

1990

Georgia J. Russell v. Gene J. Russell, geneil P.
Russell, ADA J. russell and Helen russell Green :
Reply Brief

Utah Supreme Court

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BRIEF

900184

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF)
MERVIN J. RUSSELL,)

Deceased.)

Case No. P-86-052)

GEORGIA J. RUSSELL,)
Plaintiff,)

vs.)

GENE J. RUSSELL, GENEIL P.)
RUSSELL, ADA J. RUSSELL and)
HELEN RUSSELL GREEN)
Defendants.)

Case No. 87-208)

ADA J. RUSSELL, HELEN J.)
RUSSELL, GENE RUSSELL and)
GENEIL RUSSELL, his wife)
Plaintiffs,)

vs.)

GEORGIA J. RUSSELL,)
Defendant.)

Case No. 87-213)

Case No. 90-0184
(Priority No. 16)

REPLY BRIEF OF APPELLANT

Appeal from a jury trial in the Third District Court in Tooele
County, State of Utah, the Honorable Scott Daniels, presiding.

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CLERK SUPREME COURT
UTAH

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Torres v. Oakland Scavenger Co. 487 U.S. 312, 316-317, 108 S. Ct. 2405 101 L Ed 2d 285 (1988).

STATEMENT OF THE CASE

Statments of the case and facts have been adequately set out in the Appellant's original brief.

SUMMARY OF ARGUMENTS

POINT I

The notice of appeal supplies all of the information required in Utah R. APP.P. 3(dD) by identify the petitioner Gene Russell as the Party filing the Notice of Appeal and indicating the appeal is from the verdict of the jury last entered.

POINT II

Appellant's counsel neither voluntarily agreed to the Stipulation nor was the Stipulation correctly given to the jury. This deprived the jury of the opportunity to weigh the expert witness's testimony against that of Georgia Russell.

POINT III

Cases cited by Appellee are not applicable. Appellant timely objected orally to the instructions given.

POINT IV

Appellee's arguments are mis-statements of this casees cited, incorrect grammatically, or mis-statements of the thesis she cited. The Deed - will distinction as to the burden of proof by Appellee Supports appellant's position.

Pursuant to Rule 24(c), Utah Rules of Appellate Procedure, Petitioner-Appellant Gene Russell respectfully submits this Reply Brief.

ARGUMENT

POINT I: THE UTAH SUPREME COURT TAKES JURISDICTION BY THE TIMELY FILING OF THE NOTICE OF APPEAL.

Pursuant to Rule 3, Utah Rules of Appellate Procedure, appellant must file a Notice of Appeal with the clerk of the trial court. Rule 3(d) mandates that the notice must specify the parties taking the appeal, designate the judgment or order appealed from, the court from which the appeal is taken and designate the court to which the appeal is taken. Appellee contends that appellant's notice of appeal fails to comply with this section. However, even though appellant's notice of appeal is less than a model of clarity, the notice includes all the requirements.

No Utah law directly discusses the designation of parties on appeal. Since Rule 3(c) was changed to conform with the federal rule, federal cases can provide some guidance. In Tri-Crown, Inc. v. American Federal S & L Ass'n, 908 F.2d 578, 580 (10th Cir. 1990), the court stated that "[t]he caption of the notice of appeal named each plaintiff specifically and the body of the notice incorporated the caption by reference." The court also noted that the existence of a signature block for

each plaintiff also indicated which parties were appealing.
Id.

Here, the notice of appeal was filed in Case No. P-86-052, the will contest matter. The notice was filed and signed by the attorney for petitioner and plaintiff Gene Russell. Thus, the notice indicates that, at the least, Gene Russell was appealing the verdict of Case P-86-052. In Torres v. Oakland Scavenger Co., 487 U.S. 312, 316-317, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), the court held that although a notice may be technically at variance with the letter of a procedural rule a court may still find compliance if the "litigant's action is the functional equivalent of what the rule requires."

Appellee also cited Nunley v. Stan Katz Real Estate, Inc., 388 P.2d 798 (Utah 1964) as a bar to jurisdiction for failure to designate which judgment has been appealed. In Nunley, unlike here, the judgment referred to in the notice was void. The court refused to accept the appellant's argument that the judgment listed was merely a clerical error and should be corrected to read an earlier judgment. Unlike Nunley, here the last judgment entered is valid and not void.

In Jones v. Nelson, 484 F.2d 1165 (10th Cir. 1973), the court accepted a notice of appeal taken from an order denying a motion for a new trial. The court stated that "[b]y looking behind the form of notice, it is clear the appeal probes the validity of the summary judgment." It followed precedent that an appeal will not be lost for "hypertechnical reasons." Id. citing Cheney v. Moler, 285 F.2d 116 (10th Cir. 1960).

Here, the notice of appeal identified the petitioner Gene Russell as the party filing the notice of appeal taken from the last verdict entered in case no. P-86-052. Such a notice adequately gives jurisdiction to this court.

POINT II: THE ENTRY OF A STIPULATION REGARDING APPELLANT'S EXPERT WITNESS IS HARMFUL ERROR.

Despite appellee's contention that appellant voluntarily entered into the stipulation, at no time in the voir dire of Christine Thornberry does appellant's counsel explicitly agree to the stipulation. On the contrary, counsel objects to being forced into a stipulation. Counsel did not voluntarily agree to stipulate when he respectfully answered the trial court's questions.

Appellee's counsel relies on three cases which differ from these facts because in those cases the stipulations were all reduced to writing by the parties themselves instead of being orally discussed in open court. See, Land v. Land, 605 P.2d 1248 (Utah 1980); Birch v. Birch, 771 P.2d 1114 (Utah App. 1989); Richins v. Delbert Chipman & Sons Co., 817 P.2d 382 (Utah App. 1991). If the stipulation had been reduced to writing, the issues of voluntariness and content of the stipulation would not exist.

The resulting confusion affected the jury's ability to weigh the testimony of an expert witness against the testimony of Georgia Russell who is less than an objective party in this matter.

POINT III: APPELLANT DID NOT WAIVE HIS RIGHT TO APPEAL THE STANDARD OF PROOF.

Appellee contends that appellant waived its right to appeal the issue of the correct standard of proof when he failed to submit a written request for a standard of proof issue.

However, Rule 51 Utah Rules of Civil Procedure requires on that:

. . . If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise objections may be made to the instructions after they are given to the jury but before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection
. . .

Thus, according to Rule 51, appellant needs only to orally object to the instruction and state his grounds for objecting.

Appellee relies on cases that are not applicable to these facts. See Kesler v. Rogers, 542 P.,2d 354 (Utah 1975); Fuller v. Zinik Sporting Goods Co., 538 P.2d 1036 (Utah 1975); Romrell v. W.W. Clyde and Company, 531 P.2d 867 (Utah 1975). In all three cases, the contention was that the court failed to define and instruct on a particular concept. Here, appellant contends not that the court failed to instruct on the standard of proof but taht the court applied the wrong standard of proof.

Even if appellant's objection is inadequate to preserve the issue on appeal, Rule 51, Utah Rules of Civil Procedure, also provides that:

" . . . Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interest of justice, may review the giving of or failure to give an instruction. . ."

This issue is important enough to warrant such review because there is no direct Utah law governing which standard of proof must be placed on the issue of undue influence in a will contest. A decision by this court will affect every case that deals with this issue.

POINT IV: APPELLEE'S ARGUMENT ON THE CORRECT STANDARD OF PROOF IS FLAWED.

A. Appellee confuses the concepts of standard of proof and kind of proof.

Appellee confuses the concept of standard of proof with the kind of evidence required to prove a claim of undue influence. There is no question that the case law requires that undue influence must be shown by "substantial evidence." In re Bryan's Estate, 25 P.2d 602 (Utah 1933); In Re Goldsberry's Estate, 81 P.2d 1106 (Utah 1933); In Re George's Estate, 112 P.2d 498 (Utah 1941); In Re Lavelle's Estate, 248 P.2d 372 (Utah 1952). Appellee claims that substantial evidence relates directly to the standard of proof. Appellee supports this assertion in a number of flawed ways.

First, Appellee claims the court in Anderson v. Anderson, 134 P. 553 (Utah 1913) uses a standard of proof greater than a preponderance of the evidence. However, at no point does the

court discuss a standard of proof nor does Appellee show how Anderson supports such a claim.

Second, Appellee uses a grammatical argument on a section of In Re Buttars, 261 P.2d 171 (Utah 1953). The sentence in question states:

By this evidence the proponents made out a prima facie case entitling the will to be admitted to probate and it then became incumbent on the contestants to prove by a preponderance of evidence that the testatrix did not have a sound and disposing mind at the time she executed the will or that she was acting under fraud, menace or undue influence.

Id. at 172. Appellee's argument that the Buttars Court's reference to preponderance standard only applies to claims of incompetency is illogical.

The grammatical structure of the sentence is "contestant must prove by a preponderance of the evidence that [first point] or that [second point]." By structuring the sentence this way, the author is stating that the party must prove by a preponderance either one or the other point. This is an acceptable grammatical contraction for "contestant must prove by a preponderance that [first point] or the party must prove by a preponderance that [second point]." Appellee's interpretation is correct only if the sentence would have been written "contest must prove that [first point] by a preponderance or that [second point]."

Third, appellee's argument that substantial proof is equivalent to a standard of clear and convincing evidence is rebutted by his own citation to 95 C.J.S. Wills Section 251.

This section states that some authorities require a preponderance of the evidence and some require clear and convincing evidence but all require substantial evidence.

Last, the Utah Supreme Court has required "substantial proof" where the standard of proof was a preponderance of evidence in two cases that are not will contests. Rowe v. Rowe, 365 P.2d 797, 797 (Utah 1961) (" . . . the conclusions of the trial court in a case like this will remain inviolate if supported by a preponderance of competent, substantial and believable evidence . . . "); Piute Reservoir & Irr. Co. v. West Panguitch I. & R. Co., 364 P.2d 113, 116 (Utah 1961) ("It must support a decision in its favor on this question by substantial evidence and it has the burden of convincing the trier of facts by a preponderance of all the evidence that such change. . .").

B. Appellee's own distinctions between will contests and deed contests supports appellant's argument.

Appellee argues that undue influence is undue influence regardless of whether a will or a deed is attacked. Appellee's recitation of the different tests for mental capacity for deeds and wills show the very reason for different standards of proof for undue influence. Appellee is correct in relying on Northcrest, Inc. V. Walker Bank & Trust Cop., 248 P.2d 692, 693 (Utah 1952) for the proposition that an attack on a deed for invalidity must be proved by clear and convincing evidence. An entire line of cases support this point. See Richmond v. Ballard, 325 P.2d 839 (Utah 1958); Bradbury v. Rasmussen, 401 P.2d 710 (Utah 1965); Controlled Inc. V. Harman, 413 P.2d 807 (Utah 1966); Baker v. Pattee, 684 P.2d 632 (Utah 1984) ("A

party attacking the validity of a written instrument must do so by clear and convincing evidence").

Appellee claims that Anderson v. Brinkerhoff, 756 P.2d 92 (Utah Ct. App. 1988) is not a correct statement of law. He fails to explain why it is wrong. In Anderson, a deed was attacked due to the incompetency of the grantor. Since an instrument was being attacked, according to precedent, the standard of proof must then be one of clear and convincing evidence.

Appellee equates undue influence with fraud and reasons that both require the same standard of proof. Even though no Utah case has ever discussed this issue, the majority rule is that fraud in a will contest requires clear and convincing evidence. In re Undziakiewics Estate, 203 N.E.2d 434 (Ill. App. 1964); In re Elias, 239 A.2d 393 (Penn. 1968).

However, despite the obvious similarities there is a very clear cut difference between undue influence and fraud.

Undue influence consists in exerting sufficient pressure or influence upon the testator to break down his will power and overcome his free agency or free will so that he is unable to keep from doing that which he would not otherwise do. Such undue influence need not involve the use of false and fraudulent representations or untrue statements. . . .

Fraud on the other hand need not involve the overpowering of the testator's free agency or will power, though it is by no means impossible that false statements may be so used to harass the testator to the point that he is both tricked and deprived of his will power. The basic ingredient of fraud however is that the testator is deceived through the use of false information, so that his

free will or free agency, of which he is not deprived, is exercised upon the basis of false information.

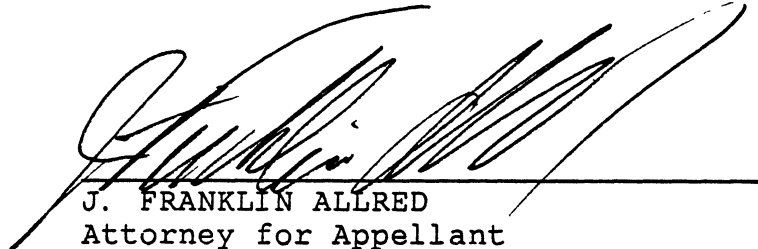
1 Pace on Wills 14.3 at p. 694.

Appellee is also incorrect on a number of small points. Appellee's statement that a will is effective on execution is false. A will is revocable until death and generally does not govern the distribution of property until it is admitted to probate. (Although a will can transfer property without being probated by affidavit, Utah Code Ann. 75-3-120 or by informal probate, Utah Code Ann. 75-3-201 et. seq. Additionally, although third parties can rely on a testator's statement, this is also true of any promise and is unrelated to the recording of a deed which does not include any oral representations.

CONCLUSION

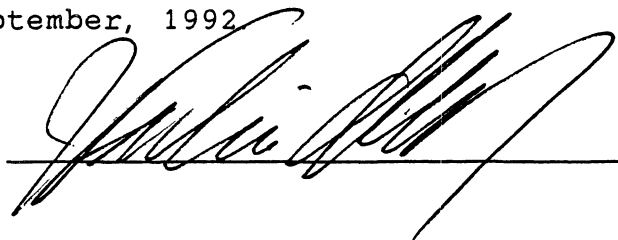
For the foregoing reasons, appellant respectfully requests that the judgment should be reversed in part and the case remanded for new trial.

Respectfully submitted this 30th day of September 1992.


J. FRANKLIN ALLRED
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Reply Brief of Appellant was mailed, postage prepaid, to Wendell P. Ables, 536 East 400 South, Salt Lake City, Utah 48102 on the 30th day of September, 1992.

A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be "Julia P. [unclear]".