

1982

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

Utah Supreme Court

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David E. Bean; Attorney for Appellants;

H. Ralph Klemm; Kent H. Murdock; Sumner J. Hatch; David B. Boyce; Richard Ruckenbroad;
Attorneys for Respondents;

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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.

RESPONDENT SCALLEY'S BRIEF

SUMNER J. HATCH
Attorney for Respondent,
Nina O. Scalley
72 East 400 South, #330
Salt Lake City, Utah 84111

DAVID E. BEAN
Attorney for Appellants,
Carol Smith and Ella Johnson
190 South Fort Lane, Suite 2
Layton, Utah 84041

H. RALPH KLEMM
Attorney for First Security
Bank, Conservator
175 South West Temple, #500
Salt Lake City, Utah 84101

KENT H. MURDOCK
Attorney for Respondent,
Lois Jean Osborn
400 Deseret Building
Salt Lake City, Utah 84111

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190 South Fort Lane, Suite 2
Layton, Utah 84041

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Attorney for First Security
Bank, Conservator
175 South West Temple, #500
Salt Lake City, Utah 84101

KENT H. MURDOCK
Attorney for Respondent,
Lois Jean Osborn
400 Deseret Building
Salt Lake City, Utah 84111

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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, by Grace M. Anderson and admitting said will to probate.

RELIEF SOUGHT ON APPEAL

Affirmance of the decision below.

FACTS

Appellants' Statement of Facts is inconsistent with the record as follows:

1. K. O. Smith was not the nephew of Charles H. Anderson. He was not even a blood relative of Grace M. Anderson. He only claimed to be a long-time friend of hers. (G-5)

2. The Stipulation in open court at the hearing on June 28, 1977, had no terms and conditions, at that time, regarding further testamentary dispositions or deeds nor any requirement of

court approval. (G-49) Subsequently on July 30, 1977, a stipulation with certain terms and conditions was executed by the parties, (G-50), which were an afterthought on the part of the appellants for which there was no consideration. (Finding of Fact II, R., pp. 252-53)

In other regards the Appellants' Statement of Facts is incomplete, as shown by Finding of Fact II, R., pp. 252-53, as follows:

(a) That on or about the 17th day of May, 1977, Lois Jean Osborn petitioned the court for the removal of Kenneth O. Smith as guardian for Grace M. Anderson, an aged person, and for the substitution of herself. (G-30)

(b) That the parties agreed that that issue would be resolved by the wishes of Grace M. Anderson.

(c) That Grace M. Anderson chose Lois Jean Osborn.

(d) That Gerald Hess 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-50).

(e) That on or about August 11, 1977, the Court issued an order incorporating the terms of the Stipulation. (G-54)

(f) That on or about August 11, 1977, Lois Jean Osborn was appointed conservator for Grace M. Anderson, an aged person. (G-62)

(g) That the actual purpose of the stipulation and Court Order referred to in paragraphs (d) and (e) 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.

(h) That on or about February 14, 1978, Kenneth O. Smith petitioned the court 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-63)

(i) That 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-63)

(j) That 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-73, 98)

(k) That 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. (G-81)

(l) That trial was scheduled on said petition for April 11, 1979, before Judge Swan, but Grace M. Anderson died on March 7, 1979. (G-138)

(m) That the appointments of various guardians and conservators were because Grace M. Anderson was an aged person and not because she was incompetent and there never was, during the lifetime of Grace M. Anderson, any evidentiary hearing of any kind to determine her competency. (G-1, 3-4, 13, 21-22, 30, 50, 54, 62, 98, 109-110)

(n) That Judge Swan's order voiding the deeds and 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-73, 100)

No transcript of the testimony was designated by the appellants as part of the record on appeal. Therefore, the Findings of Fact of the trial court are conclusively presumed to be supported by the testimony given at the trial and such Findings of Fact are unassailable. McDonald v. Shaw, 581 P.2d 1017 (Utah 1978).

The only objection to the Findings of Fact by the appellants was to Finding of Fact II(g). (E-248)

ARGUMENT

POINT I

THE ORDER VOIDING THE WILL AND THE DEEDS IS INVALID

The right or privilege of disposing of property by will is accorded by statute in all American jurisdictions, and although it is recognized that the right is a creature of statute, and subject to legislative control, the right is a valuable one and will be sustained wherever possible. 79 AM JUR.2d § 54, Wills. It has even been held that the right to make a will is a sacred and constitutional right. State v. Horan, 123 N.W.2d 488 (Wis. 1963). The privilege has been characterized as a sacred, untrammelled, valuable, and absolute right, and as a privilege guaranteed by law, although not with intent to place the privilege beyond control of the legislature. 79 AM JUR.2d § 5, Wills.

In Utah the only statutory restrictions on the making of a will are contained in § 75-2-501, Utah Code Annotated 1953 as amended, as follows: "Any person 18 or more years of age who is of sound mind may make a will." Grace M. Anderson was more than 18 years of age when she executed the will under date of November 28, 1977, and it has been determined by the trial court that she was of sound mind when she executed it. In the case of Anderson v. Anderson, 134 P. 533 (Utah 1913), the Supreme Court of Utah

said that the right to make a will cannot be invaded or abrogated by the courts; only the legislature could do that.

In the case at bar, the appellants are contending that the valuable right of Grace M. Anderson to execute a will should be abrogated by an interim order of the trial court even though the trial court subsequently determined, in the only evidentiary hearing, that she was competent when the will was executed. Her competency is not being contested in this appeal.

The facts surrounding the order voiding the will are essential to understand why the interim order should in no way be used to abrogate the valuable right of the decedent to make her own determination of the disposition of her property. On May 17, 1977, Lois Jean Osborn executed a petition for the removal of K. O. Smith as guardian and the appointment of herself as guardian for Grace M. Anderson, an aged person. (G-30; Finding of Fact II(a), R. p. 252) K. O. Smith and Lois Jean Osborn agreed that that issue would be resolved by the wishes of Grace M. Anderson. (Finding of Fact II(b), id.) Grace M. Anderson chose Lois Jean Osborn to be guardian. (G-49; Finding of Fact II(c), id.) No other conditions were imposed at that time with regard to future wills or deeds. (G-49) Subsequently a stipulation, which required court approval of wills and deeds, was prepared to change the guardian. (G-50; Finding of Fact II(d), id.) On August 11, 1977, the court issued an order incorporating the terms of the

stipulation. (G-54; Finding of Fact II(f), id.) The trial court found the purpose of the stipulation and order was to give notice to K. O. Smith of any subsequent deeds or wills of Grace M. Anderson. (Findings of Fact II(g), id.)

Grace M. Anderson executed the deeds and will of November 28, 1977, prior to giving notice to K. O. Smith and prior to petitioning the court for approval. This was so the court would be able to see what it was being requested to approve. The respondents had intended to present the deeds and will of November 28, 1977, to the court for approval but had not done so at the time that the appellants petitioned the court to set them aside. (Finding of Fact II(i), R., p. 253).

Even if K. O. Smith had been given notice of the deeds and the will of November 28, 1977, and had the court been petitioned before their execution for approval, no determination of validity would have or should have been made because it is improper to do so until after the death of the testator. This is because wills are ambulatory in nature and can be revoked until death. Therefore, a will can only be contested after death. Johnson v. Johnson, 336 P.2d 420 (Utah 1959).

In the only objection to the Findings of Fact, the appellants contend that the purpose of the stipulation that notice be given to K. O. Smith, the previous guardian, was to give him a chance to have a competency examination of Grace M. Anderson if

she executed deeds or a new will. (E. 248) Even if Smith had been given notice, that may not have given him the right to require her to submit to a mental examination. Even if Smith could require Grace M. Anderson to submit to a mental examination, that would only be so that he could attempt to preserve evidence of competency until after her death, since competency cannot be decided until then. Johnson v. Johnson, supra. In reality Smith did have the requested mental examination. Grace M. Anderson was examined by Dr. Jack Tedrow regarding her mental competency on the 12th day of June, 1978. That was not long after the will and deeds and could have been sooner if the appellants had exercised their rights under Rule 36 of the Utah Rules of Civil Procedure.

So the appellants got all they were entitled to even under their explanation for the purpose of the notice requirement in the stipulation. Even if they had not been allowed to examine Grace M. Anderson, that would not make the deeds and will void.

The valuable right of the decedent to execute the deeds and will cannot be abrogated on the facts of this case. The primary reason is that the order was not a final determination nor was it intended to be. (See Point II below.) Furthermore, the stipulation was not made by the decedent, Grace M. Anderson. Both the stipulation requiring court approval for the deeds and will and the stipulation voiding the deeds and will for lack of court approval were made by David B. Boyce. The appellants contend that

he was the attorney for Lois Jean Osborn and not Grace M. Anderson. (G-112) In Finding of Fact II(i), he is found to be the attorney for Lois Jean Osborn. On November 15, 1978, K. O. Smith, one of the appellants, filed a motion for the appointment of an attorney for Grace M. Anderson. (G-111) On November 30, 1978, the court ordered that an attorney be appointed to represent Grace M. Anderson. (G-116) That took place after the execution of the deeds and will. (G-119-120) So Grace M. Anderson was apparently unrepresented when the stipulations were executed and was not a party to the stipulations that resulted in the order voiding the will and deeds.

Not only was Grace M. Anderson not a party to the stipulations that resulted in the court orders, but Nina O. Scalley, one of the primary residuary beneficiaries under the will, will not represented and was not a party to the stipulations. (G-50) So the stipulations and resulting court orders are ineffective because they were not made by the testatrix, who was competent, or her attorney, and they were not made by one of the primary beneficiaries of the will.

The recognized methods for revocation of a will are set forth in § 75-2-507, Utah Code Annotated 1953, as amended. It states as follows:

- (1) A will or any part thereof is revoked:

- (a) By a subsequent will which revokes the prior will or part expressly or by inconsistency; or
- (b) By being burned, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

The stipulation and order voiding the will would not have been valid even if the testatrix had so stipulated because such was not a recognized method for revocation.

It should be noted that the statutory provisions for revocation all require the intent of the testatrix. There is nothing in the record in this case to show that the testatrix intended to revoke the will of November 28, 1977.

The appellants contend that under § 75-5-42 of the Uniform Probate Code, the court had jurisdiction and power to void the will and deeds. That statute is immaterial because the will and deeds were not voided because of the statute. That statute provides for the voiding of any sale or encumbrance to a conservator of any transaction which is affected by a substantial conflict of interest. There was no sale or encumbrance to the conservator and there is no evidence of any transaction affected by a substantial conflict of interest. The order voiding the will and deeds was based on the stipulation and had nothing to do with that statute.

In paragraph 1 of Point II of the appellants' brief, they state that the provisions of the stipulation which required court approval were conditions precedent to the change of guardianship. If that is the case, then the remedy the appellants should have sought when the stipulation was allegedly violated, was to seek a rescission of the stipulation. In other words, K. O. Smith was stipulating that Lois Jean Osborn could become the guardian if all future deeds and wills were presented to the court for approval. Even assuming that the stipulation was breached, the remedy for the appellants would be to rescind the stipulation approving of the change in guardian. A violation of the stipulation does not make the deeds and will invalid. This can be illustrated by referring to other provisions of the stipulation. For example, the stipulation provided that Lois Jean Osborn would post a bond, that she would render an accounting and that before Grace M. Anderson was placed in a nursing home, there would be court approval. Under the rationale of the appellant, if Lois Jean Osborn had failed to post a bond or had failed to render an account or had placed Grace M. Anderson in a nursing home without court approval, then the deeds and will would be invalid. Such logic does not follow. The court order requiring court approval for future wills and deeds did not say that any such deeds and will would be invalid without court approval. (G-54)

POINT II

THE ORDER VOIDING THE WILL AND DEEDS WAS NOT A FINAL DETERMINATION OF THEIR VALIDITY

Even assuming that the stipulations and orders were valid and that Grace M. Anderson could be required to get court approval for the deeds and will, there was a petition pending and trial date set when Grace M. Anderson died to acquire that court approval. (G-81) The fact that the testatrix died before the issues were decided does not resolve the matter; it simply postponed the decision until after her death. (Actually, that was the only proper time to have determined competency anyway. Johnson v. Johnson, supra) If she was competent and not acting under undue influence, then the will and deeds are valid. Court approval was eventually obtained at the trial of this matter wherein the court determined that Grace M. Anderson was competent to execute the deeds and will of November 18, 1977, and that she was not unduly influenced in so doing. (E-251-258)

The appellants contend that the record does not reflect the understanding that a hearing would eventually be held to determine the competency of Grace M. Anderson to execute the deeds and will. Findings of Fact II(i-1) clearly reflects that intent and understanding and those findings are unassailable due to lack of a transcript. McDonald v. Shaw, 581 P.2d 1017 (Utah 1978).

The order of the court under date of August 11, 1977,
says in part as follows:

4. That as guardian of the estate of Grace M. Anderson, Lois Jean Osborn shall not sell or otherwise transfer or dispose of any real property of Grace M. Anderson without first petitioning and obtaining approval of this Court.

. . . .

6. Lois Jean Osborn shall not sign any trusts or any testamentary devises for Grace M. Anderson, nor shall Grace M. Anderson sign any such documents for herself without first petitioning and obtaining approval of this Court (emphasis added). (G-54)

So the order itself contemplated the possibility of a hearing to determine the competency of Grace M. Anderson to execute the deeds and will. From the language of the order itself, it is apparent that even Judge Swan did not consider his order to be final. He would not have set the matter on the trial calendar if he thought the order was final.

On April 27, 1978, Lois Jean Osborn executed a petition that was filed with the court on May 1, 1978, which says in part as follows:

2. That Grace M. Anderson is under Court order not to sign any trusts or testamentary devises without first petitioning and obtaining approval of the Court and she desires to have the Court make such approval and in connection therewith, to determine that Grace M. Anderson has the capacity to execute trusts or testamentary devises and to execute deeds and similar documents. Wherefore, your petitioner

prays that . . . an order be entered approving testamentary devises executed by Grace M. Anderson and giving her the right to execte trusts, testamentary devises, deeds or similar instruments in the future without further court approval (emphasis added). (G-81-82)

At the time of the petition, the will and deeds of November 28, 1977, had already been executed. So the petition was a petition to approve of the deeds and will of November 28, 1977. The court then scheduled a hearing for October 12, 1978, on the petition to consider confirming those documents that she had executed. (G-89) At the hearing on October 12, 1978, the issues raised by the petition were assigned to the trial calendar. (G-94) On January 4, 1979, a request for trial setting was filed with the court. (G-121) Pursuant to the request for trial setting, notice of pretrial was filed January 8, 1979, setting pretrial for January 29, 1979. (G-122) Notice of trial was filed with the court February 9, 1979, wherein trial was scheduled for April 11, 1979. (G-138) Grace M. Anderson died on March 7, 1979, before the trial was held. In light of these facts, it is difficult to imagine how the appellants can contend that the record does not reflect 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.

For the reason that it was contemplated by the court and by the parties that a hearing would eventually be held to

determine the validity or invalidity of the deeds and will, there was no need for the respondents to appeal from Judge Swan's order nor was there any need for any reservation pursuant to Rule 72 of Utah Rules of Civil Procedure.

The appellants conclude Point I of their argument by asking the following question: "How do you void the deeds and will by stipulation of the parties while Grace M. Anderson is alive and then resurrect the will when she is dead?". The answer to that question is simple and in the answer is the resolution of this appeal. The answer is that the voiding of the deeds and will by stipulation (assuming the Court order is valid) was only a preliminary or interim order that may have made them void until a hearing was held. They are "resurrected" after death because the hearing was not held until after her death. After her death, at the only evidentiary hearing ever held regarding competency, it was determined that she was competent, which has not been challenged by Appellants.

POINT III

RES JUDICATA AND COLLATERAL ESTOPPEL ARE INAPPLICABLE

The appellants contend that the order voiding the will and deeds is res judicata or that the doctrine of collateral estoppel applies to prevent the trial judge from overruling that order. Those doctrines are entirely inapplicable in this case.

They have to do with the relitigation of issues in the interest of judicial economy. To relitigate something obviously requires a previous litigation. There was no previous litigation in this case. The issues were only heard once and that was at the trial. Finding of Fact II(m) is as follows:

(m) That the appointments of various guardians and conservators were because Grace M. Anderson was an aged person and not because she was incompetent and there never was, during the lifetime of Grace M. Anderson, any evidentiary hearing of any kind to determine her competency. (G-1, 3-4, 13, 21-22, 30, 50, 54, 62, 98, 109-110)

The appellants recite the four basic essentials of the doctrine of collateral estoppel on page 13 as follows:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
2. Was the final judgment on the merits?
3. Was the party against whom the plea is asserted a party in privity with the party to the prior adjudication?
4. Was the issue in the first case competently, fully, and fairly litigated?

The answers to those questions show the inapplicability of that doctrine in this case. In answer to question No. 1, the issues were not decided in connection with the order voiding the will and deeds. So it cannot be said that the issue decided in the prior adjudication is identical with the one presented in this action.

The second essential element of the doctrine is to have a final judgment on the merits. The order voiding the will and deeds was obviously not the final determination since a trial was scheduled to make that determination.

The fourth element is that the issues be competently, fully and fairly litigated in the first case. There was no first case. So the issues were not even litigated before the trial of this matter, let alone competently, fully, and fairly.

POINT IV

THE RULING OF THE TRIAL COURT IN NO WAY VIOLATES THE LAW
DESPITE THE PRIOR ORDER VOIDING THE WILL AND DEEDS

This is not a situation where the judge of one division of the same court is overruling an order of another judge. Judge Palmer, in trying the case, was simply doing what Judge Swan would have done had he still been on the bench and that was having the hearing that was always contemplated and that Judge Swan scheduled to determine the right of Grace M. Anderson to execute the will and deeds. Judge Palmer was not reviewing Judge Swan's order.

In In re Estate of Mecham, 537 P.2d 312 (Utah 1975), this Court allowed Judge Taylor to make an order changing a previous order of Judge Jeppson because Judge Taylor had jurisdiction for what he did. In the case at bar, Judge Palmer certainly had jurisdiction to have the hearing that Judge Swan authorized and

could have heard himself had he been on the bench when it came on for hearing. Once the matter was placed on the trial calendar, it was triable by any of the judges in the district. It was always contemplated that the interim order could be changed.

In Peterson v. Peterson, 530 P.2d 821 (Utah 1974), this Court said that it is not impossible under some circumstances for one district judge to vacate the orders of his colleagues. In Richardson v. Grand Central Corporation, 572 P.2d 395 (Utah 1977), the Supreme Court of Utah said that preliminary or interim rulings do not rise to the dignity of res judicata. The Court went on to say that the ruling of one judge as to the sufficiency or effect of pleadings does not prevent another division of the court from considering that same question of law if it is properly involved on a subsequent motion which presents the case in a different light, as in this case.

POINT V

PETITIONER SCALLEY IS NOT BOUND BY A COURT ORDER

IN A PROCEEDING TO WHICH SHE WAS NOT A PARTY.

Petitioner Scalley was not a party to Probate No. 1-3347 and thus cannot be bound by an order premised and founded upon a stipulation entered into by the parties to that action. That she was a residual beneficiary under the November 28, 1977, will of Grace M. Anderson does not come close to placing her in privity to

the position of Petitioner Osborn in the guardianship proceeding. Furthermore, the question of privity doesn't even arise in this case because no litigation of issues occurred until the trial of this matter. Thus the summary order of Judge Swan based upon a stipulation she did not sign cannot bind her.

CONCLUSION

The right to dispose of property by will is a valuable right to be upheld wherever possible. Only the legislature, and not the courts, can abrogate that valuable right. The legislature in Utah has given the right to everyone over the age of 18 who is of sound mind. In the only evidentiary hearing regarding the competency of Grace M. Anderson, it has been determined that she was competent on November 28, 1977, the date of the execution of the will and deeds.

The only possible reason to invade her right to make her will would be the order requiring court approval and the order voiding the deeds and will. Those orders should not invalidate the deeds and will because (1) the order voiding the deeds and will was an interim order not intended to be final; (2) competency cannot be determined until death; (3) the purpose claimed by the appellants for the requirement that notice be given to them of any subsequent deeds or will was complied with in that they were able to have a mental examination of Grace M. Anderson; (4) the

stipulations resulting in the order requiring court approval and the order voiding the deeds and will were not entered into by the testatrix or her attorney or by one of the primary beneficiaries under the will; (5) the order voiding the deeds and will is not one of the recognized statutory methods for revocation of a will; and (6) notice was simply a condition precedent and failure to give notice would only allow a rescission of the change of guardianship, but would not void the deeds and will.

Even if the order voiding the deeds and will is valid, it was only a preliminary order awaiting a final determination. There is no question from the record on appeal that a hearing to determine the validity of the will and deeds of November 28, 1977, was anticipated even after the order voiding them. At that final determination, it was concluded that Grace M. Anderson was competent and was not unduly influenced in the making of the deeds and will.

Since there is no question that Grace M. Anderson was competent and was not unduly influenced in the making of the deeds and will of November 28, 1977, there is no valid reason why the deeds and will should not be determined to be valid and the will should be admitted to probate as the Last Will and Testament of Grace M. Anderson.

DATED this _____ day of March, 1982.

Sumner J. Hatch
Attorney for Respondent
Nina O. Scalliey

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of March, 1982,
two copies of the foregoing RESPONDENT SCALLEY'S BRIEF were
mailed, first-class, postage prepaid, to each of the following:

Kent H. Murdock, Esq.
400 Deseret Building
Salt Lake City, Utah 84111

David E. Bean, Esq.
190 South Fort Lane, Suite 2
Layton, Utah 84041

H. Ralph Klemm, Esq.
175 South West Temple, #500
Salt Lake City, Utah 84101
