

1958

# Sheldon R. Brewster et al v. William Barlow et al : Reply Brief of Appellants

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

McKay, Burton, McMillan and Richards; Attorneys for Hoyt W. Brewster;

---

## Recommended Citation

Brief of Appellant, *Brewster v. Barlow*, No. 8682 (Utah Supreme Court, 1958).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2840](https://digitalcommons.law.byu.edu/uofu_sc1/2840)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

# IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the ESTATE OF  
MAUDE K. BARLOW, also known  
as MAUDE KARREN RICHARDS  
and MAUDE K. RICHARDS,  
*Deceased.* } Case No. 8682

In the Matter of the ESTATE OF  
MAUDE KARREN RICHARDS,  
*Deceased.* } Case No. 8683

SHELDON R. BREWSTER, AUDREY  
B. BELL, HOYT W. BREWSTER,  
KYLE H. BREWSTER, and LAEL  
B. GEE,  
*Plaintiffs and Respondents,* } Case No. 8825

—vs.—

WILLIAM BARLOW, et al.,  
*Defendants and Appellants.*

REPLY BRIEF OF HOYT W. BREWSTER, ET AL.,  
APPELLANTS, IN CASE NO. 8682 AND 8683 AND  
PLAINTIFFS AND RESPONDENTS IN  
CASE NO. 8825

McKAY, BURTON, McMILLAN  
AND RICHARDS

*Attorneys for*  
Hoyt W. Brewster, et al.

720 Newhouse Bldg.  
Salt Lake City, Utah

# TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS.....	1
POINTS RELIED UPON .....	2, 3
ARGUMENT .....	
I. A SUBSEQUENT MARRIAGE BETWEEN BEN S. BREWSTER AND MAUDE KARREN RICH- ARDS WOULD NOT REVOKE THE WILL OF BEN S. BREWSTER, WHERE THE LATTER HAD MADE PROVISION FOR MAUDE KAR- REN RICHARDS IN HIS WILL .....	3
II. THE STATUTE OF FRAUDS IS NO BAR TO THE CIVIL ACTION COMMENCED BY HOYT W. BREWSTER, ET AL .....	7
III. THE WILL AND AGREEMENT OF MAUDE KARREN RICHARDS DATED FEBRUARY 7, 1939, IS SUPPORTED BY ADEQUATE CON- SIDERATION .....	8
IV. THE RECIPROCAL WILL OF MAUDE KARREN RICHARDS WHICH IS DATED FEBRUARY 7, 1939, SHOULD HAVE BEEN ADMITTED TO PROBATE RATHER THAN THE LATER OLO- GRAPHIC WILL, AND LETTERS TESTAMENT- ARY SHOULD HAVE BEEN ISSUED TO HOYT W. BREWSTER .....	10
V. THE ACTION OF HOYT W. BREWSTER, ET AL., FOR SPECIFIC PERFORMANCE OF THE RECIPROCAL WILL AND CONTRACT OF FEB- RUARY 7, 1939, IS NOT PREMATURE.....	12
VI. IN POINT IV OF HIS REPLY BRIEF, BARLOW HAS MISCONSTRUED THE RECIPROCAL WILL AND AGREEMENT OF MAUDE KARREN RICHARDS DATED FEBRUARY 7, 1939, AND HAS MISCONSTRUED THE JUDGMENT EN- TERED BY THE COURT WHICH CORRECTLY GRANTS SPECIFIC PERFORMANCE OF THE SAID WILL AND AGREEMENT .....	13
SUMMARY .....	19

## CASES CITED

In re Anderson's Estate, 131 P. 975 (Ariz.).....	5
In re Edward's Estate, 120 N.E. (2d) 10 (Ill.).....	11
In re Gaffken's Will, 188 N.Y.S. 852, affirmed 135 N. E. 971 .....	5
In re Neufeld's Will, 260 N.Y.S. 302 .....	5
In re Poisl's Estate, 280 P. (2d) 789 (Cal.).....	4
In re Scolpino's Will, 248 N.Y.S. 634.....	5
Jacoby v. Jacoby, 96 N.E. (2d) 362 (Ill.).....	11
Lawrence v. Ashba, 59 N.E. (2d) 568 (Ind.).....	9
Ward v. Ward, 96 Utah 263, 85 P. (2d) 635.....	7

## AUTHORITIES CITED

169 A.L.R. 1, 55 .....	6
169 A.L.R. 1, 59 .....	12
95 C.J.S., Wills, Sec. 291 (2) .....	6
97 C.J.S., Wills, Sec. 1366 (b) .....	11
97 C.J.S., Wills, Sec. 1366 (d) .....	6
97 C.J.S., Wills, Sec. 1367 (b) .....	9

## STATUTES CITED

Book 13, Decedent Estate Law, McKinney's Consolidated Laws of New York, Ann., Art. 2, par. 35.....	6
Utah Code Annotated, 1953, Section 25-5-1 .....	7
Utah Code Annotated, 1953, Section 74-1-25.....	3
Utah Code Annotated, 1953, Section 74-4-4 .....	9

# IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the ESTATE OF  
MAUDE K. BARLOW, also known  
as MAUDE KARREN RICHARDS  
and MAUDE K. RICHARDS,  
*Deceased.* } Case No. 8682

---

In the Matter of the ESTATE OF  
MAUDE KARREN RICHARDS,  
*Deceased.* } Case No. 8683

---

SHELDON R. BREWSTER, AUDREY  
B. BELL, HOYT W. BREWSTER,  
KYLE H. BREWSTER, and LAEL  
B. GEE,  
*Plaintiffs and Respondents,* } Case No. 8825  
—vs.—  
WILLIAM BARLOW, et al.,  
*Defendants and Appellants.* }

---

REPLY BRIEF OF HOYT W. BREWSTER, ET AL.,  
APPELLANTS, IN CASE NO. 8682 AND 8683 AND  
PLAINTIFFS AND RESPONDENTS IN  
CASE NO. 8825

---

## STATEMENT OF FACTS

Counsel for Hoyt W. Brewster, et al., have made  
a statement of facts in their initial brief, therefore no

further statement as such is appropriate here. However, it should be restated that it is not determined whether Ben S. Brewster and Maude Karren Richards were married subsequent to their having executed the reciprocal wills and agreement on February 7, 1939. The pre-trial order, Case No. 8825, specifically found that there existed this issue of fact (R. 62).

Errors and unjustified inferences with respect to the facts as stated by respondent will be discussed in the argument which follows.

## POINTS RELIED UPON

### POINT I.

A SUBSEQUENT MARRIAGE BETWEEN BEN S. BREWSTER AND MAUDE KARREN RICHARDS WOULD NOT REVOKE THE WILL OF BEN S. BREWSTER, WHERE THE LATTER HAD MADE PROVISION FOR MAUDE KARREN RICHARDS IN HIS WILL.

### POINT II.

THE STATUTE OF FRAUDS IS NO BAR TO THE CIVIL ACTION COMMENCED BY HOYT W. BREWSTER, ET AL

### POINT III.

THE WILL AND AGREEMENT OF MAUDE KARREN RICHARDS DATED FEBRUARY 7, 1939, IS SUPPORTED BY ADEQUATE CONSIDERATION.

### POINT IV.

THE RECIPROCAL WILL OF MAUDE KARREN RICHARDS WHICH IS DATED FEBRUARY 7, 1939, SHOULD

HAVE BEEN ADMITTED TO PROBATE RATHER THAN THE LATER OLOGRAPHIC WILL, AND LETTERS TESTAMENTARY SHOULD HAVE ISSUED TO HOYT W. BREWSTER.

#### POINT V.

THE ACTION OF HOYT W. BREWSTER, ET AL., FOR SPECIFIC PERFORMANCE OF THE RECIPROCAL WILL AND CONTRACT OF FEBRUARY 7, 1939, IS NOT PREMATURE.

#### POINT VI.

IN POINT IV OF HIS REPLY BRIEF, BARLOW HAS MISCONSTRUED THE RECIPROCAL WILL AND AGREEMENT OF MAUDE KARREN RICHARDS DATED FEBRUARY 7, 1939, AND HAS MISCONSTRUED THE JUDGMENT ENTERED BY THE COURT WHICH CORRECTLY GRANTS SPECIFIC PERFORMANCE OF THE SAID WILL AND AGREEMENT.

### ARGUMENT

#### POINT I.

A SUBSEQUENT MARRIAGE BETWEEN BEN S. BREWSTER AND MAUDE KARREN RICHARDS WOULD NOT REVOKE THE WILL OF BEN S. BREWSTER, WHERE THE LATTER HAD MADE PROVISION FOR MAUDE KARREN RICHARDS IN HIS WILL.

Section 74-1-25 U.C.A., 1953, does not require that a bequest to a woman who later becomes the wife of a testator appear on its face to be in contemplation of marriage to prevent a revocation of a will.

This issue concerns the validity of the will of Ben S. Brewster dated February 7, 1939. William Barlow

says that Ben S. Brewster's will was revoked by a subsequent marriage of Ben S. Brewster and Maude Karren Richards (8825, R. 61) and that thereby Maude Karren Richards was free to execute another will which she in fact did. See Point II of Barlow's brief.

The question of the marriage of Ben S. Brewster and Maude Karren Richards is not resolved. Counsel for Barlow on page 13 of his brief says that the trial court by its judgment (8825, R. 89) found that such marriage existed. Such is not the case. The court was merely holding that a marriage, if it occurred, would not revoke the wills. At the pre-trial of the case the court specifically found that the question of marriage was a factual item to be determined (8825, R. 62).

Hoyt Brewster, et al., contended that even if Ben S. Brewster and Maude Karren Richards were married subsequent to the execution of the reciprocal wills, the reciprocal will of Ben S. Brewster was not revoked by virtue of said Sec. 74-1-25 U.C.A., 1953, because Maude Karren Richards was provided for therein. See Point No. 1 of the initial brief of Hoyt W. Brewster, et al.

However, should the court rule that such a marriage, if it occurred, would have revoked the will, the judgment of the trial court should still be affirmed for the reasons set forth in Points II through V of the initial brief.

The case of *In Re Poisl's Estate*, 280 P. (2d) 789, (Cal. 1955), relied upon by Barlow, has been analyzed in detail. See page 13, et seq., of the initial brief. As



pointed out, the case is not controlling here and should not be followed.

As further authority for the proposition that Ben S. Brewster's will was revoked, counsel cites *In Re Scolpino's Will*, 248 N.Y.S. 634, and *In Re Anderson's Estate*, 131 P. 975 (Ariz. 1913). See Barlow brief, p. 17.

*In Re Anderson's Estate*, supra, involved a statute similar to Section 74-1-25 U.C.A., 1953, but there the similarity ends, for the court specifically noted that the one who became the testator's wife was not "provided for in the will, nor mentioned therein." In the instant case, as pointed out above, Maude Karren Richards was provided for in the will of Ben S. Brewster (Ex. 2). The case is obviously not in point and rather than helping Barlow, infers that had Anderson's widow been "provided for in the will" it would not have been revoked.

*In Re Scolpino's Will*, supra, decided many years ago by one of the lower courts of the State of New York, is contrary to the position contended for by Hoyt W. Brewster, et al. However, the courts in New York at that time were not at all consistent. For example, see the case of *In Re Neufeld's Will*, 260 N.Y.S. 302. In that case the will was held not to be revoked even though there was no indication in the will itself that a bequest to a certain lady was in contemplation of marriage. The testator later married the woman provided for and the will was held not to be revoked. Also in the case of *In Re Gaffken's Will*, 188 N.Y.S. 852, affirmed 135 N.E. 971, the will was not revoked by the subsequent marriage, even though the will expressed no contempla-

tion of marriage between the testator and the one provided for. It is true that in these two latter cases the court considered some evidence outside of the will as suggesting that there might possibly have been a contemplation of marriage. However, because it was recognized that the status of the law in New York was so confused by the courts, the Commission in 1931 recommended an amendment to the statute. An amendment to the New York statute did result and the amended statute now reads:

“If after making any will, said testator marries, and the husband or wife survives the testator, such will shall be deemed revoked as to such survivor, unless provision shall have been made for such survivor by an anti-nuptial agreement in writing . . .” Book 13, Decedent Estate Law, McKinney’s Consolidated Laws of New York, Ann., Art. 2, par. 35.

The general statements from 97 C.J.S., Sec. 1366 (d), p. 299, and 95 C.J.S. Sec., 291 (2), p. 76, are too general and are not applicable to the instant case. As a matter of fact the latter statement cites as supporting authority the case of *In Re Anderson’s Estate*, supra, distinguished above.

Aside from the question of the effect on Ben S. Brewster’s reciprocal will of a possible subsequent marriage to Maude Karren Richards, there is no doubt that when an agreement for the execution of reciprocal wills exists the same will be enforced in a court of equity. See 169 A.L.R. 1, 55 and 97 C.J.S., Wills, Sec. 1366. This principal of law was not even made an issue

at the pre-trial (8825, R. 60-61). It is conceded to be the law by counsel for Barlow (8623, R. 21).

## POINT II.

THE STATUTE OF FRAUDS IS NO BAR TO THE CIVIL ACTION COMMENCED BY HOYT W. BREWSTER, ET AL.

In Point III of his brief, counsel for Barlow makes a unique and feeble argument regarding the applicability of the Statute of Frauds, Sec. 25-5-1, et seq., U.C.A., 1953. Some point is made of the fact that the reciprocal wills and agreement did not contain an actual statement whereby the parties agreed *not to revoke the wills*. If not expressed, it is obviously implied that the agreement and the reciprocal wills would not be revoked. This is elementary.

Such an argument is totally without merit. In paragraph VIII of Maude Karren Richards' will (Ex. 1) and in paragraph XI of Ben S. Brewster's will (Ex. 2), it is stated that the wills are made pursuant to written agreement and in accordance therewith. Each reciprocal will is stated to be in consideration for the other. The written agreement is part of Ex. 1.

While this issue was raised in Barlow's amended answer, the pre-trial order is silent about such a contention on the part of Barlow (8825, R. 60-61) and counsel's brief below never mentioned it (8825, R. 63-71). The novel argument of counsel is grasping at straws to say the least.

*Ward v. Ward*, 96 Utah 263, 85 P. (2d) 635, in no

wise resembles the instant case, nor do the other cases cited by counsel on this point. The Statute of Frauds, Sec. 25-5-1, et seq., U.C.A., 1953, has been completely satisfied.

### POINT III.

THE WILL AND AGREEMENT OF MAUDE KARREN RICHARDS DATED FEBRUARY 7, 1939, IS SUPPORTED BY ADEQUATE CONSIDERATION.

As for the consideration and equities of the case, Barlow, on pages 24-28 of his brief, has made some point of the fact that Maude Karren Richards only received one-third of the Ben S. Brewster Estate and that Hoyt W. Brewster, et al., are now seeking to obtain all of the Maude Karren Richards Estate. Such a comparison, of course, is utterly meaningless. If it is significant at all, it should be pointed out that Maude Karren Richards' distributive share under the Ben S. Brewster will amounted to some \$7,500. Such an amount appears to be somewhere near the total value of the Maude Karren Richards Estate. If this comparison is of any consequence, then there is certainly no equity favoring Barlow.

Counsel contends that Maude Karren Richards only took under the Ben S. Brewster will such part of his estate as she would have been entitled to as his widow. This argument overlooks the fact that had Maude Karren Richards been in fact the wife of Ben S. Brewster, the latter would have had no obligation aside from the obligation under the contract, to leave her one-third of his *entire* estate.

Were there no such contract, and were she insufficiently provided for, she could elect to take one-third of the real estate in lieu of her distributive share under the will. See Sec. 74-4-4 U.C.A., 1953. But the one-third of the real estate might have been much less than one-third of the entire estate which Maude Karren Richards did, in fact, receive. In addition thereto she, of course, received one-half of the executor's fee.

Suffice it to say that there existed between Maude Karren Richards and Ben S. Brewster an actual written agreement containing mutual covenants and promises between the parties, Ex. 1, and the executed wills, Exs. 1 and 2, each executed in consideration for the other. Mutual promises of the parties is sufficient consideration. *Lawrence v. Ashba*, 59 N.E. (2d) 568, (Ind. 1945), 97 C.J.S. Wills, Sec. 1367 (b) p. 302.

Maude Karren Richards received her distributive share under the will of Ben S. Brewster without raising any question as to the validity of his will. It is only equitable and in accordance with good conscience that the provisions of Maude Karren Richard's will and the agreement of February 7, 1939, now be enforced.

Even were it to be held that Ben S. Brewster's will would be revoked by a subsequent marriage to Maude Karren Richards, and even were it to be further assumed that such a marriage occurred, still it could not be successfully argued that the revocation of Ben S. Brewster's will imposed by law would affect the agreement between the parties. His will would only be revoked

as a will. The agreement would still stand. Maude Karren Richards having taken under the agreement, it cannot now be sensibly argued that there is a lack of consideration to support the enforcement of her reciprocal will.

The net effect of allowing Barlow to prevail in this case would be to allow him a windfall and permit him to enjoy the benefits of both the Ben S. Brewster Estate and Maude Karren Richards Estate to the exclusion of rightful beneficiaries.

#### POINT IV.

THE RECIPROCAL WILL OF MAUDE KARREN RICHARDS WHICH IS DATED FEBRUARY 7, 1939, SHOULD HAVE BEEN ADMITTED TO PROBATE RATHER THAN THE LATER OLOGRAPHIC WILL, AND LETTERS TESTAMENTARY SHOULD HAVE ISSUED TO HOYT W. BREWSTER.

Counsel for Barlow in Point No. 1 of his brief has cited several authorities holding that where a party, after having received benefits under a reciprocal will in his favor, violates an agreement for reciprocal wills by executing a later revoking will, the later will should be admitted to Probate while the contract between the parties should be enforced in equity. In Point VI of the initial brief of Hoyt W. Brewster, et al., we admitted that the authorities have frequently so held.

However, though some courts have so held, there is good authority for holding that the earlier reciprocal will is simply irrevocable and that a later revoking will



should be denied admission to probate. In the case of *In Re Edwards' Estate*, 120 N.E. (2d) 10 (1954), the Supreme Court of Illinois affirmed the trial court which admitted to probate an earlier joint will and denied probate of a later document purporting to be the last will and testament of the same decedent. See also *Jacoby v. Jacoby*, 96 N.E. (2d) 362 (Ill., 1950), and 97 C.J.S., Wills, Sec. 1366 (b), p. 296 and cases therein cited.

We reaffirm our argument set forth in Point VI of the initial brief and particularly invite the court's attention to the exceptions to the general rule therein noted. Where the total estate is affected by the prior reciprocal will there is no substantial reason for admitting the later revoking will to Probate. All that would be probated is a "hollow shell."

There is no reason why, under such circumstances as this, it should not simply be declared, as was done in the cases cited above, that the earlier will is an irrevocable will; that the later will is invalid and admit the earlier will to probate and thereby save considerable time and expense and certainly the empty formality of probating a will under which none of the estate will pass.

We respectfully submit that notwithstanding the rule that prevails in some of the jurisdictions, this Court should seriously consider establishing the law in this State as herein contended for. Such a position is not without precedent and is certainly proper where Probate Courts such as ours, are clothed with

ample authority. See Point VI of the initial brief of Hoyt W. Brewster, et al.

## POINT V.

THE ACTION OF HOYT W. BREWSTER, ET AL., FOR SPECIFIC PERFORMANCE OF THE RECIPROCAL WILL AND CONTRACT OF FEBRUARY 7, 1939, IS NOT PREMATURE.

Counsel for William Muir Barlow makes the general statement on page 12 of his brief, under Point I, that Hoyt W. Brewster, et al., had no cause of action for specific performance of the reciprocal will until the Probate Court had denied its admission to Probate. No such contention has heretofore been made by counsel for Barlow and no specific authority is cited for the broad general statement.

Where Maude Karren Richards took her distributive share under the will of Ben S. Brewster, by the very nature of her agreement with him, a cause of action would arise in favor of the beneficiaries under the reciprocal will immediately upon her death. Even before death the rights of beneficiaries can be protected.

“There is substantial authority in support of the power of a court of equity to grant injunctive relief to restrain the surviving party of a contract to make wills with mutual and reciprocal provisions from conveying or transferring the property in violation of the contract, upon demand for such relief by one who would be prejudiced by a breach of a contract.” 169 A.L.R. 1, 59.



In anticipation of this very argument, however, Hoyt W. Brewster, et al., as soon as William Barlow had been named executor of the later olographic will of Maude Karren Richards, filed an amended complaint in Case No. 8825 (Civil action No. 107,499 below), naming as defendants, among others, William Barlow, personally, and William Barlow, Executor of the Last Will and Testament of Maude Karren Barlow, etc. (8825, R. 38-41) The argument of counsel for William Barlow that the Civil Action is premature, completely overlooked this fact. All interested parties were before the Court in the civil matter. The Court having jurisdiction of the property was in a position to specifically enforce the reciprocal will and agreement of Maude Karren Richards, dated February 7, 1939.

#### POINT VI.

IN POINT IV OF HIS REPLY BRIEF, BARLOW HAS MISCONSTRUED THE RECIPROCAL WILL AND AGREEMENT OF MAUDE KARREN RICHARDS DATED FEBRUARY 7, 1939, AND HAS MISCONSTRUED THE JUDGMENT ENTERED BY THE COURT WHICH CORRECTLY GRANTS SPECIFIC PERFORMANCE OF THE SAID WILL AND AGREEMENT.

In Point IV of his reply brief, Barlow has challenged the propriety of the judgment entered by the Court in the Civil Action, Case No. 8825.

So that there can be no misunderstanding as to the applicable provisions of the reciprocal will of Maude Karren Richards and the judgment entered by the Court,

the pertinent portions thereof are set forth below for the convenience of the Court.

In paragraph II of her reciprocal will (Ex. 1), Maude Karren Richards stated the following:

“I declare that I am the owner of the real and personal property including the following described property:

“One insurance policy in the sum of \$1,000.00 in the West Coast Life Insurance Company, payable to my estate.

“One insurance policy in the Business Men’s Assurance Company, in the sum of \$1,000.00 with double indemnity, payable to my estate.

“Savings accounts with Walker Bank & Trust Company, First Security Bank & Trust Company and Zion’s Savings Bank & Trust Company.

“My home situated at 1346 Thornton Avenue, Salt Lake City, Utah.

“Certain mining stock in a Vanadium Company.

“Household furniture in my home at 1346 Thornton Avenue and also at 141 First Avenue, Salt Lake City, Utah.

“Certain personal belongings.”

In paragraph III of her said will, Maude Karren Richards provided for the payment of funeral and burial

expenses, etc., and in paragraph IV she bequeathed to certain named relatives the sum of Five Dollars (\$5.00).

Paragraph VI then provided as follows:

*"I hereby give, devise and bequeath all the rest, residue and remainder of any and all my estate both real and personal property which I may own at the time of my death to Ben S. Brewster of Salt Lake City, Utah, if he survive me and if the said Ben S. Brewster does not survive me and my brother Merton Karren does survive me, then I hereby give, devise and bequeath to my brother, Merton Karren, an amount equal to one-sixth (1/6) part of my estate exclusive of the amount my estate will be enhanced in value by the distribution of the estate of Ben S. Brewster. All the rest, residue and remainder of my estate, both real and personal, in the event Ben S. Brewster does not survive me, I hereby give, devise and bequeath to the children of the said Ben S. Brewster in equal part, share and share alike, and if any of the said children of Ben S. Brewster have died leaving issue, then to their children by right of representation. In the event that neither my brother Merton Karren nor Ben S. Brewster survive me, then I hereby devise and bequeath the whole of my estate to the children of the said Ben S. Brewster, as aforementioned."* (Emphasis supplied.)

The Court, in case No. 8825 (Civil No. 107,499 below) entered judgment as follows: (R. 89-90)

**"WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

**"1. That the Motion for Summary Judgment of the defendant William Muir Barlow be and**

the same is hereby denied.

“2. That the Motion for Summary Judgment of the plaintiffs be and the same is hereby granted.

“3. That the plaintiffs are entitled to specific performance of the reciprocal will of Maude Karren Richards and the agreement between Maude Karren Richards and Ben S. Brewster, being pre-trial exhibits Nos. 1 and 2 insofar as the same apply to any and all properties described in said exhibits or any and all assets of the estate of Maude Karren Richards.

“4. That the plaintiffs be and they are hereby awarded all of the estate of Maude Karren Richards, deceased, provided, however, that they shall hold in trust such part thereof as may be necessary to pay the creditors of Maude Karren Richards and the expenses of her last illness and burial, as may be determined by the Court in Probate case No. 38411 (In the Matter of the Estate of Maude K. Barlow, also known as Maude Karren Richards, also known as Maude K. Richards, Deceased), and to further hold in trust one-sixth (1/6th) of the remainder of the said estate for Merton Karren, if he were living at the date of the death of the said Maude Karren Richards.

“5. IT IS SPECIFICALLY ORDERED AND DECREED:

(a) That the defendant William Barlow deliver to the plaintiffs all of the proceeds he may have received from the insurance policies on the life of Maude Karren Richards issued by the West Coast Life Insurance Company and the Businessmen's Assurance Company, or from

policies of insurance issued by the Reserve Life Insurance Company paying benefits for hospital and medical expenses incurred by Maude Karren Richards.

(b) That the defendant William Barlow deliver to the plaintiffs all moneys in any bank account, whether held solely or jointly, in the name of Maude Karren Richards and specifically any and all moneys withdrawn by him from any such accounts since the death of Maude Karren Richards, except as to any money contributed by William Barlow.

(c) That the defendant William Barlow deliver to the plaintiffs all properties of any kind and nature located at the premises at 221 East Fourth South Street, Salt Lake City, Utah, at the time of the death of the said Maude Karren Richards, and any and all other personal or real property of any kind or nature whatsoever and wheresoever located that are a part of the estate of Maude Karren Richards.

(d) That the proceeds of the following described insurance policies be paid to the Clerk of this Court for the use and benefit of the plaintiffs:

(1) Policy No. 320549 and supplemental contract No. 1982, said policy being issued by the West Coast Life Insurance Co. upon the life of Maude Karren Richards and dated October 10, 1931.

(2) Policy No. L-166920 issued by the Businessmen's Assurance Company of America upon the life of Maude K. Richards.

"Dated this 10th day of December, 1957.



"BY THE COURT: AT

/s/ A. H. ELLETT

District Judge"

Contrary to the contention of counsel (Barlow brief, p. 30), it is apparent that the reciprocal will of Maude Karren Richards does contain a general clause conveying "all the rest, residue and remainder," of her estate to Ben S. Brewster and certain contingent beneficiaries.

Barlow is only required in paragraph 5 (a) of the judgment, to deliver such proceeds from the named insurance policies as "he may have received." Counsel for Barlow has again misconstrued the judgment (Barlow brief, p. 28-29). If he received no such proceeds then he needn't worry. If he did, he should forthwith deliver the same to Hoyt W. Brewster et al.

Paragraphs 5 (b) and 5 (c) of the judgment only award to plaintiffs such money and property as belonged to Maude Karren Richards. Barlow will never have to give up any of his "hard earned dollars" and the suggestion that future litigation might be necessary to determine which property belonged to Maude Karren Richards and which property belonged to Barlow only anticipates Barlow's unwillingness to cooperate and surrender that which the trial court has said he, in justice and equity should.

If it becomes necessary to implement the judgment of the trial court by appropriate supplemental remedies such as appropriate Orders To Show Cause, etc., that is of no concern at this time to this Court.

The judgment as entered does nothing more than specifically enforce the agreement entered into by Ben S. Brewster and Maude Karren Richards on February 7, 1939, evidenced by the written agreement between the parties and their reciprocal wills (Exs. 1, 2). It is just and equitable in every respect. Barlow is not forced to give up any money or property which belongs to him separately. While he would like to obtain a windfall, it is only just and equitable that the decree stand as entered inasmuch as Maude Karren Richards has already received her portion of the Ben S. Brewster estate as provided in his will.

We will never know how much of her estate, enhanced by her share of the Ben S. Brewster Estate, might have been dissipated while she was married to Barlow. He seems to have been quite concerned about her estate for it will be noted that Barlow and Maude Karren Richards were married August 25, 1952, (Ex. D-2) and we find Maude Karren Richards executing an olographic will in his favor only 26 days later, on the 20th day of September, 1952. (8682, R. 1)

## SUMMARY

It is the contention of Hoyt W. Brewster, et al., that the Agreement of Maude Karren Richards entered into on February 7, 1939, with Ben S. Brewster, said agreement being represented by an actual written document and a reciprocal will executed pursuant thereto (Exhibits 1 and 2), should be specifically enforced, and that the judgment of the trial court in the civil action

below (8825, R. 88-90) should be affirmed. It is not material that Ben S. Brewster in his reciprocal will, in providing for Maude Karren Richards, made no mention of any contemplation of marriage.

Section 74-1-26 U.C.A., 1953, does not require that a bequest to a woman who later becomes the wife of a testator appear on its face to be in contemplation of marriage to prevent a revocation of the will. However, should the Court hold to the contrary, then the said agreement of Maude Karren Richards should still be specifically enforced, for William Muir Barlow is not a proper person to question the validity of the Brewster will and probate thereof; (see initial brief, page 22) and, further, he is barred by the provisions of Section 75-3-12 U.C.A., 1953, from contesting the will of Ben S. Brewster or the probate of said will (see initial brief, page 22). All persons claiming under Maude Karren Richards are estopped to deny the validity of the will of Ben S. Brewster (see initial brief, page 24).

The agreement entered into by Maude Karren Richards and Ben S. Brewster is evidenced by a written document, and the reciprocal wills executed pursuant thereto state that they are made pursuant to the written agreement. The Statute of Frauds is therefore fully satisfied.

There was adequate consideration for the reciprocal will of Maude Karren Richards. She received her distributive share under the will of Ben S. Brewster. It is only equitable and in accord with good conscience to enforce her end of the bargain.



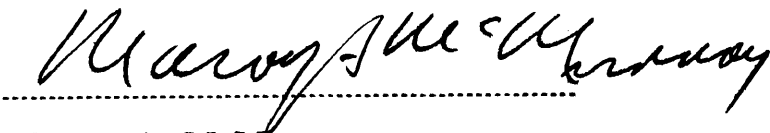
William Muir Barlow personally and in his capacity as the executor of the later revoking will is a party defendant in the civil action below. There is no merit to any claim that the civil action is premature.

As for the probate matters (Cases Nos. 8682 and 8683), it is the contention of Hoyt W. Brewster, et al., that the judgment of the lower court in admitting the later revoking will to probate should be reversed and that the earlier reciprocal will of Maude Karren Richards should have been admitted to probate as her irrevocable last will and testament. While there are authorities holding that the later revoking will should be admitted as the last will and testament of the decedent and that the agreement be enforced in equity, there is excellent authority to the contrary, and certainly under the circumstances of this case it would be merely an empty formality to probate the later revoking will under which none of the estate would pass.

Respectfully submitted,

McKAY, BURTON, McMILLAN  
AND RICHARDS

By



Macoy A. McMurray

Attorneys for  
Hoyt W. Brewster, et al.  
720 Newhouse Building  
Salt Lake City, Utah