

1990

In the Estate of Herbert Lee Jones v. : Brief of Appellee

Utah Supreme Court

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Van Cott, Bagley, Cornwall & McCarthy; R. Stephen Marshal; Susan G. Lawrence; Attorneys for Counter-Petitioner/Appellee.

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

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STATEMENT OF JURISDICTION

Jurisdiction of this appeal is conferred on the Utah Supreme Court by Utah Code Ann. § 78-2-2(3)(j) (Supp. 1991).

STATEMENT OF ISSUES

1. Did the Third Judicial District Court err in ruling that a decree allegedly entered by a California Superior Court was invalid with respect to the distribution of decedent's real property located in the State of California when the decedent was a resident of the State of Utah at the time of his death and his last will and testament was probated in the State of Utah? The lower court's order is a conclusion of law and this Court need accord no deference to the lower court's ruling. Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989).

2. Did the Third Judicial District Court err in ruling that the Personal Representative must distribute one-half of all property owned by the Decedent at the time of his death, including all real property owned by the Decedent in the State of California, to the Decedent's son, Robert Lee Jones, who is a pretermitted heir under Utah law? The lower court's order is a conclusion of law and this Court need accord no deference to the lower court's ruling. Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989).

3. Did the Third Judicial District Court err in ordering the Personal Representative to post a bond equal to

one-half of the value of the entire Estate. The lower court's order is a conclusion of law and this Court need accord no deference to the lower court's ruling. Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989).

DETERMINATIVE STATUTES

Utah Code Ann. § 75-1-201(11) "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this code as originally constituted and as it exists from time to time during administration.

Utah Code Ann. § 75-1-201(33) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

Utah Code Ann. § 75-1-301(1)(a) (1) Except as otherwise provided in this code, this code applies to: (a) the affairs and estates of decedents, missing persons, and persons to be protected, domiciled in this state;

Utah Code Ann. § 75-1-302(1)(a) (1) To the full extent permitted by the Constitution of Utah, the court has jurisdiction over all subject matter relating to: (a) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons;

Utah Code Ann. § 75-1-311 Consent to jurisdiction.

By submitting an application for informal probate or appointment or a petition for formal probate, adjudication of intestacy, or appointment the applicant or petitioner subjects himself to the jurisdiction of the court in all matters arising under this code. Notice of any proceeding sought to be maintained against the applicant or petitioner pursuant to his submission to jurisdiction shall be delivered to him or mailed to him by ordinary first-class mail at his address as it is known to the moving party or as listed in the application or petition or as thereafter reported to the court.

Utah Code Ann. § 65-3-605. Demand for bond by interested person.

If bond is excused as provided in Section 75-3-603, any person apparently having an interest in the estate worth in excess of \$5,000, or any unsecured creditors having a claim in excess of \$5,000, may make a written demand that a personal representative give bond. The demand shall be filed with the registrar and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond is required, but the requirement ceases if the person demanding bond ceases to be interested in the estate, or withdraws the demand. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate. Failure of the personal representative to meet a requirement of bond by giving suitable bond within 30 days after receipt of notice is cause for his removal and appointment of a successor personal representative.

Utah Code Ann. § 75-3-703. General duties - Relation and liability to persons interested in estate - Standing to sue.

(1) A personal representative is a fiduciary who shall observe the standard of care applicable to trustees as described by Section 75-7-302. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

(2) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a supervised administration proceeding. Nothing in this section

affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children, and any pretermitted child of the decedent as described elsewhere in this code.

(3) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and courts of any other jurisdiction as his decedent had immediately prior to death.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the order of the lower court which ordered that: (1) Robert Lee Jones is a pretermitted heir; (2) a decree of the California Superior Court in an ancillary probate proceeding was "wholely [sic] invalid" with regard to the California real property of the decedent; (3) the Personal Representative is required to post a bond in the sum of one-half of the amount of the entire estate, including the value of all real and personal property or the proceeds from the sale thereof. (R. 550.)

B. Course of Proceedings Below.

Herbert Lee Jones (hereinafter "Herbert Lee Jones" or the "Decedent") died on July 5, 1985. The Decedent's daughter, Linda Cameron, now known as Linda Anglesey (hereinafter "Linda Anglesey" or the "Personal Representative"), filed a petition to probate his will and to appoint her as personal representative

with the Third Judicial District Court, Salt Lake County (R. 5), which was contested by appellee Robert Lee Jones. (R. 9, 40.) In his objection, Robert Jones claimed to be a pretermitted heir. (R. 40.) The matter was tried on February 10, 1986, before the Honorable Homer F. Wilkinson, who held that the Decedent's Will was valid and that Robert Lee Jones was not a pretermitted heir. (R. 110.) The Decedent's Will was formally probated on April 15, 1986.

Robert Lee Jones appealed from judgment of the trial court. On August 8, 1988, the Utah Court of Appeals vacated the trial court's ruling, holding that Robert Lee Jones was a pretermitted heir and that he was entitled to the equivalent of his intestate share of the Estate. (R. 395; Estate of Jones v. Jones, 759 P.2d 345 (Utah App. 1988).

Subsequent to the trial court's decision but prior to the decision of the Utah Court of Appeals, Linda Anglesey filed a "Petition for Decree Determining Interest in Estate and Entitlement to Distribution" with the Superior Court of the State of California, County of Los Angeles, dated October 8, 1987. (R. 402, Exhibit "A.") Based on the representations in the California Petition and the representations of the Estate's attorney in the California proceeding, the Superior Court of California entered a decree that Robert Lee Jones was not a pretermitted heir. The California Court awarded all of the

Decedent's real property located in California to Linda Anglesey. (R. 402, Exhibit B.)

In September, 1989, Linda Anglesey filed 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 of the Administration of the Estate" with the Third Judicial District Court in Salt Lake County. (R. 416.)

On October 17, 1989, Robert Lee Jones filed an "Objection to Petition for Approval of Final Settlement, Discharge of Personal Representative and closing the Administration of the Estate; and Counterpetition demanding that the Personal representative Give Bond." (R. 429.) Robert Lee Jones also filed an "Amended Counterpetition for Removal of Personal Representative and Appointment of Successor Personal Representative; and Demanding that the Personal Representative Give Bond." (R. 461.)

C. Disposition at trial court.

On October 18, 1989, the probate division of the lower court entered an Order enjoining the Personal Representative from transferring any of the assets of the Estate including the real property located in the state of California or the proceeds from the sale of that property. (R. 473.)

The matter came on for further hearing on January 16, 1990. The lower court ordered that Robert Jones was a pretermitted heir; that the California decree was "wholely [sic] invalid"; that the real property located in the State of California or the proceeds of the sale thereof be distributed to all of the heirs of the Decedent; that the Personal Representative post a bond equal to the value of one-half of the entire estate including all real and personal property owned by the Decedent at the time of his death wherever located or the proceeds from the sale of any such property. (R. 551-52.) It is from this Order that Linda Anglesey appeals.

STATEMENT OF FACTS

Herbert Lee Jones died on the 5th day of July, 1985. At the time of his death, Herbert Lee Jones was domiciled in Salt Lake County. (R. 5, ¶ 3.) On July 19, 1985, Linda Cameron, now known as Linda Anglesey, filed a "Petition for Formal Probate of Will and Appointment of Personal Representative" in the Third District Court, Salt Lake County, State of Utah, Probate Division. (R. 5).

Robert Lee Jones, Decedent's son, filed an "Objection to Petition for Formal Probate and Formal Appointment of Personal Representative; and Counterpetition for Formal Appointment of Special Administration" (R. 9), which was later amended. (R. 40.) In his Amended Objection, Robert Lee Jones

claimed, among other things, that he was a pretermitted heir under the Utah Uniform Probate Code, Utah Code Ann. § 75-2-302(1)(a). (R. 42, ¶ 9.)

At the trial held on February 10, 1986, the Honorable Homer F. Wilkinson of the Third Judicial District Court, Salt Lake County, State of Utah, upheld the validity of the will and held further that Robert Lee Jones was not a pretermitted heir under Utah law. (R. 110-113).

On April 15, 1986, the Third Judicial District Court entered an Order formally probating the document dated May 1, 1985, as the Decedent's Will and appointing Linda Anglesey as Personal Representative. (R. 114-115).

Robert Lee Jones appealed from the judgment of the lower court. (R. 119-120). On August 8, 1988, the Utah Court of Appeals affirmed the validity of the will, but held that, because the statutory presumption against disinheritance stood un rebutted, the trial court erroneously found that Robert Lee Jones was not pretermitted child under Utah Code Ann. § 75-2-302(1)(a) (1978). Estate of Herbert Lee Jones v. Jones, 459 F.2d 345, 350 (Utah App. 1988). The judgment of the trial court was vacated, and the case remanded for entry of judgment in favor of Robert Lee Jones. (R. 393-399).

On October 2, 1986, subsequent to the decision of the Third Judicial District Court and the filing of the Notice of

Appeal by Robert Lee Jones, but prior to the ruling of the Utah Court of Appeals, Linda Anglesey initiated ancillary probate proceedings in the Superior Court of the State of California, County of Los Angeles, by filing a "Petition for Decree Determining Interests in Estate and Entitlement to Distribution." (R. 402, Exhibit A).¹ A copy of the Petition is attached hereto as Addendum A.

In her "Petition for Decree Determining Interests in Estate and Entitlement to Distribution" filed with the California court, Linda Anglesey represented to the California court that the issue of pretermitted heirs had been adjudicated in the State of Utah.

The issue of pretermitted heirs has been adjudicated in the Order of Formal Probate of Will and appointment of Personal Representative filed April 15, 1986 in the State of Utah, County of Salt Lake, the jurisdiction of the domiciliary [sic] estate, attached hereto as Exhibit "A". During the course of this hearing on the Probate Petition in the State of Utah, as evidenced by the Amended Findings of Fact and Conclusions of Law, a copy of which is attached hereto as Exhibit "B", the Utah court specifically determined that the "language of the will without the aid of extrinsic evidence showed the intent of the

¹An uncertified copy of the California Petition is attached as an exhibit to the Personal Representative's "Memorandum in Support of 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," filed in the lower court in the present action. (R. 402.)

decedent to intentionally omit his son, petitioner Robert Lee Jones from the will." (Findings of Fact, page two, paragraph 8). The Utah court further held that, "Had the court considered the extrinsic evidence it heard, that consideration would have reinforced the showing of intent by the decedent to omit his son, petitioner Robert Lee Jones from the will." (Finding of Fact, page three, paragraph 8) The Court then concluded that "The petitioner Robert Lee Jones should take no part of the estate . . ." (Finding of Fact, Page three, Conclusions of Law, paragraph 2)

(R. 402, Exhibit A.)

At the hearing before the California court, a copy of the transcript of which is attached hereto as Addendum B, Linda Anglesey's attorney made the following representation to the California court:

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

(R. 531.)

At the time this hearing was held, the issue of whether Herbert Lee Jones intended to omit Robert Lee Jones from his will had not been conclusively determined and was still on appeal to the Utah Court of Appeals. The Utah Court of Appeals later ruled that the testator did not intend to omit his son, Robert Lee Jones. (R. 398-99.)

Based on the representations in the Petition filed with the California court, California Superior Court Judge J. Kimball Walker entered a "Decree Determining Interests in Testate Estate" in which the court ordered:

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.

(R. 402, Exhibit B.)

The California court also entered a "Decree Settling the First and Final Account and Report of Executor, for its Settlement, for Allowance of Commissions and Fees for Statutory Service, and for Final Distribution" in which the court held:

The holographic will of the decedent set forth LINDA M. CAMERON as his sole heir. Although the decedent did not specifically set forth the disinheritance of his remaining child, it was intention to omit such child, ROBERT LEE JONES, being aware of the existence of such child and being further aware that by the execution of his will that such child would be omitted as to any share of his estate. There are, therefore, no issues of pretermitted heirs.

(R. 402, Exhibit B.)²

²Uncertified copies of the two California decrees are attached as exhibits to Linda Anglesey's Memorandum in Support of her Petition. (R. 402.)

In the "Decree Settling the First and Final Account and Report of Executor, for its Settlement, for Allowance of Commissions and Fees for Statutory Service, and for Final Distribution" the California court awarded to Linda Anglesey "the balance of \$115,355.99 of which \$109,185.99 is in cash and the remainder consisting of unimproved real property located in the County of San Bernadino" (R. 402, Exhibit B.)

In September of 1989, Linda Anglesey filed with the Third Judicial District Court, Probate Division, 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 of the Administration of the Estate" together with a "Summary of Account." The Petition failed to provide that one-half of all of the real property or the cash proceeds thereof owned by the Decedent at the time of his death and located in California be distributed to his son, Robert Lee Jones. (R. at 416-422).

In the "Summary of Account," Linda Anglesey similarly failed to include assets belonging to the estate, including certain real property located in California and the proceeds from the sale of certain real property located in California. (R. 421-422.)

On October 17, 1989, Robert Lee Jones filed an "Objection to Petition for Approval of Final Settlement,

Discharge of Personal Representative and Closing the Administration of the Estate; and Counterpetition Demanding that the Personal Representative Give Bond." (R. 429.) Robert Lee Jones also filed an "Amended Counterpetition for Removal of Personal Representative and Appointment of Successor Personal Representative; and Demanding that the Personal Representative Give Bond." (R. 461.)

On October 31, 1989, the Honorable Kenneth Rigtrup, entered an order enjoining Linda Anglesey from transferring or in any way conveying any interest in the assets of the Estate including the real property located in the State of California or the proceeds therefrom. The hearing on Linda Anglesey's Petition and Robert Lee Jones' Counterpetition was continued to December 6, 1989. (R. 472.) The hearing on Linda Anglesey's Petition and Robert Lee Jones' Counterpetition was again continued at the request of Linda Anglesey to January 10, 1990. (R. 524.)

The hearing on the Petition and Counterpetition was held on January 10, 1990, before the Probate Division of the lower court, the Honorable James S. Sawaya presiding. (R. 546.) No evidence was presented at the hearing, which consisted only of legal argument based on the record before the Court. On February 5, 1990, Judge Sawaya entered a Minute Entry (R. 549), which was reflected by an Order dated February 26, 1990, In its

ruling, the lower court held that the Decree of the California court awarding all of the real property located in the State of California was "wholely [sic] invalid" and ordered that the California real property or the proceeds from the sale thereof should be distributed to all of the Decedent's heirs. the court further ordered the Personal Representative, Linda Anglesey, to post a bond in an amount equal to one-half of the value of all the assets of the Estate wherever located. (R. at 550-552). It is from this Order that Linda Anglesey appeals. A copy of the Order and Minute Entry are attached hereto as Exhibit C.

SUMMARY OF ARGUMENT

The Utah Court of Appeals has held that Robert Lee Jones is a pretermitted heir. As a pretermitted heir, Robert Lee Jones is entitled to his intestate share of the Decedent's estate. Robert Lee Jones' intestate share of the Estate consists of one-half of all of the Decedent's real and personal property, wherever situated, including any real or personal property located in the State of California.

The decision of the Utah Court of Appeals is binding on the parties, including the Personal Representative, Linda Anglesey. The Decree of the California court that awarded all of the Decedent's real property located in the State of California to Linda Anglesey is invalid. It is not res

judicata, is not binding on the parties, and is not entitled to full faith and credit by the Utah courts. Because Robert Lee Jones' interest in the Estate exceeds Five Thousand Dollars, the Personal Representative should be required to post a bond.

ARGUMENT

I.

UTAH COURTS HAVE JURISDICTION OVER ALL A DOMICILIARY DECEDENT'S REAL AND PERSONAL PROPERTY.

The decision of the Utah Court of Appeals is res judicata as to the pretermitted heir issue. A judgment is res judicata as to the parties thereto and the issues therein if the judgment was final, and was entered on the merits, without fraud, by a court of competent jurisdiction. See Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988). There has been no claim that the judgment of the Utah Court of Appeals, in which it was held that Robert Lee Jones was a pretermitted heir, was fraudulently obtained. There is also no contention that the judgment is not final or was not entered on the merits. The Utah courts had both subject matter jurisdiction and personal jurisdiction. The probate division of the lower court followed the decision of the Utah Court of Appeals, as it was bound to do, when it ordered one-half of all the Decedent's property to be distributed to Robert Lee Jones.

A. The Utah Uniform Probate Code
Confers Subject Matter and
Personal Jurisdiction on the Utah
Courts.

The State of Utah adopted the Uniform Probate Code (with modifications) effective July 1, 1977. Utah Code Ann. § 75-1-101 et. seq. (1978 & Supp. 1991) The Utah Uniform Probate Code applies to the estates of decedents who were domiciled in the State of Utah at the time of death. Utah Code Ann. § 75-1-301(1)(a) (Supp. 1991). Any district court of the State of Utah has jurisdiction over all subject matter relating to the "estates of decedents, including construction of wills and determination of heirs and successors of decedents" Utah Code Ann. § 75-1-302(1)(a) (Supp. 1991).

Linda Anglesey repeatedly argues in her brief to this Court that there is authority, which she terms "black letter law," holding that subject matter jurisdiction over the disposition of real property is always vested in the court sitting in the jurisdiction in which the real property is located. She fails, however, to cite even one Utah case which has followed this purported "black letter law." Additionally, she has failed to cite any cases decided under the Uniform Probate Code. In point of fact, she apparently believes that the Utah Uniform Probate Code has any application to this matter, since she advised this Court in her brief that "[t]here

are no Utah statutes determinative of the issues upon appeal before the Court" (Appellant's brief, at 2.)

Even the most widely followed common law rules have no value as precedent in jurisdictions that have codified an alternate rule. The common law has no application in Utah if it is inconsistent with a Utah statute. Utah Code Ann. § 68-3-1 (Supp. 1991). Section 75-1-201(11) of the Utah Uniform Probate Code defines "estate" as "the property of the decedent." Utah Code Ann. § 75-1-201(11) (Supp. 1991). The term "property" "includes both real and personal property or any interest therein and means anything that may be the subject of ownership." Utah Code Ann. § 75-1-201(33) (Supp. 1991).

By adopting the Utah Uniform Probate Code, the Utah Legislature has thus given district courts of Utah subject matter jurisdiction over all of a decedent's estate, including all real and personal property, if the decedent was domiciled in the State of Utah at the time of death. Herbert Lee Jones was domiciled in Utah at the time of his death. Since the filing of Linda Anglesey's original Petition, the Utah courts have had subject matter jurisdiction over all of the property that belonged to Herbert Lee Jones at the time of his death, both real and personal, regardless of where located.

In addition to having subject matter jurisdiction over all of the Decedent's real and personal property, the Utah

courts also have personal jurisdiction over the Personal Representative, Linda Anglesey. The Utah Uniform Probate Code provides that "by submitting . . . a petition for formal probate . . . petitioner subject himself to the jurisdiction of the court in all matters arising under this Code." Utah Code Ann. § 75-1-311 (Supp. 1991). By filing her "Petition for Formal Probate of Will and Appointment of Personal Representative" (R. 5) with the Third Judicial District Court, Linda Anglesey submitted herself to the jurisdiction of the Utah courts. She is bound by the decisions of those courts.

B. The Order of the Probate Court is Consistent with the Decision of the Utah Court of Appeals.

The Utah Court of Appeals, pursuant to the exercise of its subject matter jurisdiction and personal jurisdiction, determined that Robert Lee Jones was a pretermitted heir. Under Utah law, a pretermitted heir is entitled to a "share of the estate equal in value to that which he would have received if the testator had died intestate" Utah Code Ann. § 75-2-302 (1978) (since amended). As discussed above, the term "estate" is defined by the Utah Uniform Probate Code as including all "property" of a decedent. Utah Code Ann. § 75-1-201(11) (Supp. 1991). "Property" includes both "real and personal property or any interest therein." Utah Code Ann. § 75-1-201(33).

Thus, as a pretermitted heir under Utah law, Robert Lee Jones was entitled to one-half of all of the personal and real property owned by the Decedent at the time of his death, including the property in California.

The decision of the Utah Court of Appeals was reached on the merits, without fraud, and was not appealed by Linda Anglesey to this Court. Having failed to raise the issue in the trial court that Robert Lee Jones was not entitled to one-half of the Decedent's real property located in California, she is now barred from raising that issue. See Barnard v. Attebury, 629 P.2d 892, 895 (Utah 1981).

C. Linda Anglesey is Estopped from Denying that Robert Lee Jones is a Pretermitted Heir.

When this action was tried before Judge Wilkinson on February 10, 1986, one of the issues was whether Robert Lee Jones was a pretermitted heir. Neither Linda Anglesey nor her lawyer claimed, at any time, that California law should provide the rule of decision on that issue. In her trial brief filed prior to the trial, Linda Anglesey, then Linda Cameron, argued that Robert Lee Jones was not a pretermitted heir under Utah law. (R. 64-68.) Robert Lee Jones also briefed the issue under Utah law. (R. 85-19.) All of the parties understood at the time of the trial that Herbert Lee Jones primary assets

consisted of real property located in the State of California.³ At no time did Linda Anglesey argue that California law applied in determining whether Robert Lee Jones was a pretermitted heir.

Robert Lee Jones tried that issue before Judge Wilkinson and appealed the issue to the Utah Court of Appeals. Based on the position taken by Linda Anglesey at the trial, he reasonably believed that the decision of the Court of Appeals would be determinative of the issue. It was neither fair nor equitable for Linda Anglesey to claim, in a separate proceeding commenced in a foreign jurisdiction, that the pretermitted heir issue should have been resolved under California law.

Her actions raise a judicial estoppel against her. According to this Court in Condas v. Condas, 618 P.2d 491 (Utah 1980), "[1]t is well settled that a party who has taken a position in prior litigation and has obtained relief on the basis of it cannot maintain the opposite position in another action." Id. at 496.⁴ This Court should hold that, having

³This is demonstrated by the "Summary of Account" filed by Linda Anglesey (R. 421) which shows that Herbert Lee Jones had only \$6,210.00 in the State of Utah when he died. This is in contrast to the sum of \$115,355.99, which the California court distributed to Linda Anglesey in the ancillary proceeding. (R. 402, Exhibit B.)

⁴The Utah Court of Appeals similarly stated in Occidental/Nebraska Federal Savings Bank v. Mehr, 791 P.2d 217 (Utah App. 1990).

(continued...)

litigated the question of Robert Lee Jones' status as a pretermitted heir under Utah law, Linda Anglesey is now estopped from taking the position that California law governs with respect to the Estate's real property in California.

II.

UNDER THE COMMON LAW RULE, ROBERT LEE JONES IS ENTITLED TO ONE-HALF OF THE DECEDENT'S ESTATE.

Linda Anglesey relies on a common law rule that questions relating to intestate succession to interests in land are to be determined by the law of the jurisdiction in which the real property is situated. An important exception to this rule is set forth in the Restatement (Second) of Conflicts of Law § 236 comment a. That comment provides in relevant part:

There may be other states which have an even greater interest [than the state in which the real property is situated] in this question, such as would probably be true of a state where the decedent and all of his heirs were domiciled. . . . [I]t is unlikely that any policy of the state of the situs would be seriously infringed if the distribution upon intestacy of interests in

⁴(...continued)

Generally in legal proceedings a party with knowledge of all the facts will not be allowed to take a position, pursue that position to fruition, and later, with no substantial change in circumstances, return to attack the validity of the prior position or the outcome flowing from it.

Id. at 220 (citation omitted).

local land were to be decided in accordance with the local law of another state.

In addition, the comment further states:

There will be situations in any event where the courts of the situs would look to the local law of some other state to determine questions involving intestate succession to local land. For example, although these courts would usually look to their own local law to determine what categories of persons will inherit upon intestacy, they might look to the local law of some other state to determine whether a given person belongs to one of these categories.

Restatement (Second) of Conflicts of Law, § 236, comment a.

In Estate of Dugesne, 29 Utah 2d 94, 505 P.2d 779 (1973), this Court stated that when the legitimacy of a potential heir is at issue, it would be illogical to determine the heir's legitimacy both under the law of the state in which the decedent owned real property and under the law of the state in which the decedent owned personal property. See Estate of Dugesne, 29 Utah 2d 94, 505 P.2d 779, 781 (1973). This Court refused to apply the law of the state in which the decedent's real property was located to determine whether his illegitimate daughter was entitled to a share of that real property. Once the daughter's status as an heir was determined, the situs state was required to recognize that status. Thus, in Dugesne this Court followed comment a of the Restatement, as discussed above.

In a recent case, the Supreme Court of Idaho addressed the issue of the validity of a California judgment that affected

real property in Idaho. Andre v. Morrow, 680 P.2d 1385 (Idaho 1984). The Idaho Supreme Court, citing approximately ten cases from various jurisdictions, stated that "a personal judgment ordering a conveyance of the property by a party is a valid exercise of a court's power." Id. at 1361. The Idaho Supreme court further stated that "a foreign court has the power to indirectly affect out-of-state property by means of a decree, based on personal jurisdiction over the parties, which determines the parties' personal rights or equities in that property." Id. at 1361 n.2 (emphasis in original).

In her brief to this court, Linda Anglesey cites In re Ray's Estate, 287 P.2d 692 (Wyo. 1955), in support of her position that the law of the situs state governs the disposition of real property located in that state. The facts of Ray's Estate are similar to those before this Court. The decedent in that case was a resident of Nevada at the time of his death. The decedent's Will was admitted to probate in California, Nevada, and Wyoming. The Will did not provide for the decedent's son. The District Court in Clark County, Nevada, held that the son was a pretermitted heir and under Nevada law was entitled to one-third of the decedent's property. Id. at 631. The Supreme Court of Nevada affirmed the district court's ruling. Id. at 632. In an ancillary proceeding before the District Court for the County of Laramie, Wyoming, the son asked

the court to approve the distribution to him of one-third of any of the decedent's real property in Wyoming. The court denied the son's request and excluded him from the distribution of the decedent's Wyoming property. Id. The son appealed the decision to the Wyoming Supreme Court.

This case has no application to the present case since, as discussed above, the Utah Uniform Probate Code specifically provides that Robert Lee Jones, as a pretermitted heir, is entitled to his intestate share of all of the Decedent's property, including real property.

Moreover, the Ray's Estate case does not hold that the issue of whether a child is pretermitted is to be determined by the law of the state in which the property is located. The Wyoming Supreme Court in Ray's Estate affirmed the lower court's ruling but it did so, not because the son was not pretermitted under Wyoming law, but because under Wyoming law a pretermitted child is not entitled to any share of the decedent's estate. The Wyoming Supreme Court thus implicitly recognized the Nevada court's finding that the son was a pretermitted child. The court, after recognizing him as such, then applied its own law in determining the portion of the Wyoming estate to which a pretermitted heir is entitled. As argued above, under Utah law the probate court has jurisdiction over all real property of a decedent, including real property located in other states. But

even if this Court follows the rule in Ray's Estate, it should hold that Robert Jones is entitled to the share to which he would be entitled as a pretermitted heir under California law. Applying the rule which Linda Anglesey claims to be controlling in this matter, a California court would be required to recognize the Utah court's determination that Robert Lee Jones is a pretermitted heir, but would then apply its own law as to what portion of the estate a pretermitted heir receives.

Under California law, a pretermitted heir receives, "a share in the estate equal in value to that which the child would have received if the testator had died intestate." Cal. (Prob.) Code § 6570 & 6572 (1992). A child's intestate share is "equally if all of same degree . . ." Cal. (Prob.) Code § 6402 (1992), which in this case is one half of the decedent's estate.

As discussed above, the Utah courts had both subject matter jurisdiction over the Estate of Herbert Lee Jones and personal jurisdiction over the parties. The status of Robert Lee Jones as a pretermitted heir was conclusively determined by the Utah Court of Appeals, and must be recognized by the courts in California. Linda Anglesey did not appeal the decision of the Utah Court of Appeals. Under California law, a pretermitted heir is entitled to his intestate share which in this case is one half of Decedent's estate. Such disposition is consistent

with the common law rule argued to be applicable in this case by Linda Anglesey.

III.

THE CALIFORNIA STATE COURT DECREE IS NOT RES JUDICATA, IS NOT BINDING ON THE PARTIES, AND IS NOT ENTITLED TO FULL FAITH AND CREDIT BY THE UTAH COURTS.

The United States Supreme Court has stated that, "[f]ull faith and credit thus generally requires every state to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it." Durfee v. Duke, 375 U.S. 106, 109 (1963). In a case originating in Utah, the Tenth Circuit Court of Appeals applied the rule that, "'the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions. . . .'" Braselton v. Clearfield State Bank, 606 F.2d 285, 287 (10th Cir. 1979) (citation omitted).

At the time the California court entered its Decrees, the Utah Court of Appeals had not finally adjudicated the issue of whether Robert Lee Jones was a pretermitted heir. Linda Anglesey, in her Petition to the California court, not only failed to disclose the fact that the decision of the Third Judicial District Court was then on appeal to the Utah Court of

Appeals but her attorney represented to the California court in her Petition that the issue of the Decedent's intent to omit Robert Lee Jones had been determined by the court in Utah. (R. 402, Exhibit B, ¶ 5.) Based on the facts as presented by Linda Anglesey in her Petition, the California court erroneously believed that the pretermitted heir issue had been fully and finally litigated in Utah.

As Personal Representative of the Decedent's estate and a fiduciary, Linda Anglesey owes the Decedent's estate a duty of care. Utah Code Ann. § 75-3-703 (Supp. 1991).⁵ This duty of care required her to disclose to the California court the fact that an appeal was pending before the Utah Court of Appeals. The existence of the Utah appeal was a material fact which Linda Anglesey, as a fiduciary of the estate, had a duty to disclose. If the existence of the Utah appeal had been disclosed, the California court would not have entered an order awarding all of the Decedent's California real property to Linda Anglesey. The Decrees of the California court are not res judicata in Utah. To comply with the full faith and credit clause, the Utah courts must give the California judgment the res judicata effect it would have in California. See Durfee,

⁵A California judgment may be vacated if it is rendered "in ignorance of material facts which [the judge] believes a party had a duty to disclose to him, and which, if known to him, would have caused him to refrain from ordering the judgment." Gordon v. Gordon, 145 Cal. Rptr. 231, 302 P.2d 355, 358 (1956).

375 U. S. At 109. Because the California Decree has no res judicata effect in California, it is not binding on the parties, and the Utah courts do not have to give full faith and credit to the judgment.

IV.

JUDICIAL ECONOMY IS SERVED BY GRANTING THE UTAH COURTS JURISDICTION OVER ALL THE REAL AND PERSONAL PROPERTY OF A DOMICILIARY DECEDENT.

To follow the rule espoused by Linda Anglesey would result in a flood of ancillary probate proceedings which would further clog the already overcrowded court calendars. Any time a decedent died intestate owning real property in a state other than the state of his domicile, the heirs of the decedent would have to be determined in each state in which the decedent owned real property. Otherwise simple probate proceedings could become full-blown trials in as many as fifty states and the same issues would be repeatedly relitigated. If an individual's status as a pretermitted heir or legally adopted child is at issue, issue will have to be litigated in each state in which the decedent owned real property. No court's decision, including the decision of the domiciliary court, would be res judicata in any other state even though the issues would be identical. This would result in the confusing and illogical disposition of the decedent's estate. Such a situation would be

inefficient and a waste of the limited resources of the judicial system.

Linda Anglesey is asking this court to condone such judicial inefficiency. She is asking this court to relinquish its subject matter jurisdiction over the real property of a domiciliary decedent's estate granted to it by the Utah legislature. Such a rule would not benefit the beneficiaries of the decedent's estate but would quickly result in the dissipation of the estate in attorneys' fees. An individual's status as an heir or successor in interest should be determined once, by the domiciliary estate, and that determination should be res judicata in all other states.

V.

ROBERT LEE JONES' INTEREST IN THE ESTATE
EXCEEDS \$5,000.00 AND THE PERSONAL REPRESENTATIVE
OF THE ESTATE SHOULD BE ORDERED TO POST BOND.

Pursuant to Section 75-3-605 of the Utah Uniform Probate Code, any person apparently having an interest in the estate exceeding \$5,000.00 may demand that the personal representative give bond. The date of death value of the estate of the Decedent was estimated to be approximately \$200,000.00. Petitioner Robert Lee Jones, is entitled to receive one-half of the estate. Because Robert Lee Jones has an interest in the estate exceeding \$5,000.00, Linda Anglesey, as the personal representative of the estate of the Decedent, should be ordered

to give a bond in the amount of one-half of the date of death value of all of the real and personal property owned by the Decedent at the time of his death.

CONCLUSION

The decision of the Utah Court of Appeals is a final judgment entered on the merits by a court of competent jurisdiction and, thus, is binding on the parties. Based on the decision of the Utah Court of Appeals, Robert Lee Jones is a pretermitted heir and, under both Utah and California law, is therefore entitled to his intestate share of the Decedent's estate. The intestate share of the Decedent's estate to which Robert Lee Jones is entitled consists of one-half of all of the Decedent's real and personal property wherever situated. The Schedule of Distribution should be amended to reflect this distribution. The Decree of the California court is not binding on the parties and does not control the disposition of any of the Decedent's property. In addition, until Robert Lee Jones receives his share of the estate, the Personal Representative, Linda Anglesey, should be ordered to give bond in the amount of one-half of the date of death value of all of the real and personal property owned by the Decedent at the time of his death.

ADDENDUM

EXHIBIT A - PETITION FOR DECREE DETERMINING INTERESTS
IN ESTATE AND ENTITLEMENT TO DISTRIBUTION
FILED WITH THE CALIFORNIA SUPERIOR COURT

EXHIBIT B - REPORTER'S TRANSCRIPT FROM CALIFORNIA
SUPERIOR COURT

EXHIBIT C - MINUTE ENTRY AND FINAL ORDER OF THIRD
THIRD DISTRICT COURT

DATED this 19 day of February, 1992.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By 

R. Stephen Marshall
Susan P. Lawrence
Attorneys for Petitioner, Robert
Lee Jones
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of February, 1992, I caused to be mailed, postage prepaid, four true and correct copies of the above and foregoing Brief of Counter-Petitioner/Appellee Robert Lee Jones to the following:

Richard L. Halliday, Esq.
Brown, Larson, Jenkins & Halliday
660 South 200 East, Suite, 201
Salt Lake City, Utah 84111

RS Marshall

1 WILFRED E. BRIESEMEISTER
Greenleaf Square, Suite 370
2 7200 S. Greenleaf Avenue
Whittier, CA. 90602
3 (213) 945 6504

4 Attorney for Petitioner
5
6
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES
10

11	Estate of)	NO. SEP 17587
12)	
13	HERBERT LEE JONES,)	PETITION FOR DECREE DETER-
14	also known as HERBERT)	MINING INTERESTS IN ESTATE
	L. JONES,)	AND ENTITLEMENT TO DISTRI-
)	BUTION
15)	Date:
)	Time:
16	Deceased.)	Dept:

17 Petitioner, LINDA M. CAMERON, alleges:

18 1. Petitioner is the Executor of the ancillary estate in
19 California and the Executor of the domiciliary estate in Utah,
20 and is named as the sole beneficiary in the holographic will
21 of the decedent. Petitioner, as sole beneficiary, is entitled
22 to distribution of the entirety of the estate of the above-
23 named decedent.

24 2. HERBERT LEE JONES, aka HERBERT L. JONES, decedent,
25 died on July 5, 1985, in the County of Salt Lake, Utah. Decedent's
26 will was admitted to probate in said County on February 24, 1986
27 and letters testamentary were issued to LINDA M. CAMERON. On
28 October 2, 1986, LINDA M. CAMERON filed her Petition for Probate

1 in Los Angeles County in order to open an ancillary estate in
2 said County as the decedent possessed real property in Los
3 Angeles County. Notice of Death has been duly published
4 and letters testamentary were issued to LINDA M. CAMERON on
5 November 20, 1986.

6 3. The First and Final Account was filed with the
7 above-entitled court on August 28, 1987 and was set for
8 hearing on September 23, 1987. Said hearing has been con-
9 tinued to November 4, 1987 due to questions of distribution
10 to pretermitted heirs, requiring the filing of this Petition.

11 4. Decedent has three living children, to wit: LINDA M.
12 CAMERON, ROBERT LEE JONES and DEBORAH L. J. ALLEN. Deceased
13 also has one deceased child, EVERETT WRIGHT JONES, who died
14 in 1975, and who is survived by a daughter, TERRY HURST.

15 5. The issue of pretermitted heirs has been adjudicated
16 in the Order of Formal Probate of Will and appointment of
17 Personal Representative filed April 15, 1986 in the State of
18 Utah, County of Salt Lake, the jurisdiction of the domiciliary
19 estate, attached hereto as Exhibit "A". During the course
20 of this hearing on the Probate Petition in the State of
21 Utah, as evidenced by the Amended Findings of Fact and Con-
22 elusions of Law, a copy of which is attached hereto as Exhibit
23 "B", the Utah court specifically determined that the "language
24 of the will without the aid of extrinsic evidence showed the
25 intent of the decedent to intentionally omit his son, petitioner
26 Robert Lee Jones from the will." (Findings of Fact, page
27 two, paragraph 8). The Utah court further held that, "Had
28 the court considered the extrinsic evidence it heard, that

1 consideration would have reinforced the showing of intent by
2 the decedent to omit his son, petitioner Robert Lee Jones
3 from the will." (Findings of Fact, page three, paragraph 8)
4 The Court then concluded that "The petitioner Robert Lee Jones
5 should take no part of the estate" (Findings of Fact,
6 page three, Conclusions of Law, paragraph 2) Since Robert Lee
7 Jones was the only child or grandchild to initiate the suit in
8 Utah, all references are to him alone, although said findings
9 could have easily extended to the other surviving child and
10 grandchild.

11 6. Decedent's will states as follows:

12 "I, HERBERT LEE JONES, grant power of ATTORNEY to
13 my daughter, Linda M. Cameron, AND TO BE EXECUTOR
14 AND SOLE BENEFICIARY TO MY ESTATE."

15 The decedent was well aware that he would leave no interest in
16 his estate to his other surviving children and their heirs,
17 which is the reason for his specifically setting forth LINDA M.
18 CAMERON as his "SOLE" beneficiary. The testator's failure to
19 provide for his other surviving children and grandchild was
20 intentional as shown by his designation of LINDA M. CAMERON
21 as "SOLE" beneficiary of his estate. Said will is therefore
22 a clear and distinct bequest to the Petitioner, and there is
23 no issue of pretermitted heirs, and such intention to omit is
24 clearly set forth in the will of decedent.

25 7. The names, addresses and relationships of the heirs,
26 devisees and legatees of the deceased and all persons entitled
27 to notice of the time and place of the hearing of this petition,
28 as far as are known to the petitioner, are:

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<u>Name</u>	<u>Relationship</u>	<u>Address</u>
LINDA M. CAMERON	Daughter	11220 Foxmoor Dr. Sandy, Utah 84092
ROBERT LEE JONES	Son	1257 Calle Cecilia San Dimas, CA. 91773
DEBORAH L.J. ALLEN	Daughter	12081 Himalaya Reno, Nevada
TERRY HURST	Grand- daughter	75 Oakvale Court Oroville, CA. 95966

8. No one has filed request for special notice.

9. Various persons have claimed an interest in the estate of the decedent in the Utah estate, but the rights of persons so claiming an interest in said estate have not been determined by any judgment, order or decree of any Court of competent jurisdiction in the State of California.

WHEREFORE, Petitioner prays that the court determine and declare the rights of all persons to said estate, and all interests therein, and determine to whom distribution of the estate should be made.

DATED: 10-8-87

X Linda M. Cameron
LINDA M. CAMERON

Gloria Bronpfield
Notary Public
711 1/2 Commissioner Express 5-4 71

THOMPSON & WILLIAMS
W. Paul Thompson (3244)
Alan M. Williams (3478)
Attorneys for Petitioner Linda Cameron
9662 South State Street
Sandy, Utah 84070
Telephone: 562-2555

April 15, 1986
H. Dixon
By *[Signature]*
Deputy Clerk

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

IN THE MATTER OF THE ESTATE OF	:	FORMAL PROBATE OF
ROBERT LEE JONES,	:	WILL AND APPOINTMENT
	:	OF PERSONAL REPRESENTATIVE
Deceased.	:	Probate No. P85-0736
	:	Judge Homer Wilkinson

The above entitled matter came on regularly to be heard before the Honorable Homer Wilkinson, one of the Judges of the above-entitled Court, on the 10th day of February, 1986 at the hour of 9:00 o'clock A.M.. Petitioner Linda Cameron appeared personally and by her attorney, Alan M. Williams. Petitioner Robert Lee Jones appeared personally and by his attorneys, R. Steven Marshall and Thomas E. Nelson. Witnesses were sworn and testified; and the issues raised by the objection to Petitioner Linda Cameron's petition were argued by counsel orally and upon trial briefs. The Court having made its Findings of Fact and Conclusions of Law, does hereby ORDER, ADJUDGE, and DECREE as follows:

1. The will of the decedent, dated May 1, 1985, is hereby formally probated.

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2. The objection of the petitioner Robert Lee Jones is denied.

3. Linda Cameron is hereby formally appointed as the personal representative of the decedent, to act without bond.

4. Upon qualification and acceptance, letters testamentary shall be issued to the said personal representative.

Dated this 19th day of April, 1986.

BY THE COURT:

[Signature] ATTEST

Judge

H. DIXON HINDLEY
CLERK

MAILING CERTIFICATE

By [Signature]
Deputy Clerk

I hereby certify that a true and correct copy of the foregoing Formal Probate and Appointment of Personal Representative was mailed to R. Steven Marshall and Thomas E. Nelson, VAN COTT, BAUGLEY, CORNWALL, AND MCCARTHY, P.O. Box 5340, Salt Lake City, Utah 84145-45340, on this 24th day of February, 1986

[Signature]

STATE OF UTAH }
COUNTY OF SALT LAKE } SS
I THE UNDERSIGNED CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK WITNESS MY HAND AND SEAL OF SAID COURT THIS 10th DAY OF September 1986
H. DIXON HINDLEY CLERK
BY [Signature] DEPUTY

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THOMPSON & WILLIAMS
 W. Paul Thompson (308)
 Alan M. Williams (308)
 Attorneys for Petitioner Linda Cameron
 9662 South State Street
 Sandy, Utah 84070
 Telephone: 562-2555

APR 15 1986

H. Dixon
 Deputy Clerk

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

IN THE MATTER OF THE ESTATE OF
 HERBERT LEE JONES,

LETTERS TESTAMENTARY

Deceased.

Probate No. P85-0736

Judge Homer Wilkinson

1. Linda Cameron was duly appointed and qualified as
 General Personal Representative of the estate of the above named
 decedent on the 15th day of April, 1986 by the Court
 with all authority pertaining thereto.

2. Administration is unsupervised.

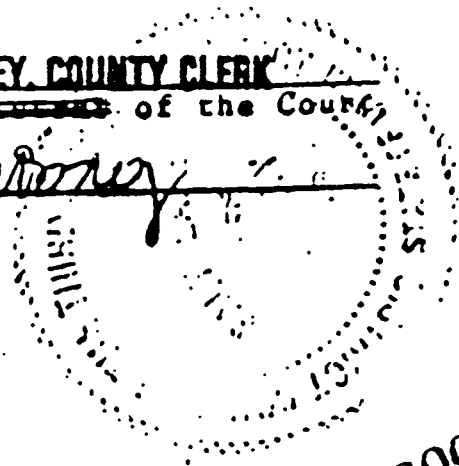
3. These letters are issued to evidence the appointment,
 qualification, and authority of the said personal
 representative.

15th WITNESS, my signature and the Seal of this Court, this
 day of April, 1986.

H. DIXON HINDLEY, COUNTY CLERK
 Clerk of the Court

By: Alvin [Signature]

STATE OF UTAH }
 COUNTY OF SALT LAKE } SS
 THE UNDERSIGNED CLERK OF THE DISTRICT
 COURT OF SALT LAKE COUNTY UTAH, DO HEREBY
 CERTIFY THAT THE FOREGOING IS
 A TRUE AND CORRECT COPY OF AN ORIGINAL DOCU-
 MENT FILED IN MY OFFICE AS SUCH CLERK
 AND IN MY HAND AND SEAL OF SAID COURT
 THIS 15th DAY OF September 1986
 H. DIXON HINDLEY, CLERK
[Signature] DEPUTY



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FINDINGS OF FACT

1. The testamentary instrument to which the petition relates is the decedent's last will.
2. It was executed on May 1, 1985 by Herbert Lee Jones the decedent, in West Covina, California.
3. At the time of the execution, the decedent had the testamentary capacity to make a will.
4. The will was drafted by the decedent's daughter, Linda Cameron.
5. At the time of the drafting of the will, there was no confidential relationship between the decedent and his daughter Linda Cameron.
6. The phrase "and to be executer and sole beneficiary to my estate" was added to an unsigned document on May 1, 1985 by the petitioner Linda Cameron. That phrase was added to the unsigned document in the presence of the deceased and witnesses. The deceased acknowledged and executed the document including the added phrase as his will in the presence of the witnesses, and he and the witnesses executed it in the presence of each other.
7. The making of the will was not procured by the undue influence of any person.
8. The language of the will, without the aid of extrinsic evidence, showed the intent of the decedent to intentionally omit his son, petitioner Robert Lee Jones from the will.

Had the court considered the extrinsic evidence it heard, that consideration would have reinforced the showing of intent by the decedent to omit his son, petitioner Robert Lee Jones from the will.

10. The court finds the other issues made by the pleadings in favor of petitioner Linda Cameron and against the petitioner Robert Lee Jones.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The will of the decedent, Herbert Lee Jones was properly executed and acknowledged by the decedent and the witnesses in each other's presence.
2. The petitioner Robert Lee Jones should take no part of the estate by virtue of the provisions of Section 75-2-302(1), Utah Code Annotated.
3. The will was not procured by undue influence on the part of petitioner Linda Cameron.
4. The objection of the petitioner Robert Lee Jones should be denied.
5. The May 1, 1985 will executed by the decedent should be admitted to probate.

DATED this 15 day of April, 1986.

BY THE COURT:

IN
SALT LAKE }
COUNTY, CLERK OF THE DISTRICT
COURT, UTAH, DO HEREBY
CERTIFY THAT THE ABOVE AND FOREGOING IS A
TRUE AND CORRECT COPY OF AN ORIGINAL DOCUMENT
FILED IN MY OFFICE AS SUCH CLERK
ON THIS 15 DAY OF April 1986
BY CLERK
[Signature]

[Signature]
JUDGE
ATTEST
H. DIXON HINDLEY
CLERK
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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 TRANSCRIPT

November 4, 1987

APPEARANCES:

For the Executor:	WILFRED E. BRIESEMEISTER
	ATTORNEY AT LAW
	7200 Greenleaf Avenue
	Suite 370
	Whittier, California 90602

ORIGINAL

WILLI D. HILL, CSR
Official Reporter

0050

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

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.)

27

28

FEB 26 1990

VAN COTT, BAGLEY, CORNWALL & MCCARTHY
R. Stephen Marshall (2097)
Attorneys for Petitioner Robert E. Jones
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

SALT LAKE COUNTY
By H. P. [Signature]
County Clerk

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

In the Matter of the Estate)
)
 of)
)
 HERBERT LEE JONES,)
)
 deceased)
_____)

ORDER
853900736
Probate No. 85-736

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,

0059

Including the Property 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:

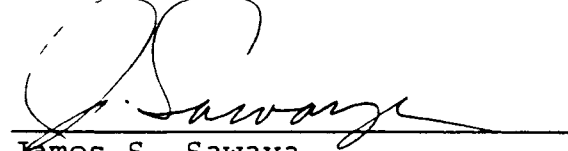
1. That Robert Lee Jones is a pretermitted heir.
2. That the California decree awarding the real property owned by the decedent, Herbert Lee Jones, at the time of his death to Linda Anglesey was wholly invalid and that said property or the proceeds from the sale thereof should be distributed to all the 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 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 26 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