, e.g., Re West Jordan, Inc., supra; Matthews v. Matthews, 102 Utah 428, 132 P.2d 111 (1942); 46 Am. Jur. 2d, Judgments § 395. Certainly Judge Swan's order did not come about as a result of a hearing or trial in which issues were litigated. His order was based upon stipulation, which was entered into with the understanding that a hearing would later be held; it was a summary order and was entered without benefit of a hearing. (Findings of Fact II(j) and (n), R., p. 253) As noted by this Court in Re West Jordan, Inc., supra, the doctrine of collateral estoppel

only applies where a question of fact essential to and determinative of the judgment is actually litigated and determined by a valid or final judgment

7 Utah 2d at 394.

Third, Judge Swan's order was not reviewed in a subsequent or different action. It was subjected to trial on the merits in the same case in which it was issued, Probate No. 1-3347. Thus there can be no question of the effect of Judge Swan's order upon the issues in Probate No. 2827, because Probate No. 1-3347 was consolidated with it for trial, and Judge Swan's order was thus superseded by a decision on the merits in the very case in which it was originally entered.

As a result, Appellants' arguments regarding collateral estoppel and res judicata are inapposite and should be wholly disregarded by the Court.

IV. THE APPEAL MUST FAIL BECAUSE JUDGE PALMER ACTED
WITHIN HIS AUTHORITY IN VACATING JUDGE SWAN'S
INTERIM ORDER AFTER TRIAL ON THE MERITS.

Appellants cite the general rule that a judge of one division of the same court cannot act as an appellate court and overrule orders, judgments, or decrees of another judge. (Appellants' Brief, p. 14) The Appellants' argument is misdirected for a number of reasons. First, the rule is not applicable in this instance because Judge Palmer did not review

Judge Swan's order as an appellate court and overrule it. He sat as a trial judge on the merits of a controversy as to which Judge Swan made an interim ruling that contemplated a trial on the merits of the case, the foreseeable result of which might be the vacating of the interim order. In that sense, the interim order of Judge Swan was like a preliminary injunction, an order that is not binding on the trial court (nor are the findings and conclusions supporting it) when the case in which it is entered comes to trial on the merits. E.g., Berrigan v. Sigler, 499 F.2d 514 (D.C. Cir. 1974). If Judge Swan's order had been the ultimate determination of the issue of the validity of Grace's 1977 will, then Appellants would have objected to a trial in Probate No. 1-3347 or Judge Swan would not have set the matter for trial. Neither occurred, of course, and trial was had in that case and the issues hearing upon the validity of that will were finally litigated.

Second, Judge Palmer did not overrule another judge's order, in practical effect. If Judge Swan had not retired, he would have tried the issues and would have made his rulings as to the validity of the will, thus either upholding, modifying, or vacating his interim order. Since he retired, another judge stepped into his shoes and heard the case.

Third, the placement of the case on the trial calendar for trial of the issues bearing upon the validity of Grace's 1977

will gave the trial court jurisdiction to determine those issues and make appropriate rulings to carry them out. See In re Estate of Mecham, 537 P.2d 312 (Utah 1975), wherein this Court upheld the authority of the law and motion judge to vacate the order of another judge who had said that the matter should be referred to the law and motion division. In so doing, this Court held:

While in normal procedure and protocol this motion would have come up before Judge Jeppson, when he directed that it be placed on the general law and motion calendar, any judge of the court had jurisdiction to act in the matter.

Id. at 314. Similarly, in the case at bar, Judge Palmer, sitting as the trial judge at the trial directed to be held by Judge Swan, had authority to act in the matter.

Fourth, the general rule cited by Appellants is not categorical. In In re Estate of Mecham, supra, this Court stated the rule as follows and then commented:

We have no doubt about the rule, applicable under proper circumstances, that a judge of one division of the same court cannot act as an appellate court and overrule another such judge
. . . .

[W]e note that though this is usually stated to be the general rule, it should also be appreciated that it may depend upon the circumstances and the justice of the case, see Annotation, 20 A.L.R. Fed. 13, at p. 17, which states that the rule is sometimes considered to be absolute, but ". . . the modern trend appears to regard the rule as one of restraint on the exercise of judicial discretion, . . ."

537 P.2d 314 & n. 2. Given the circumstances of Judge Swan's order based upon stipulation of the parties, with a further hearing contemplated, summarily entered without benefit of evidence or hearing, and the case being previously set by Judge Swan for trial on the very issues dealt with in the order, without objection of the Appellants -- Judge Palmer appropriately exercised his discretion to resolve the issues on the merits.

Fifth, the general rule does not apply where the second judge considers the same question of law previously ruled upon, i.e., the legal validity of Grace's 1977 will, in connection with a subsequent motion in which the question of law is properly involved and the subsequent motion presents the case in a different light. Richardson v. Grand Central Corporation, 572 P.2d 395 (Utah 1977). Although the rule is stated as to motions, it applies with even more force to a trial of the merits of the case. Following the entry of Judge Swan's order, and the setting of the case for trial, the parties conducted discovery, arranged for Grace's examination by psychiatrists, and prepared for trial upon the merits of the issues that would determine the validity of Grace's 1977 will -- her capacity to make a will and the question of undue influence. When the issues were presented to Judge Palmer, all such evidence was available and was presented to him in orderly fashion, along with evidence of the circumstances surrounding the issuance of Judge Swan's orders, and in light of

the new evidence and the full development of the case, he was entitled to review Judge Swan's order and rule upon the issues ordered to trial by Judge.

Sixth, the general rule is not applicable where the prior judge is unavailable to review his original order. See Annotation, 20 A.L.R. Fed 13, § 6 and cases cited therein. Since Judge Swan was not available to hear the case and determine the effect of the evidence at trial upon his earlier order, the general rule does not apply.

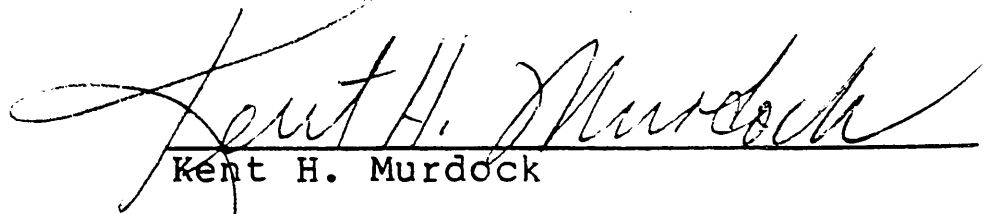
For all of these reasons, Judge Palmer acted properly in entering his Findings and Conclusions and Order as he did.

CONCLUSION

Respondent respectfully requests the Court to affirm the decision of the court below.

DATED this 2nd day of March, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 1982,
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