1958

Charles E. Richmond v. Ivie W. Ballard : Brief in answer to Petition for Rehearing

Utah Supreme Court

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In the Supreme Court of the State of Utah

CHARLES E. RICHMOND, Executor of the Estate of WILLIAM B. OUTCALT, Deceased,
Plaintiff and Respondent,

vs.

IVIE W. BALLARD,
Defendant and Appellant.

Case No. 8755

BRIEF IN ANSWER TO PETITION FOR REHEARING

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PRELIMINARY STATEMENT

As a reply to the respondent's Petition for Rehearing, we set forth herein a concise answer to the points raised. A more complete answer may be found in the appellant's Brief heretofore filed and in the opinion of this court.

STATEMENT OF POINTS

POINT I.

MRS. BALLARD'S TESTIMONY PERTAINING TO EXECUTION OF THE DEED IS COMPETENT.

POINT II.

THE EVIDENCE IN THE RECORD COMPELS THE CONCLUSION REACHED BY THIS COURT.

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THE OPINION OF THIS COURT REFLECTS ONLY THE INESCAPABLE CONCLUSIONS COMPELLED BY THE EVIDENCE.

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NEITHER WIGMORE NOR ANY OTHER AUTHORITY WOULD ADMIT EXHIBIT 11.

ARGUMENT

POINT I.

MRS. BALLARD'S TESTIMONY PERTAINING TO EXECUTION OF THE DEED IS COMPETENT.

Counsel for respondent admit that Mrs. Ballard's testimony was properly received yet they complain because the court has given credence to it. At page 4 of respondent's petition it is stated:

"The trial court properly admitted and heard all the evidence on both sides of the case."

Counsel's position is a paradox. On the one hand they state the testimony was properly received and on the other hand it is urged that it is not entitled to consideration. Plaintiff agrees that he waived the incompetency of Mrs. Ballard to testify with regard to circumstances surrounding the execution of the deed. He is certainly in no position, and we do not understand him to argue, that the incompetent exhibit proffered by him and received by the court did not effect a waiver. The offer and admission of evidence, whether competent or not, which it is claimed relates to a privileged transaction constitutes a waiver of the statute, just as would a failure to object. *Anderson v. Anderson,* 136 Wis. 328, 117 N.W. 807.

There was a waiver of the statute by the offer and admission of Exhibit 11. There was also a waiver by plaintiff's examination of Mrs. Ballard as an adverse witness. Respondent's counsel by their questioning of Mrs. Ballard elicited part of the contract made between Mrs. Ballard and the deceased (R. 183-185). This opened the door to proof as to modification of said contract by execution of the deed. Whether the waiver was effected by Exhibit 11 or by the examination of Mrs. Ballard or by both is of little consequence, however. There being a waiver of her disqualification, her testimony is entitled to the same credence as that of other witnesses. It is an established principle of law that:

"Where there is a waiver of the incompetency of the witness to testify as to transactions or communications with decedent, such testimony has probative force, cannot be disregarded, requires no corroboration before

it can be credited, and is to be weighed as other testimony." 97 C.J.S. 737.

See also *Boeltcher v. Busse,* 45 Wash. 2d 579, 277 P. 2d 368; *Farias v. Salas,* 244 S. W. 1115; *In re Schaefer's Estate,* 261 Wis. 431, 53 N.W. 2d 427.

But suppose that there had been no waiver and that Mrs. Ballard was therefore disqualified from testifying as to the circumstances surrounding the execution of the deed. How would this affect the evidence? Respondent has not alleged nor has he introduced a scintilla of evidence to prove that the deed was not executed and delivered by Outcalt. The genuineness of the document is unchallenged. Further, there is not only a total failure of proof of undue influence, but the independent testimony of several impartial witnesses, as pointed out by the court, conclusively refute that allegation.

POINT II.

THE EVIDENCE IN THE RECORD COMPELS THE CONCLUSION REACHED BY THIS COURT.

Point 2 of respondent's Petition for Rehearing begins with the following sentence:

> "The trial court did not believe Mrs. Ballard's version of the manner in which the deed was obtained, and there is ample reason for such determination."

Although counsel state there is "ample reason" for disbelieving Mrs. Ballard's account of the execution of the deed, they have not chosen to state to this court one single reason in support of this broad claim. Instead of bolstering their own case, they have attempted to select, isolate and discredit portions of the

opinion of this court. The fact that one and one-half pages of the petition are devoted to a vain attempt to show that the court erred in hinting at the intent and motives of the Richmonds demonstrates the complete inability of counsel to point to evidence in support of the trial court's judgment.

Counsel complain bitterly because some weight has been given to the December codicil as reflecting the agreement of Outcalt to leave his property to the defendant. This agreement was not only established by testimony elicited by plaintiff's counsel themselves but Outcalt's intentions were clearly established by the independent testimony of his neighbors, the Taylors (R. 200-202, 250-259). Plaintiff's petition does not tell us why the court should ignore the December codicil and the events leading up to it. The court gave credence to this evidence because it was established as factual without dispute and by the uncontradicted testimony of several witnesses.

It is urged by respondent that the court should be suspicious because Outcalt did not tell the world that he had given Mrs. Ballard a deed. This feeble attempt to cast doubt on the execution of the deed is completely obliterated by the undisputed fact that Outcalt did not choose to disclose to the Richmonds and the McConnells either the contract, the December codicil or the olographic will. Why should his private affairs be as an open book to these people?

The opinion of this court reflects a painstaking review of the record and a careful analysis of the facts. Plaintiff's counsel have failed to point to a single sentence in the fifteen page opinion which indicates a departure from or a distortion of the evidence as contained in the record, nor have they sug-

gested any pertinent evidence which has not been fully considered and dealt with.

POINT III.

THE OPINION OF THIS COURT REFLECTS ONLY THE INESCAPABLE CONCLUSIONS COMPELLED BY THE EVIDENCE.

Irrespective of the regard which Dr. Marshall and Mrs. Romney had for Mr. Outcalt, it is simply inescapable from the undisputed evidence that he double-crossed Mrs. Ballard. Counsel have not attempted nor are they able from the record to show that the execution of the olographic will was anything but an unmitigated act of deceit. Likewise the preparation of Exhibit 11 is susceptible of no other reasonable interpretation. It is unfortunate that the evidence which indicates the character of the acts performed by the decedent must be published for all the world to read but this cannot be laid at the door of the court or of the defendant for it was the choice of plaintiff and his counsel to exact the last pound of flesh in attempting to deprive Mrs. Ballard of the fruits of her labor.

Respondent's counsel have lost track of the fact that it is this court's prerogative and duty to weigh the evidence in the record in order to determine where the preponderance lies. It is urged again and again that there was opportunity and reason for suspicion, yet there is no evidence either direct or circumstantial tending to prove the exercise of undue influence. Failing in their proof to show undue influence counsel argue that it must be presumed that Mrs. Ballard exercised undue

influence because she was Outcalt's housekeeper. In support of this proposition the case of *Omega Investment Company v. Woolley* is cited. Counsel fail to mention that the relationship of attorney-client was involved in that case. Their argument on presumptions is completely answered by the green sheet opinion of the court and by the authorities cited at pages 51 to 54 of the Brief of Appellant. In any event this could not be controlling for the defendant's evidence was more than ample to eliminate the effect of any presumption and by no stretch of the imagination could it be said that plaintiff's evidence was "clear and convincing."

POINT IV.

NEITHER WIGMORE NOR ANY OTHER AUTHORITY WOULD ADMIT EXHIBIT 11.

The opinion of this court holds Exhibit 11 incompetent for multiple reasons. Namely, (1) it is irrelevant, (2) it violates the opinion rule, and (3) it is self-serving and hearsay. Referring to the exhibit the green sheet opinion states:

> " . . . It does not purport to relate to the deed or any deed. It does not say that any paper was signed under undue pressure. It does not refer to any specific transaction, it does not specify or refer to any definite time, place, circumstance or person. It has no probative value in proving the fact of undue influence, unless we use it, in violation of the Hearsay rule to show the ultimate fact that other papers may have been signed by him and we guess and single out the deed, Exhibit 1, as one of the papers he had in mind, if he had any in mind."

The Petition for Rehearing completely ignores the fact that the exhibit is irrelevant and in violation of the opinion rule. No attempt has been made either in respondent's Brief or in the Petition for Rehearing to justify admission of the exhibit in view of these rules of evidence. Instead counsel urges that the exhibit is not hearsay and for that reason should be held admissible and given weight. This, of course, is in utter disregard of the careful consideration given by this court to the several objections made to admission of the exhibit. But it is clear that the exhibit is just as squarely opposed to the hearsay rule as it is to the other mentioned rules.

The portion of Wigmore's text quoted by the court fully sustains the proposition that Exhibit 11 is hearsay for the purpose for which respondent's counsel offered it. Notwithstanding the fact that the exhibit was signed more than two months subsequent to the execution of the deed, counsel now contend that the exhibit is competent to show the deceased's mental condition. Their argument, however, fails to consider the inescapable conclusions reached by this court and reflected in the following language of the opinion:

> "Decedent's declaration in Exhibit 11 has no relevancy to the issues unless his declaration is true. As so considered it strikes squarely at the hearsay rule . . . The letter does not disclose the grantor's state of mind as to the grantee. . . . He is not disclosing his mental attitude toward her. Conceded that a statement, oral or in a letter, made by decedent at a time not too remote that reflected his mental attitude toward the grantee or evidenced his view of her intent is admissible. . . . Statements of the grantor tending to show that his mind could be easily influenced and that another person dominated him or attempted to dominate

him are, under proper conditions, admissible for the purpose of showing the condition of his mind at the time he made the statement, but the naked statement of a conclusion that grantor was 'unduly pressured' is inadmissible because it goes solely to prove the ultimate fact, and, does not go to the condition of the grantor's mind at the time of utterance."

In addition to being an irrelevant, self-serving hearsay conclusion of the decedent, the exhibit is squarely opposed to the criteria for admissibility set forth in the *Mower* case. Although counsel contend that these criteria go to the weight of the evidence only, it is clear from a careful reading of the decision that unless the declarations are made fairly and in the ordinary course of life and not in apparent anticipation of litigation, they should not be admitted.

CONCLUSION

The court has committed no error in its application of the law to the facts. The decision reflects the fair and equitable result which the facts of the case require. The Petition for Rehearing is merely a re-hash of issues already correctly decided by this court in its painstaking review of the record. We respectfully submit that the Petition for Rehearing should be denied.

Respectfully submitted,

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