

1990

In the Estate of Herbert Lee Jones : Brief of Appellant

Utah Supreme Court

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Brown, Larson, Jenkins & Halliday; Richard L. Halliday; Attorney for Petitioner/Appellant.

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UTAH SUPREME COURT
BRIEF

900170

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate
of HERBERT LEE JONES

:

Case No. 900170

:

Deceased

:

BRIEF OF PETITIONER/APPELLANT
THE ESTATE OF HERBERT LEE JONES
BY PERSONAL REPRESENTATIVE
LINDA ANGLESEY

APPEAL FROM FINAL ORDER OF
THE THIRD DISTRICT COURT, THE
HONORABLE JAMES S. SAWAYA PRESIDING

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FILED

DEC 13 1991

CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate	:	
of HERBERT LEE JONES	:	Case No. 900170
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LIST OF PARTIES

1. The Estate of Herbert Lee Jones Appellant/Petitioner
by Personal Representative Linda Anglesey.
2. Robert Lee Jones Appellee/Counter Petitioner.

EXHIBIT A - DECREE OF THE CALIFORNIA SUPERIOR COURT

EXHIBIT B - REPORTER'S TRANSCRIPT FROM CALIFORNIA
SUPERIOR COURT

EXHIBIT C - WRITTEN OPINION OF UTAH APPELLATE COURT

EXHIBIT D - FINAL ORDER OF THIRD DISTRICT COURT

EXHIBIT E - WILL OF DECEASED

TABLE OF AUTHORITIES

1.	<u>Avila v. Winn</u> , 794 P.2d 20 (Utah 1990).	2
2.	<u>Clarke v. Clarke</u> , 178 U.S. 186, 20 S.Ct. 873, 44 L. Ed. 1028 (1900).	10, 11,12,13,14,16
3.	<u>Durfee v. Duke</u> , 375 U.S. 106, 845 S.Ct. 242 (1963).	13,14
4.	<u>Hayes v. Gulf Oil Corp.</u> , 821 F.2d 285 (5th Cir. 1987)	14
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6.	<u>In Re Rays Estate</u> , 287 P.2d 629 (Wyo. 1955)	13
7.	<u>Toledo Society for Crippled Children v. Hickok</u> , 152 Tex. 758, 261 S.W.2d 692 (1953)	14
8.	<u>Welch v. Trustees of Robert A. Welch Foundation</u> , 465 S.W.2d 195 (Tex. App. 1971)	14
9.	<u>Restatement of Conflicts</u> , 2d Sections 239 and 240 .	10
10.	<u>Utah Code Ann. § 75-1-201(33)</u> (1953 as Amended) . .	1,5, 6,12

STATEMENT OF JURISDICTION

Pursuant to Rule 3(a) of the Rules of the Utah Supreme Court the final order of the Utah District Court is appealable and jurisdiction is conferred upon the Utah Supreme Court pursuant to Utah Code Ann. Section 78-2-2(j) (1953 as amended).

STATEMENT OF ISSUES

A. Does the Utah District Court have the authority and/or power to invalidate a California Court order and judgment with regard to California State real property?

B. Does the Utah District Court have jurisdiction over real property located in the State of California in probate proceedings?

C. Where a conflict of probate laws exists between the deceased's state of domicile and the state where the deceased owns real property, which law takes precedence?

D. Did the Utah District Court abuse its discretion by ordering the personal representative of the deceased's estate to reobtain and redistribute property already distributed pursuant to an order and judgment of the California Superior Court?

E. Is the judgment of the California Superior Court res judicata with regard to the issue of California real property and therefore entitled to full faith and credit by the Utah courts.

F. Should the personal representative be required to file a bond for property not includeable in the Utah estate of the deceased and already distributed pursuant to a current court order?

STANDARD OF REVIEW

The order of the District Court below was made as a matter of law and therefore the Supreme Court is not required to accept the conclusions of the District Court but shall review the questions of law independently. Avila v. Winn, 794 P.2d 20 (Utah 1990); Henretty v. Manti City Corp., 791 P.2d 506 (Utah 1990).

DETERMINATIVE STATUTES

There are no Utah statutes determinative of the issues upon appeal before the Court and this appears to be a matter of first impression in the State.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from a final order of the Third Judicial District Court, for the District of Utah, the Honorable James S. Sawaya presiding, wherein the Court found as a matter of law a prior judgment of a California Superior Court "wholly invalid" with regard to California real property and ordered said property redistributed according to Utah Law

and further ordered the Personal Representative to post bond in an amount equal to one-half of the value of said California real property.

B. Course of Proceedings and Disposition of the Case Below.

At trial held before the Third District Court in February, 1986, the will of the deceased was upheld and his estate passed to Linda Anglesey. Said judgment was appealed by Appellee Robert Lee Jones (hereinafter "Jones") who had been disinherited and reversed on the issue of his status as a pretermitted child and remanded for further proceedings before the District Court.

Subsequent to the above-referenced trial, ancillary proceedings were brought in the Superior Court of California regarding California real property owned by the deceased. The California court held that pursuant to California law, Jones was disinherited and distributed said real property to Linda Anglesey.

In compliance with the decision of the Utah Court of Appeals, Personal Representative Linda Anglesey prepared a Final Accounting awarding one-half (1/2) of all personal property of the deceased as well as one-half (1/2) of all real property located in the State of Utah to Jones. The California real property, previously distributed by the California Superior Court, was not included in said Final

Accounting. Personal Representative Linda Anglesey further petitioned the Court to close the estate.

Jones objected to the Final Accounting and Petition to Close the Estate and Counter-petitioned that the Personal Representative be removed or in the alternative that a personal representative's bond be required. Said Counter-Petition was objected to by the estate and by Personal Representative Linda Anglesey.

Third District Court Judge James S. Sawaya, upon hearing, held that as a matter of law the judgment of the California Superior Court was "wholly invalid", that Jones was entitled to one-half (1/2) of the California real property, and that the Personal Representative was required to post a bond for one-half (1/2) of the estate. This is in appeal by the estate, by and through Personal Representative Linda Anglesey, of said final order.

C. Statement of Facts.

1. On May 1, 1985, Herbert Lee Jones (hereinafter "the deceased") executed a Last Will and Testament prior to his death on July 5, 1985.

2. Said written will named Petitioner Linda M. (Cameron) Anglesey "to be Executor [Sic] and sole beneficiary to my Estate".

3. Petitioner Linda M. (Cameron) Anglesey, Testator's daughter (hereinafter "Linda Anglesey" or "the Personal

Representative") filed a Petition for Formal Probate subsequent thereto on July 19, 1985 to which an Objection was filed by Robert Lee Jones, (hereinafter "Jones") Testator's son, claiming that the Testator lacked testamentary capacity, that Linda Anglesey had exerted undue influence over the Testator and that Jones was a pretermitted child pursuant to Utah Code Ann. Section 78-2-302(1)(a).

4. Trial was held before the Honorable Homer F. Wilkinson of the Third District Court on February 10, 1986. After full presentation of the evidence, the court found that the Testator had the capacity to execute a will in May, 1985; that he was not unduly influenced on said date; that the entire will was completed May 1, 1985; and that the language of the will was sufficient to show that the Testator intended to disinherit his son and therefore Robert Lee Jones was not a pretermitted child pursuant to Utah law. (R.at 110-110).

5. On April 15, 1986 the Court entered the Formal Probate of Will and Appointment of Personal Representative of Linda Anglesey. (R. at 114-115).

6. Thereafter, an ancillary proceeding was filed by the Personal Representative Linda Anglesey in the Superior Court of the State of California, County of Los Angeles for the distribution of the deceased's real property located in the State of California. (R. at 554-561).

7. Jones was provided notice of said ancillary proceeding, and all proceedings in conjunction thereto. (R. at

554-561).

8. A hearing upon said ancillary proceeding was held November 7, 1987 before California Superior Court Judge J. Kimball Walker wherein the Court found that the decedent intended to omit his son Robert Lee Jones from his Will and that pursuant to California law, the entirety of the California real property in the estate would be distributed to Linda Anglesey. (R. at 530-538, 448-454). Said Decree was not appealed nor did Jones appear at any of said proceedings. (R. at 549, 554 - 561).

9. The judgment of the above-referenced Utah District Court decision, however, was appealed by Jones, and the Utah Court of Appeals, in a written opinion, ruled that all aspects of the lower court's decision would be affirmed with the exception of the pretermitted child issue. The Court of Appeals found that Jones was pretermitted child pursuant to Utah Code Ann. Section 75-2-302 (1)(a) and remanded the case for entry of judgment consistent with such a finding. No costs were awarded. Estate of Jones v. Jones, 759 P.2d 345 (Utah App. 1988).

10. Personal Representative Linda Anglesey thereafter submitted a Petition for Entry of Order and Decree in Accordance with Decision of Utah Court of Appeals and Petition for Approval of Final Settlement, Discharge of Personal Representative and Closing the Administration of the Estate as well as a Summary of Account for all real property of the

decedent's estate located in the State of Utah and all personal property of the decedent's estate wheresoever situated. (R. at 416-420).

11. All real property of the decedent located in the State of California has been distributed in accordance with the ancillary proceeding filed in that state and the court decree therefrom and was not included in said Summary of Account. (R. at 421-422).

12. Jones objected to the Personal Representative's Petition and counter-petitioned the court for an order removing Linda Anglesey as Personal Representative of the deceased's estate, appointing Robert Lee Jones as Personal Representative or in the alternative requiring that Personal Representative Linda Anglesey file a bond in the amount of one-half (1/2) the value of the estate. (R. at 461-471).

13. Personal Representative Linda Anglesey objected to Robert Lee Jones' Counter-Petition on the grounds that the Utah estate had nothing to distribute after the payment of debts and therefore a bond was unnecessary. (R. at 480-485).

14. Judge Kenneth Rigtrup of the Third District Court ordered that the Personal Representative be temporarily restrained from further transferring or disposing of the estate property pending resolution of the matter. (R. at 473-476).

15. On January 16, 1990 hearing on the above-referenced petitions was held before the Honorable James S. Sawaya of the

Third District Court. Without discussing any of the issues of fact, the Court ruled as a matter of law that the California judgment was wholly invalid, that the California real property was includeable in the Utah estate, that each distributee was entitled to one-half of such, and that a bond should be filed by Personal Representative Linda Anglesey for one-half (1/2) of said estate. (R. at 550 - 552).

16. The estate of the deceased Herbert Lee Jones, by and through its Personal Representative Linda Anglesey, appealed the order of the District as inconsistent with the previously entered order and judgment of the California Court. (R. at 562).

SUMMARY OF ARGUMENT

The courts have been nearly unanimous in upholding the principles set forth by the U.S. Supreme Court in 1900 that a foreign court is without subject matter jurisdiction to affect the title of real property located outside its territorial limits. This has been especially true in cases involving the probate of a will where real property is left in a state other than the domicile of the deceased, and a conflict of laws exists between the states regarding said probate estate. In such cases the courts have uniformly held that the law and judgment of the situs state controls.

In some instances, foreign state courts have attempted to use their personal jurisdiction over the parties to avoid the

above principle, or argued that the first judgment entered must be granted "full faith and credit" regardless of the location of the real property. Such attempts and arguments however have been unsuccessful and the courts have refused to make exceptions to said principles.

Utah, therefore, must guard its own sovereignty and not throw away its exclusive jurisdiction over real property located in Utah by adopting law to the contrary regarding foreign situated real property. This is particularly important where Utah can only enforce such a law where it has personal jurisdiction over the necessary parties.

Finally, the order of the court below requiring a personal representatives bond is unnecessary and inappropriate as there is no property within the Utah estate of the deceased, the California property is not includeable therein, and attempting to coerce the return of property already distributed by the California courts by means of personal jurisdiction over the distributee is contrary to common law and an inappropriate exercise of juridical authority.

ARGUMENT

POINT I

THE DISTRICT COURT MAY NOT INVALIDATE THE JUDGMENT OF A CALIFORNIA COURT REGARDING CALIFORNIA REAL PROPERTY

The United States Supreme Court referred to the following as a "well-defined and elementary legal principle".

It is a doctrine firmly established that the law of a state in which land is situated controls and governs its transmission by will or its passage in case of intestacy. Clarke v. Clarke 178 U.S. 186, 190, 20 S.Ct 873, 44 L.Ed. 1028 (1900). (String cite omitted).

Such black letter law has been long established regarding real property as devised by will. The Restatement 2d of Conflicts provides as follows:

Section 240. Construction of a Will Devising Land.

1. A will insofar as it devises an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the will.

2. In the absence of such a designation, the will is construed in accordance with the rules of construction that would be applied by the courts of the situs.

Section 239. Validity and Effect of Will of Land.

1. Whether a will transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs.

2. These courts would usually apply their own local law in determining such questions.

The policy behind the above principles is obvious. States, which so jealously guard their sovereignty, must be permitted to control the disposition of real property within their borders.

A. The U.S. Supreme Court Case of Clarke v. Clarke is the Cornerstone Case Involving the Subject Conflict of Laws Issue.

Although decided in 1900, the Clarke case Supra has never been reversed nor modified. In Clarke a conflict of laws existed between the state of South Carolina where the deceased was domiciled and Connecticut where the deceased owned real property at the time of her death. The Supreme Court of Errors of Connecticut had held that, while the disposition of personal property might be governed by the law of the domicile, real estate within Connecticut was controlled by the law of Connecticut.

The appellant in Clarke argued unsuccessfully that a conflicting decision of a South Carolina Court pre-dated that of the Connecticut Courts and therefore the decree of the South Carolina court construing the will, and not Connecticut's own laws of construction, should determine the rights of the parties as to Connecticut real estate.

The United States Supreme Court concluded, however, that:

[t]his is but to contend that what cannot be done directly can be accomplished by indirection, and that the fundamental principle which gives to a sovereignty an exclusive jurisdiction over the land within its borders is in legal effect dependent upon the nonexistence of a decree of a court of another sovereignty determining the status of such land. Manifestly, however, an authority cannot be said to be exclusive, or even to exist at all, where its exercise may be frustrated at any time. Id at 1992.

In the case at bar, Appellee Jones contends that Utah has granted itself jurisdiction over all real property wheresoever situated by virtue of Utah Code Ann. Section 75-1-201(33) and urged the District Court to use its personal jurisdiction over Personal Representative Anglesey to force her to reobtain possession of the California real property for the estate. Not surprisingly such is only possible because Linda Anglesey is also sole devisee of said real property. Such a situation, however, was foreseen by the Court in Clarke which reasoned as follows:

If, however, by the law as enforced in Connecticut, land in Connecticut owned by Mrs. Clarke at her decease was real estate for all purposes, despite the provisions contained in her will, that land was a subject matter not directly amendable to the jurisdiction of the Courts of another state, however, much those courts might indirectly affect and operate upon it in controversies where the court, by reason of its jurisdiction over persons and the nature of the controversy, might coerce the execution of a conveyance of or other instrument encumbering such land. Id. at 193.

The situation feared by the U.S. Supreme Court has actually occurred in the present case. The District has ordered a redistribution of the California real property and intends to enforce said order by requiring the Personal Representative to post a bond to insure such redistribution. The Court in Clarke, however affirmed the decision of the Connecticut Supreme Court of Errors specifically holding that the courts of South Carolina had no subject matter

jurisdiction over the Connecticut real property. Id. at 195 (string cite omitted).

Although the Utah Courts do not appear to have addressed these issues before, the above principles have been followed and upheld by a number of the other courts. Indeed, the Wyoming Supreme Court has stated that, "[t]he cases on the subject are numerous and so nearly unanimous that it would be useless to attempt to discuss them all". In Re Ray's Estate, 287 P.2d 629, 635 (Wyo. 1955). The Wyoming Court then went on to state that "(they) regard it then as settled law that the devolution of real property in this state and the effect of the decedent's will must be determined by the laws of this state". Id.

B. A Foreign Court has no Jurisdiction Over Property Not Found Within its Territorial Limits.

The Courts in Clarke supra and the cases that followed have uniformly centered on the question of subject matter jurisdiction in denying foreign courts the right to adjudicate the disposition of foreign real property. The case of Durfee v. Duke, 375 U.S. 106, 107-108, 845 S.Ct. 242, 243 (1963) involves a dispute over bottomland on the Missouri River. Because the river is also the boundary between the states of Nebraska and Missouri an issue on appeal dealt with jurisdiction. Justice Stewart of the U.S. Supreme Court began his opinion with the basic undisputed premise that "[t]he Nebraska court had jurisdiction over the subject matter of the

controversy only if the land in question was in Nebraska".

In the case of Welch v. Trustees of Robert A. Welch Foundation, 465 S.W.2d 195, 198 (Tex.App. 1971) involving the courts of two (2) states interpreting the will of the deceased, the Texas Court of Appeals began by validating the principles set forth in Clarke and then went on to discuss the effect of a prior ruling from another state regarding Texas real property from an earlier case decided by the Texas Supreme Court:

The mere fact that the courts of Ohio happen to have acted first in the matter is no more persuasive to us than the converse situation would be to the Ohio courts . . . Courts of a state which is not the situs of the land involved in a questioned devise, or devise in trust, are, generally speaking, without right to apply a law different from that of the situs, and their judgments assuming such a right are not protected by the "Full Faith and Credit" clause of the Federal Constitution, Art. 4, Section 1. Toledo Society for Crippled Children v. Hickok, 152 Tex. 758, 261 S.W.2d 692 (1953).

This result is not surprising as the full faith and credit doctrine requires a foreign court to have subject matter jurisdiction, Durfee v. Duke Supra at 111, and such jurisdiction is lacking with regard to real property outside of a foreign court's territorial limits.

One of the most recent cases affirming the principles in Clarke is that of Hayes v. Gulf Oil Corp., 821 F.2d 285 (5th Cir. 1987). In Hayes, the Fifth Circuit Federal Court was forced to examine whether a Federal District Court could exercise subject matter jurisdiction over real property

situated outside of its territorial boundaries by virtue of its diversity jurisdiction over the parties. The "local action rule" discussed by the Court is similar to the conflicts issues above in that it:

" . . . prevents courts unfamiliar with local property rights and laws from interfering with title to real property which must be recorded under a unitary set of rules to keep it free of conflicting encumbrances. These local rules ensure that real property actions will be tried in a convenient forum and that orderly notice to all interested parties - through Colorado land title records - will be facilitated." Id. at 290

In denying the Federal District Court's claim of jurisdiction, the Fifth Circuit stated as follows: "In short, overwhelming precedent, including cases from this Circuit, which hold that a court sitting in one state cannot adjudicate title to land situated in a different state, and numerous salutary reasons for continuing the local action rule to determine subject matter jurisdiction, compel reversal of the district court's judgment." Id.

In the matter before this Court, the California Superior Court has already demonstrated its unwillingness to allow Utah courts jurisdiction over California real property. Even though, at the time the California ancillary proceeding was initiated, a Utah Third District Court Decision awarding all property of the subject estate to Linda Anglesey and disinheriting Jones had been entered, the California Superior Court refused to grant the Utah judgment full faith and credit. A full evidentiary hearing was held by the California

Court, despite the fact that no opposition to the claims of Linda Anglesey had been filed, on the issues of the sufficiency of the will of the deceased and the effect of the California pretermitted child statute.

It is clear from Clarke and its progeny, that any dispute Jones may have with the distribution of the estate's California real property, or the judgment of the California courts, cannot be bootstrapped into the Utah probate proceeding, but must be directed to the courts with the exclusive subject matter jurisdiction over said property.

POINT II

THE STATE OF UTAH SHOULD NOT GIVE UP THE RIGHT TO DETERMINE THE DISPOSITION OF REAL PROPERTY WITHIN THIS STATE

It should not be overlooked that a failure to reverse the decision of the District Court below will have far reaching effects on the Utah courts' ability to control the disposition of real property within the state. Utah courts, in attempting to indirectly affect property situated in California, must implicitly endorse the same authority to courts outside of Utah with regard to Utah property.

Moreover, opening the door to the control of Utah real property by other states is a poor exchange for Utah. While Utah would be consigned to allowing any state to exert subject matter jurisdiction over Utah real property, in probate matters in the very least, Utah would only be able to do the same in situations where it also maintained personal

jurisdiction over parties which could be forced to accept the Utah Courts' mandates. In the present case for example, had the California real property been distributed to an individual outside of the jurisdiction of the Utah, rather than the Personal Representative Linda Anglesey, the District Court could not have ordered a redistribution of the estate.

It is essential that Utah not erode the sovereignty of the state by allowing the disposition of Utah real property to be determined other than Utah law.

POINT III

THE DISTRICT COURT'S ORDER TO POST A PERSONAL REPRESENTATIVE'S BOND IS UNNECESSARY

Jones petitioned the court below for an order requiring Personal Representative Linda Anglesey to post a personal representative's bond based upon the premise that he is entitled to one-half (1/2) of the estate of the deceased, including all California real property. As indicated in the final accounting of the Personal Representative, the Utah estate has no assets to distribute to any party. In fact, said Personal Representative was forced to pay a number of the expenses and costs related to the death of her father out of her own pocket.

The only assets that the District Court's order would affect, therefore, would be the real property situated in California. Requiring the Personal Representative to bond for

one-half 1/2) of said property is both unnecessary and inappropriate for the following reasons. First, the real property in question is no longer part of the estate of the deceased, having been distributed pursuant to the ancillary proceeding held in the California Superior Court and said proceeding having been closed.

Second, as discussed above, the Utah District Court has no subject matter jurisdiction over said California real property and therefore has no power to require or affect the transfer thereof. Finally, and also discussed above, the mere fact that the Utah Third District Court maintains personal jurisdiction over the distributee of said California property, by virtue of her position as Personal Representative of the Utah probate estate, does not also grant said Court the right to coerce a transfer thereof and the District Court's attempt to do so is inappropriate and contrary to established common law.

CONCLUSION

Because a foreign court has no power or jurisdiction over real property located outside of its territorial limits, the law of the situs state, and even moreso the determination of a court in the situs state, is controlling. Moreover, it is important that Utah not throw away its own exclusive jurisdiction over Utah real property and in doing so erode to a large measure its sovereignty.

WHEREFORE, Appellant/Petitioner, the estate of Herbert Lee Jones, by and through Personal Representative Linda Anglesey prays that the order of the Third District Court below invalidating the judgment of a California Superior Court regarding California real property, and requiring Personal Representative Linda Anglesey to post a personal representative's bond in the amount of one-half (1/2) the value of said property be reversed. Further, it is prayed that the matter be remanded to the Third District Court with the direction that the Personal Representative's Petition be granted and the Utah probate estate be closed without inclusion of the subject California real property therein.

DATED this 13th day of December, 1991.

BROWN, LARSON, JENKINS & HALLIDAY


Richard L. Halliday

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of December, 1991, I mailed, postage prepaid, four (4) copies of the foregoing to the following:

R. Stephen Marshall
Thomas E. Nelson
VanCott, Bagley, Cornwall & McCarthy
50 South Main, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145



ADDENDUM

EXHIBIT A

1 WILFRED E. BRIESEMEISTER
2 Attorney at law
3 Greenleaf Square, Suite 370
4 7200 S. Greenleaf Avenue
5 Whittier, CA. 90602
6 (213) 945 6504

7 Attorney for Petitioner

FILED

DEC 14 1987

FRANK S. ZOLIM, COUNTY CLERK
Karen M. Salcido
BY KAREN M. SALCIDO, DEPUTY

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 FOR THE COUNTY OF LOS ANGELES

11	Estate of)	NO. SEP 17587
12)	
13	HERBERT LEE JONES,)	DECREE DETERMINING INTERESTS
14	also known as HERBERT)	IN TESTATE ESTATE
15	L. JONES,)	
16)	
17	Deceased.)	

18 The petition of LINDA M. CAMERON, praying that the Court
19 determine who is entitled to distribution of the estate of
20 HERBERT LEE JONES, also known as HERBERT L. JONES, deceased,
21 came on regularly for hearing on the 4th day of November,
22 1987, at 9:00 A.M. in Department SE"W", the Honorable J.
23 KIMBALL WALKER, Judge Presiding. Upon proof satisfactory to the
24 Court, the Court finds that all notices of the time and place of
25 hearing were given as required by law, that no written statements
26 of Claimants were filed herein, and said matter having been heard,
27 evidence both oral and documentary having been introduced, and
28 good cause appearing,

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IT IS ORDERED, ADJUDGED AND DECREED that decedent was aware of the existence of his son, ROBERT LEE JONES, and that it was decedent's intention to omit the son from decedent's Will, and that upon proper petition for distribution, the entirety of the estate shall be distributed to LINDA M. CAMERON, daughter of the decedent.

DATED: DEC 14 1987

Walker
J. KIMBALL WALKER
Judge of the Superior Court

OK
T.R.N.



THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE.

DEC 14 1987

ATTEST 19

FRANK S. ZOLIN, County Clerk and Executive Officer of the Superior Court of California, County of Los Angeles.

BY J. Trujillo DEPUTY

EXHIBIT B

1 NORWALK, CALIFORNIA; WEDNESDAY, NOVEMBER 4, 1987; 9:00 AM
2 DEPARTMENT SOUTHEAST W HON. J. KIMBALL WALKER, JUDGE
3

4 THE COURT: No. 28, Herbert Jones, and No. 29,
5 Herbert Jones.

6 MR. BRIESEMEISTER: Wilfred Briesemeister
7 representing the executor, Your Honor.

8 THE COURT: Have you been to the probate lawyer on
9 these matters?

10 MR. BRIESEMEISTER: Yes, we have, Your Honor.

11 THE COURT: What did you find out about this Utah law
12 vis-a-vis California?

13 MR. BRIESEMEISTER: I think, as I tried to clarify, I
14 think the probate attorney understood the distinction.

15 We are not asking the court to apply Utah law.
16 What we are merely indicating was that there was a finding
17 of fact in the matter which was pending before the Utah
18 probate court with regard to the intention of the
19 testator.

20 Now, we have here today a witness, the brother
21 of the testator, if Your Honor wishes to have an
22 evidentiary hearing, who would testify that the will
23 itself, by the four corners which specifies that the one
24 daughter be the sole heir, was intended by the testator to
25 exclude the remaining child, the son.

26 In addition, I have a sworn statement from the
27 testator's wife to indicate that the other two potential
28 pretermitted heirs were not in fact either natural children

1 of nor adopted children of testator.

2 THE COURT: We will put that on second call as well,
3 counsel. You have other documents which I have to read,
4 and we'll have to hear this later.

5 MR. BRIESEMEISTER: Very well, Your Honor.

6 (Proceedings were held in other matters.)

7 THE COURT: No. 28 and 29, Herbert Jones.

8 MR. BRIESEMEISTER: Wilfred Briesemeister appearing
9 on behalf of the executor, Your Honor.

10 We filed a 1080 petition in order to clarify the
11 issue of pretermitted heir, which was an objection to the
12 -- or by the probate attorney.

13 In addition, we have a witness who's the brother
14 of the decedent, and my offer as a matter of proof is that
15 his testimony would be, again, that the four corners of the
16 holographic will setting forth that the executor be the
17 sole devisee was in fact the intention of his brother and
18 to exclude the other child, his son.

19 The probate attorney raised also two additional
20 parties as potential pretermitted heirs, and I have a
21 signed and notarized statement by the wife of the decedent
22 that neither individual, Everett Wright Jones nor Debra
23 Allen, was a child, natural child or adopted child.

24 THE COURT: Counsel, you're going to have to
25 establish the issue of this pretermitted heir problem by
26 some testimony that something more than just that he -- his
27 intent is expressed in the will.

28 I think the statute is clear that you not only

1 have to show that he intended to exclude an heir but that
2 he knew that the heir existed, and that's the problem I
3 think you have, and I don't know -- you have to put on
4 testimony on that.

5 MR. BRIESEMEISTER: Your Honor, we have his brother
6 who is prepared to testify that not only did the testator
7 know the existence of his son --

8 THE COURT: Then put him on.

9 MR. BRIESEMEISTER: Yes, Your Honor.

10 I call Spencer Jones.

11

12 SPENCER JONES,

13 a petitioner's witness, was sworn and testified as follows:

14 THE CLERK: Raise your right hand, sir.

15 You do solemnly swear that the testimony you may
16 give in the cause now pending before this court shall be
17 the truth, the whole truth, and nothing but the truth, so
18 help you God.

19 THE WITNESS: I do.

20 THE CLERK: Please be seated, sir, and state your
21 name, please.

22 THE WITNESS: Spencer Jones.

23

24 DIRECT EXAMINATION

25 BY MR. BRIESEMEISTER:

26 Q Mr. Jones, are you the brother of the deceased
27 Herbert Lee Jones?

28 A Right.

1 Q And prior to Mr. Jones' death did you have
2 occasion to discuss with Mr. Jones the will that he was to
3 execute and to whom he wanted his estate to be
4 distributed?

5 A He wanted it all to go to his daughter Linda.

6 Q Linda Cameron, who's the executor in this
7 estate?

8 A Yes.

9 Q Do you recall any specific conversations during
10 which Mr. Jones said that he wanted to exclude his son
11 Robert Lee Jones?

12 A Well, he wouldn't allow him on the property. He
13 didn't want to have nothing to do with him and told him
14 so.

15 Q And do you recall whether Mr. Jones in addition
16 made any comments to you about wanting his estate to go to
17 Linda Cameron and none of it to go Robert Lee Jones?

18 A I know that's the way he wanted it. He same as
19 told me so.

20 THE COURT: What did he say to you, sir?

21 THE WITNESS: Well --

22 THE COURT: When was the conversation? Who was
23 present? And what was said?

24 THE WITNESS: Well, just he and I, but then we were
25 talking.

26 THE COURT: Every time you were talking, and that was
27 70 years, I presume.

28 Let's get the specific dates and time.

1 THE WITNESS: Well, I would say that in the last
2 three or four years before he passed away is when he was
3 having a problem with his son.

4 THE COURT: What kind of problems was he having?

5 THE WITNESS: Well, he wasn't very reliable. I guess
6 he was dipping into the bank account. My brother was a
7 little bit disabled; he was blind and --

8 THE COURT: His son was around; is that correct? He
9 was around your brother?

10 THE WITNESS: Well, the son was there part of the
11 time, but he didn't live there very long.

12 THE COURT: Well, then at or about the time that this
13 will was made where was the son residing?

14 THE WITNESS: I really don't know. He was up around
15 the foothills up north of Pomona somewhere.

16 THE COURT: And when was the last conversation that
17 you had with your brother wherein he mentioned anything
18 about this son?

19 THE WITNESS: Well, in the hospital he had been
20 operated on for cancer. He didn't want him -- anybody to
21 tell his son that he was in the hospital. He didn't want
22 him around at all.

23 THE COURT: When was the will made in relationship to
24 this hospitalization?

25 THE WITNESS: Made right while he was in bed. I
26 wasn't in the room, but I knew about it.

27 THE COURT: Did he say anything to you, while was in
28 the hospital, about his son?

1 THE WITNESS: Every time he was mentioned he didn't
2 want him to know anything about him being in the hospital.

3 THE COURT: But did he tell you that?

4 THE WITNESS: He told it directly to me.

5 THE COURT: Okay.

6 Who are these other people?

7 MR. BRIESEMEISTER: Your Honor, there were two
8 others, Everett Wright Jones and Debra Allen, who
9 apparently had resided with the testator during the period
10 of time approximately when the will was executed.

11 I have a statement that has been notarized
12 October 29, 1987 by one Mary Sumner, who was married to
13 decedent.

14 THE COURT: Offer it, please.

15 MR. BRIESEMEISTER: I might also add, Your Honor,
16 that notwithstanding the filing of 1080 petition, there has
17 been no statement of interest filed by either the son --

18 THE COURT: All right.

19 The order will be granted as prayed. The
20 affidavit will be ordered filed.

21 The court finds that the deceased knew of and
22 intended to exclude the child.

23 Attorney order.

24 MR. BRIESEMEISTER: Very well, Your Honor.

25 Thank you very much.

26 (Proceedings concluded.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SOUTHEAST W HON. J. KIMBALL WALKER, JUDGE

In the Estate of)	
)	
HERBERT LEE JONES,)	No. SE P 17587
)	
Deceased.)	REPORTER'S CERTIFICATE
)	

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, WILLI D. HILL, Official Reporter of the
Superior Court of the State of California, for the County
of Los Angeles, do hereby certify that the foregoing pages,
1 through 6, inclusive, comprise a full, true, and correct
transcript of the proceedings held in the above-entitled
matter, reported by me on November 4, 1987.

Dated this 28th day of October, 1989.

Willi D. Hill, CSR NO. 2242
Official Reporter

EXHIBIT C

prior motion to withdraw is required. *E.g., Lancaster*. In either scenario, an evidentiary hearing must ordinarily be held unless the record of a prior hearing shows petitioner is clearly not entitled to relief. *See, e.g., Lancaster*. If the direct route of filing a motion to withdraw is selected, further review must be in the form of appeal from denial of the motion and failure to appeal would ordinarily be conclusive. *E.g., Wells*. However, where the failure to appeal from denial of the motion is due to counsel's omission or other good cause, review of the denial may be had by collateral action. *E.g., Chess v. Smith*. Proper resolution of the collateral action will require an evidentiary hearing unless review of the transcript of the hearing on the motion to withdraw permits a decision as a matter of law. *E.g., Lancaster*.

DAVIDSON and BENCH, JJ.,
concur.



In the Matter of the ESTATE OF
Herbert Lee JONES, Deceased,

v.

Robert Lee JONES, Appellant.

No. 880121-CA.

Court of Appeals of Utah.

Aug. 8, 1988.

Son objected to probate of father's will drafted by daughter. The Third District Court, Salt Lake County, Homer F. Wilkinson, J., denied son's objections and he appealed. The Court of Appeals, Jackson, J., held that: (1) substantial evidence supported finding that there was no confidential relationship and no undue influence, and (2) son was a pretermitted child.

Vacated and remanded.

1. Wills ¶158

A confidential relationship, required for presumption of undue influence, arises when one party, after having gained the trust and confidence of another, exercises extraordinary influence over the other party.

2. Wills ¶163(2)

If a confidential relationship exists between two parties to a transaction, and if the superior party benefits from the transaction, a presumption of undue influence is raised.

3. Wills ¶163(2)

The relationship of parent and child is not evidence of such confidential relationship as to create presumption of undue influence.

4. Wills ¶163(4)

Undue influence by daughter, in the absence of a confidential relationship with father, would not be presumed solely because she actively participated in a drafting and execution of father's will under which she was sole beneficiary.

5. Wills ¶166(4)

Substantial evidence supported finding that there was no confidential relationship and no undue influence exercised by daughter who drafted and was sole beneficiary of her father's will.

6. Wills ¶489(5)

Unequivocal language of pretermitted child statute providing that testator's failure to provide in his or her will for a child then living is presumptively intentional unless intent to omit "appears from the will" itself, rendered evidence outside the four corners of an unambiguous will, including declarations of the decedent, inadmissible to rebut statutory presumption that testator's failure to provide for living child in his will was unintentional. U.C.A.1953, 75-2-302(1)(a).

7. Descent and Distribution ¶47(2)

A testamentary disposition of entire estate is alone insufficient to establish that

omission of a child from a will is intentional. U.C.A.1953, 75-2-302(1)(a).

8. Descent and Distribution ⇐47(2)

To rebut statutory presumption against disinheritance, a will must either mention claimant child by name or fairly and clearly express an intention on the part of testator to exclude claimant as part of a mentioned group or class.

9. Descent and Distribution ⇐47(2)

Statutory presumption against disinheritance of son was not rebutted by words of will "granting" daughter "to be sole beneficiary" of estate, and since no mention of son was made either by name or by class, son was pretermitted child. U.C.A. 1953, 75-2-302(1)(a).

Stephen D. Swindle, R. Stephen Marshall (argued), Thomas E. Nelson, Salt Lake City, for appellant, Robert Lee Jones, Van Cott, Bagley, Cornwall & McCarthy.

Alan M. Williams (argued), West Jordan, for respondent, Linda Cameron.

Before JACKSON, BENCH and GARFF, JJ.

OPINION

JACKSON, Judge:

Robert Lee Jones appeals from the judgment and order denying his objections to probate of a will drafted by his sister, Linda Cameron, and concluding he was not entitled to a share of his father's estate as a pretermitted child. He presents three principal issues: (1) Should the trial court have presumed as a matter of law that there was undue influence exerted by his sister either because of the mere fact of the father/daughter relationship or because she was the drafter of the will and its sole beneficiary? (2) Even without the operation of such a presumption, is the trial court's failure to find either a confidential relationship or no undue influence clearly erroneous? (3) Even if the will is valid, is he nonetheless entitled to an intestate share of his father's estate as a pretermitted

child? We vacate the judgment and order of the trial court.

Linda Cameron ("Cameron") and Robert Lee Jones ("Robert") are the surviving natural children of Herbert Lee Jones ("Jones"), who died in Salt Lake County on July 5, 1985 after living with Cameron for approximately two months. In late April, 1985, Jones was admitted to a California hospital for cancer surgery. When Cameron found this out, she travelled to California and visited Jones in the hospital on April 30. He expressed concern about his salvage grease business affairs and bills and asked her to take care of them. After looking through his papers for many hours that night, she returned to the hospital on May 1 and told Jones he needed to sign a power of attorney so she could put her name on his checking account and conduct his affairs. When he assented, she handwrote the contested document, which initially stated:

1 May 1985

I, HERBERT LEE JONES grant power of ATTORNEY to my daughter, LINDA M. CAMERON.

During the ensuing conversation, as reported by Cameron, Jones indicated that—if he didn't make it—he didn't want Robert to get anything from his estate; he wanted Cameron to have it all. Cameron told him if that was so, he needed a will, to which Jones responded, "Okay. Do it." Cameron then changed the period after her name to a comma and added the following words to the previously drafted document:

AND TO BE EXECUTER [sic] AND
SOLE BENEFICIARY TO
MY ESTATE.

Cameron then read the document to her father. He looked at it and signed it in the presence of two witnesses, Volita Jones and Terri Hurst. The trial court found that the second part had already been added to the document when Jones signed it, although Robert disputed that point.

Robert agreed that the May 1 document qualified as a will, but challenged its admission to probate on the grounds that his father lacked testamentary capacity and

that the document was obtained by Cameron's undue influence. He also claimed that, even if the will was not so obtained, he was entitled to an intestate share of his father's estate as a pretermitted child under Utah Code Ann. § 75-2-302(1) (1978) because the will itself did not show an intention to disinherit him. At trial, Robert repeatedly objected to the admission of statements made by Jones to Cameron and others to prove Jones's intent to disinherit his son, including statements that Jones believed Robert had stolen some money from him.

The trial judge made the following relevant findings: Jones had testamentary capacity when the will was executed; there was no confidential relationship between Cameron and her father at the time she drafted the document for him; and the making of the will was not procured by her undue influence. The trial judge concluded that the language of the will itself showed the intent of the decedent to intentionally omit Robert from the will, thereby precluding him from taking any part of Jones's estate by virtue of the operation of the pretermitted child statute. He added that, if the extrinsic evidence of Jones's oral declarations was considered, it would only reinforce that conclusion.

CONFIDENTIAL RELATIONSHIP AND UNDUE INFLUENCE

[1, 2] A confidential relationship arises when one party, after having gained the trust and confidence of another, exercises extraordinary influence over the other party. *Webster v. Lehmer*, 742 P.2d 1203, 1206 (Utah 1987). If a confidential relationship exists between two parties to a transaction, and if the superior party (in

whom trust has been reposed) benefits from the transaction, a presumption of undue influence¹ is raised. *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985); *Robertson v. Campbell*, 674 P.2d 1226 (Utah 1983). In such a case, the burden shifts to the superior party to prove the absence of any unfairness by a preponderance of the evidence. *Baker v. Pattee*, 684 P.2d 632, 637 (Utah 1984).

A few relationships are presumed to be confidential, such as that of attorney and client. *Webster*, 742 P.2d at 1206; see *In re Swan's Estate*, 4 Utah 2d 277, 293 P.2d 682 (1956). In all other relationships the existence of a confidential relationship is a question of fact. *Webster*, 742 P.2d at 1206; *Baker*, 684 P.2d at 636.

On appeal, Robert asserts that, as a matter of law, a confidential relationship should have been presumed between Jones and Cameron as parent and child, giving rise in turn to a presumption that she exerted undue influence over him in order to be named as his sole beneficiary under the will.

[3] The doctrine of confidential relationship rests upon the principle of inequality between the parties and implies a position of superiority occupied by one of the parties over another. *Bradbury v. Rasmussen*, 16 Utah 2d 378, 401 P.2d 710, 713 (1965). However, the mere relationship of parent and child does not constitute evidence of such confidential relationship as to create a presumption of undue influence. *Nelson v. Nelson*, 30 Utah 2d 80, 513 P.2d 1011, 1013 (1973); *Bradbury*, 401 P.2d at 713.²

While kinship may be a factor in determining the existence of a legally signifi-

1. In the context of a testamentary disposition, "undue influence" may be established without showing any physical coercion or restraint. . . . [I]n whatever form it may appear it must, nevertheless, be made to appear from competent evidence that the will of the one accused of practicing undue influence dominated the will of the testator—that the testament is in fact and effect the will of the accused and not that of the testator. *In re Bryan's Estate*, 82 Utah 390, 25 P.2d 602, 610 (1933).

2. *Accord Clow v. Chicago Title & Trust Co.*, 9 Ill.App.3d 168, 292 N.E.2d 44 (1972); *Burns v. Nemo*, 252 Iowa 306, 105 N.W.2d 217 (1960); *Olson v. Harshman*, 233 Kan. 1055, 668 P.2d 147 (1983); *Platt v. Platzi*, 277 Mich. 700, 270 N.W. 192 (1937); *Willerts v. Willerts*, 254 N.C. 136, 118 S.E.2d 548 (1961); *Ellis v. Potter*, 453 P.2d 92 (Okla.App.1969); *Ingersoll v. Ingersoll*, 263 Or. 376, 502 P.2d 598 (1972); *Estate of Wann*, 176 Pa.Super. 498, 108 A.2d 820 (1954); *Iacometti v. Frassinelli*, 494 S.W.2d 496 (Tenn.App.1973).

cant confidential relationship, there must be a showing, in addition to the kinship, a reposal of confidence by one party and the resulting superiority and influence on the other party. . . . Mere confidence in one person by another is not sufficient alone to constitute such a relationship.

Bradbury, 401 P.2d at 713.

Without distinguishing *Nelson* and *Bradbury*, in which the transacting parties were parents and their child or one raised as their child, appellant bases his argument on the general statement, in a case involving only a trustor/trustee relationship, that "[t]here are a few relationships (such as parent-child, attorney-client, trustee-cestui) which the law presumes to be confidential." *Blodgett v. Martsch*, 590 P.2d 298, 302 (Utah 1978). This unsupported *obiter dictum* was, unfortunately, reiterated in *Baker*, 684 P.2d at 637, another case in which no familial relationship between the transacting parties was claimed.

Notwithstanding this *dicta*, we believe that the rule in *Bradbury* reflects the current state of Utah law, i.e., the relationship of parent and child does not, in and of itself, establish a confidential relationship giving rise to a presumption of unfair dealing. The *Bradbury* opinion has been recently cited and quoted with approval for its pronouncements on confidential relationships in general. See *Webster*, 742 P.2d at 1206; *Von Hake*, 705 P.2d at 769. More importantly, subsequent to *Baker*, the unanimous court cited *Nelson* and *Bradbury* as authority for its conclusion that a relationship as brother and sister-in-law is not sufficient, standing alone, to prove a confidential relationship, although the existence of a confidential relationship could be proved otherwise. *Cunningham v.*

Cunningham, 690 P.2d 549, 553 (Utah 1984).

[4] Because there is no presumption of a confidential relationship arising solely from the fact that parties to a transaction are parent and child, the trial court correctly declined to find a confidential relationship as a matter of law and left the burden on Robert to prove that there was, in fact, a confidential relationship and undue influence.³

[5] In its findings of fact, the trial court determined that no such relationship existed at the time the will was drafted and executed and that no undue influence had been exerted on Jones. The findings of the trial court on these questions must be given considerable deference and will only be reversed on appeal if they are clearly erroneous. *Webster*, 742 P.2d at 1206. See Utah R.Civ.P. 52(a). Because there is substantial record evidence to support these findings, we will not disturb them on appeal.

PRETERMITTED CHILD

Appellant next argues that he is entitled to an intestate share of his father's estate in spite of the May 1 will because the language of the will itself does not sufficiently evidence Jones's intent to disinherit him.

The relevant provisions of the statute in effect at the time of Jones's death state:

(1) If a testator fails to provide in his will for any of his children or issue of a deceased child, the omitted child or issue receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

3. Appellant also makes an unsupported argument that, even in the absence of a confidential relationship, undue influence by Cameron should be presumed as a matter of law because she actively participated in the drafting and execution of the will under which she is sole beneficiary. His position is, however, contrary to the rule set forth in *In re Bryan's Estate*, 25 P.2d at 609-610, that the presumption of undue influence applies in these circumstances if the beneficiary was in a confidential relationship

with the testator. See *Miller v. Livingstone*, 31 Utah 415, 88 P. 338, 342 (1906) (rejecting any presumption of undue influence by one who directs the drafting of a will under which he or she is to take as sole beneficiary). See also the cases reaching a similar result, collected in Annotation, *Presumption or Inference of Undue Influence from Testamentary Gift to Relative, Friend, or Associate of Person Preparing Will or Procuring its Execution*, 13 A.L.R.3d 381, 390-97 (1967).

(a) It appears from the will that the omission was intentional[.]

Utah Code Ann. § 75-2-302(1)(a) (1978) (emphasis added).⁴

Construing a prior pretermisison statute allowing a child omitted from a parent's will to take an intestate share "unless it appears that such omission was intentional,"⁵ the Utah Supreme Court held that the testator's failure to provide for a child or issue of a deceased child constituted a rebuttable presumption that the omission was unintentional. *In re Newell's Estate*, 78 Utah 463, 5 P.2d 230, 236-37 (1931). In the absence of the more restrictive statutory language "from the will," emphasized above, evidence extrinsic to the will itself, including declarations of the testator, was held admissible to rebut the presumption and establish that the omission was intentional. *Id.* 5 P.2d at 236.

The statute applicable in the instant case still extends the presumption against disinheritance to children born before execution of the will. *See id.*; *Estate of Uliscni*, 372 N.W.2d 759, 761 (Minn.App.1985) (applying pretermisison statute that, like Utah's, covers living and afterborn children). Thus, it was Cameron's burden to show by a preponderance of the evidence that the omission of Robert was intentional. *See In re Newell's Estate*, 5 P.2d at 240-41; *Estate of Ervin*, 399 N.W.2d 200, 201 (Minn.App. 1987).

[6] We agree with appellant, however, that the holding in *Newell* pertaining to the

admissibility of extrinsic evidence was superseded by the legislature's adoption of the quoted language, i.e., unless "it appears from the will," in section 75-2-302(1)(a) (1978). In construing any legislative enactment, we must give effect to the legislature's underlying intent, *American Coal Co. v. Sandstrom*, 689 P.2d 1, 3 (Utah 1984), and assume that each term in the statute was used advisedly. *West Jordan v. Morrison*, 656 P.2d 445, 446 (Utah 1982). The plain meaning of the restrictive language in section 75-2-302(1)(a) (1978) is that a testator's failure to provide in his or her will for a child then living is presumptively unintentional unless an intent to omit "appears from the will" itself. *See* 2 W. Page, *Page on Wills* § 21.109 at 551, 553 (W. Bowe & D. Parker ed. 1960). This unequivocal statutory language renders evidence outside the four corners of an unambiguous will, including declarations of the decedent, inadmissible to rebut the statutory presumption.⁶ *Accord Estate of Smith*, 9 Cal.3d 74, 106 Cal.Rptr. 774, 507 P.2d 78 (1973); *Smith v. Crook*, 160 Cal. App.3d 245, 206 Cal.Rptr. 524 (1984) (California statute, like Utah's, says "unless it appears from the will that such omission was intentional"); *In the Matter of the Estate of Hilton*, 98 N.M. 420, 649 P.2d 488 (App.1982) (interpreting identical statutory subsection), *cert. denied*, 98 N.M. 478, 649 P.2d 1391; *In re Estate of Cooke*, 96 Idaho 48, 524 P.2d 176, 182 (1973) (statute says "unless it appears that such omission was

after the effective date of the 1988 amendment to this section.

4. Under the statute as recently amended by Laws 1988, ch. 110, § 2 (effective April 25, 1988), only those children who were born or adopted after the execution of a will (or, if deceased, their issue) can claim a share in a parent's estate as a pretermitted child. Utah Code Ann. § 75-2-302(1)(a) (1988). This change brings Utah's pretermitted child statute more in line with Uniform Probate Code § 2-302 (1982) (although the UPC provision does not apply to the issue of deceased afterborn children), which is based on the presumption that a testator's failure to provide for a child living at the time the will was executed was intentional. *See* note 7, *infra*; Comment, *Articles II and III of the Uniform Probate Code as Enacted in Utah*, 1976 B.Y.U.L.Rev. 425, 434. Because appellant was alive at the time his father's will was executed, he would have no claim as a pretermitted child if Jones had died

5. When any testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child must have the same share in the estate of the testator as if he had died intestate....
1917 Utah Comp.Laws § 6341.

6. The statements to the contrary in Wellman & Gordon, *Uniformity in State Inheritance Laws: How UPC Article II Has Fared in Nine Enactments*, 1976 B.Y.U.L.Rev. 357, 373 and *BYU Journal of Legal Studies, Summary of Utah Probate Law* 86 (1986) should, therefore, be disregarded.

intentional"); *Crump v. Freeman*, 614 P.2d 1096, 1097 (Okla.1980) (same statutory language as in *Cooke*). See *Royce v. Estate of Denby*, 117 N.H. 893, 379 A.2d 1256, 1258 (1977). The purpose of the pretermission statute is to protect the omitted child's right to take unless the will itself gives clear expression to an intentional omission. See *Crump*, 614 P.2d at 1097.

Although this part of the Utah statute has been criticized as tending to defeat a testator's actual intent and prevent intentional disinheritance,⁷ it is not our function to relegislate and set out a rule different from that clearly expressed in the statute. See *In the Matter of Jackson*, 117 N.H. 898, 379 A.2d 832, 835 (1977). As the editorial board comment to section 75-2-302 (copied from the official comment to Uniform Probate Code § 2-302) points out, any potentially harsh results can be avoided by the testator:

To preclude operation of this section it is not necessary to make any provision, even nominal in amount, for a testator's present or future children; a simple recital in the will that the testator intends to make no provision for then living children ... would meet the requirement of subdivision 1(a).

Utah Code Ann. § 75-2-302 editorial board comment (1978).

[7-9] The only relevant words appearing within the confines of Jones's terse will are those "granting" Cameron "to be sole beneficiary" of his estate. There is no mention of Robert by name or by class. Contrary to the conclusion reached by the trial court, we hold that this language is insufficient to rebut the statutory presump-

tion that Jones unintentionally failed to provide for his son in his will. A testamentary disposition of the entire estate is alone insufficient to establish that the omission of a child from a will is intentional. *Crump*, 614 P.2d at 1099. In order to rebut the statutory presumption, the testator's intent to disinherit a child living at the time of the will's execution must appear in strong and convincing language on the face of the will. See *Smith v. Crook*, 206 Cal. Rptr. at 526. The will must either mention the claimant child by name or fairly and clearly express an intention on the part of the testator to exclude the claimant as part of a mentioned group or class. *In re Matter of the Estate of Hilton*, 649 P.2d at 495. See *Estate of Hirschi*, 113 Cal.App.3d 681, 170 Cal.Rptr. 186, 188 (1980); *Estate of Hester*, 671 P.2d 54 (Okla.1983).

Because the statutory presumption against disinheritance stands unrebutted, the trial court erroneously held that Robert was not a pretermitted child under our statute. Accordingly, the judgment and order of the trial court is vacated and the case is remanded for entry of judgment in favor of appellant in accordance with this opinion. We have considered the remaining issues raised by the parties and find them meritless. No costs are awarded.

GARFF and BENCH, JJ., concur.



7. Wellman & Gordon, *supra* note 6, at 373-74. [Uniform Probate Code] Section 2-302 is designed ... to support testamentary intention by mitigating the effects of unintentional

disinheritance. When a living child is omitted from a will, however, it is probable that the omission was intentional.

Id. at 373.

EXHIBIT D

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH, PROBATE DIVISION

In the Matter of the Estate)	
)	
of)	ORDER
)	
HERBERT LEE JONES,)	Probate No. 85-736
)	
deceased)	
)	

The following matters came on for hearing before the Honorable James S. Sawaya of the above-entitled court on January 16, 1990, at 9:00 a.m.: Petition for an Order Confirming the Prior Decision of Formal Probate of the Decedent's Will and for Formal Appointment of Linda Anglesey as Personal Representative; for an Order Decreeing that Robert Lee Jones is a Pretermitted Child as Determined by the Decision of the Utah Appellate Court; for an Order Approving the Final Accounting; and for Discharge of the Personal Representative, and an Amended Counter-Petition for an Order Denying the Personal Representative's Petition for Approval of Final Settlement, an Order Requiring the Personal Representative to Provide an Accounting of all Property,

Including the Property² in the State of California; for an Order Decreeing that Robert Lee Jones is a Pretermitted Heir; for Denying Attorney Fees; for Formal Appointment of Robert Lee Jones as Successor Personal Representative; and for an Order Requiring the Personal Representative to Surrender all Records, Accountings, and other Documents, or Post Bond. Petitioner Anglesey was represented by Richard L. Halliday of the law firm of Neider, Ward, & Hutchinson. Counterpetitioner Jones was represented by R. Stephen Marshall of the law firm of Van Cott, Bagley, Cornwall & McCarthy. Having heard the argument of counsel and having considered the memoranda filed by the parties, and good cause appearing,

IT IS HEREBY ORDERED as follows:

1. That Robert Lee Jones is a pretermitted heir.
2. That the California decree awarding the real property owned by the decedent, Herbert Lee Jones, at the time of his death to Linda Anglesey was wholly invalid and that said property or the proceeds from the sale thereof should be distributed to all the heirs of the decedent.
3. That Linda Anglesey is not removed from her position as Personal Representative.
4. That the Personal Representative, Linda Anglesey is required to post a bond in the sum of one-half (1/2) of the

amount of ~~the~~ the entire estate including the value of all real and personal property or the proceeds from the sale thereof.

5. That the Court reserves its ruling on the Personal Representative's petition to close the estate and distribute the assets and on the Personal Representative's request for attorney's fees.

DATED this ____ day of February, 1990.

BY THE COURT:

James S. Sawaya
District Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Order to be hand-delivered, this 16th day of February, 1990, to the following:

Richard L. Halliday
Neider, Ward & Hutchinson
7050 Union Park Avenue, Suite 420
Midvale, Utah 84047

RS Marshall

EXHIBIT E

FILED: CLERK'S OFFICE
Salt Lake County Utah

JUL 19 1985

1 May 1985

P-85-736

~~H. Dixon HINDS, Clerk of the Court~~
By ~~[Signature]~~ Deputy Clerk

I, HERBERT LEE JONES grant power of ATTORNEY
to my daughter; Linda M. CAMERON, AND TO BE EXECUTOR
AND SOLE BENEFICIARY TO MY ESTATE.

Signed: *Herbert Lee Jones*

Witness *Linda M. Jones* 5/1/85 &

Witness *Don L. Hunt* 5-1-85

MICROFILMED
DATE 7-25-85
BY m Tangles

7/25/85
D. Barber