

1958

In the Matter of the Estate of Hillard L. Voorhees : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

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

Arthur H. Nielsen; Attorney for Respondents;

Recommended Citation

Brief of Respondent, *State v. Voorhees*, No. 8809 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/3034

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

DEC 19 1958

LAW LIBRARY

IN THE SUPREME COURT
OF THE STATE OF UTAH

FILE

AUG 15 1958

IN THE MATTER OF THE ESTATE

OF

HILLARD L. VOORHEES,
Deceased.

Clerk, Supreme Court, Utah

No. 8809

RESPONDENTS' BRIEF

ARTHUR H. NIELSEN

Attorney for Respondents

510 Newhouse Building

Salt Lake City, Utah

TABLE OF CONTENTS

| | Page |
|---|------|
| INTRODUCTORY STATEMENT | 1 |
| STATEMENT OF POINTS..... | 4 |
| ARGUMENT | 5 |
| POINTS: | |
| I. AT THE TIME THE COURT APPOINTED TRACY-COLLINS TRUST COMPANY AS SUCCESSOR ADMINISTRATOR OF THE ESTATE, APPELLANT DID NOT HAVE A PREFERENTIAL STATUTORY RIGHT TO DESIGNATE THE APPOINTMENT OF AN ADMINISTRATOR | 5 |
| II. REGARDLESS OF WHETHER APPELLANT DID OR DID NOT HAVE A PREFERENTIAL STATUTORY RIGHT TO DESIGNATE AN ADMINISTRATOR, THE COURT DID NOT ERR IN REFUSING TO APPOINT WALKER BANK AND TRUST COMPANY UNDER THE FACTS AND CIRCUMSTANCES AND THE EVIDENCE IN THIS CASE..... | 23 |
| CONCLUSION | 28 |

Cases Cited

| | |
|--|----------------|
| D. E. Prum's Estate v. Soards, 26 Cal. App. 2d 319, 79 P. 2d 414 | 21 |
| Farnsworth v. Hatch, 47 Utah 62, 151 Pac. 537..... | 18, 19, 20, 22 |
| In re Bogert's Estate, 76 Utah 566, 290 Pac. 947..... | 18, 20 |
| In re Connick's Estate, 189 Cal. 498, 209 Pac. 356..... | 20 |
| In re Johnson Estate (1934), 84 Utah 168, 35 P. 2d 305..... | 13, 27 |
| In re Martin Estates (1946), 109 Utah 131, 166 P. 2d 197..... | 13 |
| In re Picot's Estate, 53 Utah 195, 178 Pac. 75..... | 25 |
| In re Pingree's Estate (1929), 74 Utah 384, 279 Pac. 901..... | 13, 27 |
| In re Robison's Estate, 59 Utah 431, 204 Pac. 321..... | 14, 20, 27 |
| In re Somerville's Estate, 12 Cal. App. 2d 430, 55 P. 2d 597..... | 20 |
| In the Matter of the Estate of Eli S. Adkin's (Montana 1957), 319 P. 2d 512 | 22 |

Authorities Cited

| | |
|---|----|
| 50 Am. Jur., STATUTES, Sec. 244..... | 11 |
| Bancroft's Probate Practice (2nd Edition), Vol. 2: Sec. 251, Page 67 | 22 |
| Sec. 314, Page 234..... | 27 |
| 33 C.J.S. 955, Executors and Administrators, Sec. 47 (d)..... | 23 |

Statutes Cited

| | |
|----------------------------|------------|
| 75-4-1, U.C.A., 1953..... | 8, 10, 12 |
| 75-4-4, U.C.A., 1953..... | 11, 10, 12 |
| 75-6-1, U.C.A., 1953..... | 11, 12, 14 |
| 75-6-3, U.C.A., 1953..... | 7, 8, 12 |
| 75-7-1, U.C.A., 1953..... | 24 |
| 75-11-3, U.C.A., 1953..... | 25 |

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE

OF

HILLARD L. VOORHEES,

Deceased.

No. 8809

RESPONDENTS' BRIEF

INTRODUCTORY STATEMENT

This matter is before the Supreme Court by way of an appeal from a so-called interlocutory order, the Court having granted the petition of Pearl O. Voorhees to review an order of the District Court of Sanpete County, State of Utah, appointing Tracy-Collins Trust Company as successor administrator in the above entitled estate. The order involved was made after a hearing by the Court and upon the entry of Findings of Fact and Conclusions of Law, which Findings and Conclusions are not assailed in connection with this appeal.

For convenience, Respondents will use the same designation as Appellant in referring to the various parties and the record.

The statement of facts set forth by Appellant in her brief on file herein are substantially correct. However, Respondents desire to correct what appear to be one or two misleading statements contained in the Statement of Facts. At Page 4 of Appellant's Brief appears the statement that "at the request of Respondents" Walker Bank and Trust Company filed its rejection of appointment as successor administrator. It was not at the request of Respondents that Walker Bank and Trust Company refused to qualify, but on its own initiative that the rejection was filed. The rejection (R. 99) states no reason for refusing to qualify. However, the evidence in the case indicates (and the lower Court so found), that the reason the Walker Bank and Trust Company elected not to qualify was that it did not desire to get involved in litigation which appeared would be necessary to marshal the assets belonging to the estate. (Tr. 117) The further reference on Page 4 of Appellant's Brief to the Order issued by the trial court directing Appellant to appear and show cause why she should not be found in contempt for failing to file her accounting of the estate within the time originally required by the court is not material to this appeal. It is only evidence of the fact that the Appellant in this case had acted without notice to the Respondents in obtaining from the court an extension of time to file her accounting. Respondents were not aware at the time of filing their motion for an Order to Show Cause that the time for sub-

mitting the accounting of Appellant as Administratrix had been extended. Counsel for Appellant had obtained such extension without advising Respondents and without obtaining a stipulation therefor. The failure to file the accounting was not urged at the time of the hearing before the court on December 16th; nor was such failure to file in any way involved in the Court's determination to appoint Tracy - Collins Trust Company as successor administrator.

On Page 5 of her Brief, Appellant states that the order appointing the successor administrator was "modified by the letter of the judge of the Court below dated December 24, 1957." The letter was not a modification of the order dated December 16, 1957, but was a notice to counsel for the respective parties that in entering the order which had been submitted by Respondents herein, the Court had corrected what was obviously a typographical error when it changed the word "partiality" to "impartiality" (R. 117). The Court's letter to counsel (a copy of which appears at Page 165 of the Record) recites that "under date December 23, 1957, I signed and filed Findings of Fact and Conclusions of Law and Order mailed to me by Arthur H. Nielsen with the following qualifications:

"In Paragraph 9 of the Findings, line 3, I changed the word 'partiality' to 'impartiality' to conform with the order entered since the same seemed to be a typographical error and not consistent with the order."

The Court in the same letter indicated that in its oral pronouncement from the bench, as well as in the minutes of the proceedings of December 16th, it had referred to Tracy-Collins Trust Company as Tracy Loan and Trust Company, and therefore that the minutes were being corrected nunc pro tunc to show that Tracy-Collins Trust Company was the name of the successor administrator being appointed.

STATEMENT OF POINTS

Appellant has raised two points to the effect that (1) Appellant had the preferential right to designate the administrator, notwithstanding her resignation or removal; and (2) In any event, the Walker Bank and Trust Company should have been appointed the successor administrator.

Respondents submit that before this Court should consider the matter on the merits, it should determine the issue raised on the Petition for an Intermediate Appeal that an Order appointing an Administrator is not an Interlocutory Order and therefore the Petition should be dismissed. A determination by the Court of this problem will be of great assistance to attorneys in determining what is a final order for purposes of appeal.

In the event this Court should deem it appropriate to consider the matter on the merits, Respondents claim:

1. At the time the Court appointed Tracy-Collins Trust Company as successor administrator of the estate,

Appellant did not have a preferential statutory right to designate the appointment of an administrator.

2. Regardless of whether Appellant did or did not have a preferential statutory right to designate an administrator, the Court did not err in refusing to appoint Walker Bank and Trust Company under the facts and circumstances and the evidence in this case.

These points will be considered in that order.

ARGUMENT

POINT I.

AT THE TIME THE COURT APPOINTED TRACY-COLLINS TRUST COMPANY AS SUCCESSOR ADMINISTRATOR OF THE ESTATE, APPELLANT DID NOT HAVE A PREFERENTIAL STATUTORY RIGHT TO DESIGNATE THE APPOINTMENT OF AN ADMINISTRATOR.

Although the question whether Appellant had a preferential right to designate the appointment of a successor administrator is primarily one of law, we wish to point out that the Findings of the Court below in respect to the facts are not assailed on appeal and are therefore binding and conclusive upon this Court. We call attention to this matter for the reason that Appellant seems to ignore the fact that the following Findings were made by the Court :

“5. From the evidence thus adduced the Court finds that the said Pearl O. Voorhees has failed properly to administer said estate and has neglected to account for property which appears

to belong thereto and has asserted and now asserts adverse interests and claims to the estate.”

“7. Thereafter on the 6th day of December 1957, said Walker Bank & Trust Company filed herein its Rejection of the appointment as Successor Administrator. The Court finds that said Rejection was based upon the ground and for the reason that the said Walker Bank and Trust Company, because of the policy which it has and upon advice of its counsel, did not desire to take affirmative steps to collect assets that might belong to the estate where an adverse claim thereto exists on the part of the said Pearl O. Voorhees; that the said Walker Bank and Trust Company desired only to serve as a “stake holder” and not to act for the best interests of the estate as required by law.”

“9. The Court finds that the said Tracy-Collins Trust Company is in all respects competent to act as Administrator and will act with fairness and impartiality; that in order to prevent further delay which may result in waste or lost to the estate it is necessary immediately to appoint an Administrator; and that there is no legal reason why the said Tracy-Collins Trust Company should not be appointed Successor Administrator.”

“10. By reason of her acts and conduct, and by reason of the Rejection filed by the Walker Bank and Trust Company the request of Pearl O. Voorhees for the appointment of Walker Bank and Trust Company should not be granted if the said Tracy-Collins Trust Company will proceed immediately to qualify.” (R. 116, 117)

These findings being conclusive upon the matter insofar as this appeal is concerned, the question whether

Pearl O. Voorhees is entitled to nominate or designate a succesesor administrator must be resolved by a determination of whether a person otherwise disqualified from acting in the estate by the reason of neglect of the affairs of the estate can nevertheless exercise a preferential right to appoint a successor under the provisions of Section 75-6-3, U.C.A., 1953. This section reads as follows :

“In case of the removal, resignation, or death of one of several Executors or Administrators, the Court, if it deems it necessary, may appoint a successor or may permit the remaining executor or executors, administrator or administrators, to complete the execution of the trust. In case of the death, resignation or removal of all, *the Court shall, upon notice, issue Letters to the person having the prior right thereto, or to any competent person named by the person having such prior right . . .*” (Emphasis supplied)

Appellant’s position as stated on Page 9 of her brief is that the revocation of Letters of Administration “could not constitute a waiver or a legal deprivation of the preferential right of the Appellant to nominate the successor administrator of the estate.” In doing so, Appellant relies upon the italicized portion of the foregoing quotation to the effect that upon removal of an administrator, the Court shall issue Letters to the person “having the prior right thereto, or to any competent person named by the person having such prior right.”

It is Respondents’ position that where a person has lost the right to act as an Administrator because of conduct which is against the interests of the estate, that such

person also loses the right to designate a successor administrator. It is Respondents' further contention that the reference in the italicized portion of Section 75-6-3, quoted above, to "the person having the prior right thereto" is to the next person who would, in the order named in Section 75-4-1, U.C.A., 1953, have the right to be appointed Administrator upon the removal of someone with a more preferential right. Thus, if a surviving husband or wife (who by the last-named section has the first right to be appointed administrator) is removed, then the person having the prior right to appointment as administrator would be the children, and such children would have the right to serve or to designate the administrator to serve, as the case may be.

Appellant apparently takes the position that because Letters of Administration heretofore issued to her were revoked by the trial court upon stipulation of counsel, she did not lose any preferential right for the designation of the appointment of a successor administrator. However, Appellant fails to recognize that in the initial petition filed by Respondents herein, it was alleged that the conduct on the part of Appellant "has constituted a neglect and mismanagement of the affairs of the estate, and a waste of the property of Decedent, so that Letters of Administration to the said Pearl O. Voorhees should be immediately revoked." (R. 30) The Court was requested to issue Letters of Administration to Walker Bank and Trust Company. (R. 29)

At the hearing of this petition, Appellant through her counsel requested the Court to permit her to resign.

Nothing was said at that time to the effect that Appellant claimed a right to nominate a successor administrator. Rather, Appellant acknowledged the right of Respondents to designate such successor by agreeing that the Walker Bank and Trust Company should be appointed. At that time it appeared that the Walker Bank and Trust Company would act with impartiality and aggressively protect the interests of the estate. It was not until later (after counsel for Appellant had consulted with Mr. Mortensen, the Trust Officer of the Bank) that the Bank became concerned and determined that it would rather act in the capacity of a "stake holder." (Tr. p. 132, 133)

Even after Appellant requested permission to resign, the Court commented:

"If she is going to stipulate to her attorney she will resign, that is one thing. Whether the court will force her to is another thing." (Tr. 31)

It was at this juncture that her counsel stated that:

"She is willing to resign, Your Honor, and *consents* that Walker Bank and Trust Company be appointed in her stead." (Tr. 32) (Emphasis supplied)

Although Letters of Administration to Appellant were revoked upon stipulation of counsel rather than upon a hearing and determination by the Court of her failure properly to conduct herself as administrator, nevertheless, under the facts found by the Court after the hearing on December 16, 1957, she had lost her right not only to be appointed an administrator of the estate of her

deceased husband, but also to nominate an administrator to be appointed. Chapter 4 of Title 75 dealing with the issuance of Letters of Administration not only provides to whom Letters of Administration may issue (Section 75-4-1), but also provides who is incompetent to act as an administrator. Section 75-4-4 provides as follows:

“No person is competent or entitled to serve as administrator or administratrix who is either:

“(1) Under the age of majority or an incompetent person; but in such cases letters must be granted to his or her guardian, or, in the discretion of the court, to any person entitled to administration;

“(2) Not a bona fide resident of the state; but if the person entitled to serve is not a resident of the state, he may request the court or judge to appoint a resident of the state to serve as administrator, and such person may be appointed;

“(3) Convicted of an infamous crime;

“(4) *Adjudged by the Court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity; or,*

“(5) The surviving partner of a firm of which the decedent was a member.” (Emphasis supplied)

The trial court by its Findings numbered 5 and 10 (hereinabove quoted) has determined that Appellant is incompetent to execute the duties of trust by reason of her lack of integrity in administering properly the affairs of the estate so that she has no right to be appointed administratrix of the estate under such conditions. Nor does

the above section give her the right to nominate a substitute administrator as it does in the case of persons who are under the age of majority, incompetent persons, or non-residents of the state. Because no provision is made for the recognition of any right of a person adjudged by the court to be incompetent under the provisions of subdivision (4), then under the maxim of *expressio unius est exclusio alterius* it must be concluded that the legislative intent was to preclude such persons from having the right to make a substitute designation. See 50 Am. Jur., STATUTES, Sec. 244.

While Section 75-4-4 provides for the exclusion of persons from appointment to the office of an administrator where such person is incompetent by reason of certain alleged acts, Section 75-6-1 provides for the removal of such an individual as an administrator where it appears that subsequent to his appointment, he has been guilty of "neglect, mismanagement, waste, embezzlement, incompetency," etc.

In the present instance there was no reason initially to suspect that Appellant would not act in the capacity of Administratrix with fidelity and to the best interests of the estate. Subsequent to her appointment, it became apparent by reason of the failure to account to the Court for considerable items of property, which it appeared had belonged to the decedent during his lifetime, that she was not acting for the best interests of the estate, nor was she acting with integrity in connection with the administration thereof. It therefore became necessary for Re-

spondents to file a petition to have her removed and, but for her voluntary resignation, the Court obviously would have had cause to remove her under the evidence in the case. Upon her removal — whether for cause or by stipulation of counsel — she became and was incompetent to designate or nominate a successor administrator under the provisions of Section 75-4-4, and 75-6-1 above referred to.

We submit that upon the removal of an administrator, it is not possible for the Court immediately to reappoint such person upon the alleged theory that such person has a “prior right” to be appointed administrator under the provisions of Section 75-4-1, U.C.A., 1953. Since such person has lost the right to be appointed personally, the person has likewise lost the right to nominate a successor by reason of the provisions of Section 75-6-3, U.C.A., 1953, which provides that the Court shall, upon notice, issue letters to the person having the prior right thereto, or to any competent person named by the person having such prior right. If the person has no prior right to be appointed personally, then such person has no prior right to name a successor. It is only in the case where the person has a right to be appointed himself that he can successfully claim the right to designate someone else in his stead.

The cases cited by Appellant in respect to the exercise of the right to designate an administrator are all cases in which the person designating the administrator had not lost or forfeited any preferential right to be appointed personally as administrator.

In the case of *In Re Pingree's Estate* (1929) 74 Utah 384, 279 Pac. 901, the trial court denied the widow her preferential right to be appointed administratrix which was reversed by this Court, stating that because the trial court had found the widow to be a "competent person to be charged with the administration of the affairs of the estate" it could not deny her right to appointment "in the absence of showing some good and sufficient reason to the contrary." In the instant matter the trial court has not only found that Appellant is not a competent person to be charged with the administration of the affairs of the estate, but it has also found good and sufficient reason why neither she nor the Walker Bank and Trust Company (subsequently designated by her) should be appointed.

Again in the case of *In Re Johnson Estate*, (1934) 84 Utah 168, 35 P. 2d 305, the Supreme Court affirmed the right of a widow to be appointed administratrix of the estate of her deceased husband "as a matter of right, in the absence of showing some good and sufficient reason to the contrary."

The case of *In Re Martin Estates* (1946) 109 Utah 131, 166 P. 2d 197, is not in point because it involves a situation where a married daughter nominated an administrator of the estate when by statute she was not permitted to act because of her marital status. There the Court said:

"Even though the statute declares them to be incompetent to administer an estate, infants and incompetents, through guardians, and non-resident heirs may exercise the right of nomination under the statute."

The Court went on to place a married woman in the same category as infants and incompetents and authorized her to nominate an administrator, although she herself could not serve because of her marital status. Obviously, this case does not have any bearing upon the issues before the Court now for the reason that we are not concerned with the marital status which disqualifies the party from acting, but neglect, and other conduct on the part of Appellant which made her incompetent to serve as Administratrix.

Though our Supreme Court has never passed on the precise issue presented by this appeal, it has nevertheless been called upon to consider the sufficiency of evidence to justify the trial court in removing an administrator of an estate under the provisions of Section 75-6-1, hereinbefore quoted. In the case of *In Re Robison's Estate*, 59 Utah 431, 204 Pac. 321, the surviving widow had initially petitioned for the appointment of a nephew as administrator of the estate of her deceased husband. Following the filing of the Inventory and Appraisement by the administrator certain heirs petitioned the court for revocation of Letters of Administration because the administrator had "wrongfully and unlawfully left out of the said inventory and appraisement certain property belonging to the estate." The petition further alleged that the administrator had permitted the widow to have possession of certain property which in truth and in fact belonged to the estate. At the close of the testimony offered in support of the petition seeking removal of the administrator, the trial court granted a motion for non-

suit from which the heirs appealed. In reversing the lower court and remanding the matter for further evidence and determination, the Supreme Court held that the evidence submitted was such as to require the trial court to determine the sufficiency thereof on the merits. The Court went on to point out that it was the duty of the administrator to make and return to the Court a true Inventory and Appraisement of all of the estate which has come to his possession or knowledge. The fact that the administrator had permitted the widow to obtain possession of certain property without taking any action in respect thereto was sufficient evidence to require the lower court to "hear any testimony offered on the part of Respondent, if any was offered, or, if none were offered, to make Findings of Fact upon the testimony before it." The Supreme Court stated that the ruling of the lower court on the motion for non-suit had to be considered in connection with the legal effect of such a motion, and in that light the court was clearly wrong in granting the motion for non-suit.

Except for the amount of property which has not been reported, the facts in the instant matter might to some extent be said to be analogous to the facts in the Robison Case. Here, Appellant originally filed an Inventory and Appraisement which listed property and assets of the approximate value of \$10,000.00. Within a few days after the filing of the petition by Respondents to have Appellant removed as administratrix, a supplemental inventory was filed in which Appellant acknowledged that the decedent owned an undivided one-half in-

terest in a partnership between himself and his brother Henry Voorhees, and further that such partnership owned certain equipment which the inventory listed, and which was appraised at approximately \$2,400.00. What the supplemental inventory failed to do, however, was to report that shortly before the death of the decedent, Mrs. Voorhees received from the partner, the sum of \$5,186.25 which she deposited in her own name in the bank under "sheep account." (Tr. 8) The amount of this deposit is shown on Exhibit 1 in evidence. (R. 55) In her testimony, Mrs. Voorhees admitted that her husband was, during his lifetime, engaged in a partnership operation with his brother, Henry. (Tr. 7) Subsequent to the initial deposit of \$5186.25 which Mrs. Voorhees had received from the other partner (and in connection with which there was no testimony that this money had ever been given to her by her husband), she received an additional sum of \$2,441.34 on or about July 16, 1956 (eight days before her husband's death). This amount represented one-half of the incentive payment made to the partnership by the Commodity Credit Corporation on account of wool sold during the preceding year and would therefore obviously belong to her husband and not to Mrs. Voorhees (Tr. 17). See also Exhibit 2. (R. 56) Appellant also retained cash in the amount of \$10,100.00 which was in the home at the time her husband died, together with other amounts paid to her husband on indebtednesses owing to him. (Exhibit 12, R. 84) Exhibit 3 reveals that during the time the sheep account remained active in the Manti City Bank (which account was opened up by Appellant in the name of Pearl O. Voorhees, or Beverly D. Clyde, or Betty V.

Hayward), in excess of \$35,000.00 was deposited, all of which, according to the testimony, came from money or property or other assets which had belonged to decedent during his lifetime.

In addition thereto, Appellant claims title as against the estate to a considerable amount of real property as well as to the personal property consisting of the interest in the sheep belonging to the partnership, and all other interests of the decedent in the partnership other than to the personal equipment listed in the supplemental inventory.

It is further significant to point out that even after the hearing on the petition to have Mrs. Voorhees removed as administratrix, and on or about the 10th of January, 1958, Mrs. Voorhees filed a further supplemental inventory and appraisal in which certain additional property was listed as belonging to the estate. (R. 157) Part of the property listed therein was property which Petitioners in their original petition alleged was not accounted for by Appellant and had been wrongfully retained by her.

This evidence, in the light of the decision of this Court in the Robison Case, *supra*, to the effect that “District Courts are, and as a matter of necessity must be, given a wide discretion in the conduct of estates, and should not be limited or restricted unnecessarily” certainly justified the decision of the trial court in appointing the Tracy-Collins Trust Company as the successor administrator to Appellant herein.

In a later case, *In Re Bogert's Estate*, 76 Utah 566 290 Pac. 947, this Court, again reiterating that the lower court has large discretion in determining whether an executrix should be removed, affirmed a decision of the lower court removing the executrix who claimed money apparently belonging to the estate. In so doing, the Court stated:

“As has been seen, our statute gives the court power to revoke the letters of any executor or administrator for neglect, mismanagement, waste, incompetency, incapacity, or for any other reason deemed sufficient by the court. The Court appointing an administrator or executor has a very large discretion in determining whether, upon the facts presented, the officer shall either be removed or suspended, and unless it appears that such discretion has been abused, the action of the trial court will not be disturbed on appeal. *Farnsworth v. Hatch*, 47 Utah 62, 151 P. 537; *In re Newell's Estate*, 18 Cal. App. 258, 122 P. 1099.”

The Court cited the earlier case of *Farnsworth v. Hatch*, 47 Utah 62, 151 Pac. 537, where the Court discusses the authorities on the subject as follows:

“Upon the other hand, counsel for the appellants refer us to cases in which the courts have removed administrators or executors upon the ground that their interests conflicted with those of the estates they represented. Among the cases cited upon that subject are the following: *In re Gleason's Estate*, 17 Misc. Rep. 510, 41 N. Y. Supp. 418; *Marks v. Coats*, 37 Or. 609, 62 Pac. 488; *Putney v. Fletcher*, 148 Mass. 247, 19 N.E. 370; *Mills v. Mills*, 22 Or. 210, 29 Pac. 443; *Kellberg's Appeal*, 86 Pa. 129-133; *In re Wallace*, 68 App. Div.

649, 74 N. Y. Supp. 33. In *Marks v. Coates*, supra, the Court, in passing upon the question, says :

“ ‘One whose personal interests are in conflict with his duty as administrator is not a proper person to hold the office.’

“In *Putney v. Fletcher*, supra, the Supreme Court of Massachusetts, in the course of the opinion, said :

“ ‘An executor or administrator is deemed unsuitable when he has any conflicting personal interest which prevents him from doing his official duty.’

“To the same effect are the other cases last above cited. In the very nature of things such must be the law. The old proverb, ‘No man can serve two masters,’ or, as the Spanish put it, ‘He who has two masters to serve must lie to one of them,’ is as true now as it ever was, and is as applicable in the administration of estates as elsewhere. Indeed, in such matters courts should be very careful to prevent the claimants or creditors from passing upon their own claims, where such claims are being contested. *In the nature of things it is not possible for any one to act with perfect impartiality and fairness in a matter in which he claims valuable and important interests.* That fact is universally recognized, and especially in our courts of justice, and the only reason that it is not always strictly applied is because it is impractical to do so.” (Emphasis supplied)

In the *Farnsworth Case*, the action of the lower court in refusing to revoke Letters of Administration was reversed, the Supreme Court stating that under all the facts and circumstances the “lower court should at least

have requested Respondent to surrender the office of executrix, and upon her refusal to do so, should promptly have removed her from office.” The Court further stated that under all the facts and circumstances it appeared “that it would be quite proper for the court to appoint some suitable and proper person, and one who is satisfactory to the parties in interest, if possible to do, to act in place of the Respondent.”

If, as is reflected in the decisions of the *Robison*, *Farnsworth* and *Bogert Cases*, supra, the conduct of Appellant in this case was such as not only to justify, but require the Court to request her to resign or to remove her for cause, then it is Respondents’ contention that Appellant has lost any right to designate her successor.

Certainly, the right of a nominee to be appointed Administrator of an estate is no greater than the right of the nominor to be personally appointed administrator. Such is the ruling of the California Court *In re Somerville’s Estate*, 12 Cal. App. 2d 430, 55 P. 2d 597, where the Court said:

“A relative is entitled to priority in appointment only when entitled to succeed to the estate or some portion thereof (Probate Code, Sec. 422); and a nominee as such can have no greater right than the person entitled. (In re Estate of Myers, 9 Cal. App. 694, 100 P. 712; In re Estate of Connick. 189 Cal. 498, 209 P. 346.)”

In the Case of *In re Connick’s Estate*, 189 Cal. 498, 209 Pac. 356, the Supreme Court of California held:

“The effect of these decisions is not only to destroy that portion of appellant’s contention that the nominee of a person other than the surviving husband or wife entitled to administer gains thereby an absolute and irrevocable right to seek such administration which cannot be affected by the subsequent change in the status of the nominor; but it would also seem to follow logically therefrom that the right of such nominee to receive the appointment as administrator must be determined by the state of facts existing at the time such appointment is to be made, and if at such time the nominor has either rightfully withdrawn his nomination or has become himself for any reason incompetent or no longer entitled to be appointed such administrator, the right of his nominee to receive such appointment must also be held to have ceased.”

In that case the nominee had been nominated by a person who had the prior right of appointment but the nominor had thereafter died. The nominee claimed her appointment as administratrix should nevertheless be enforced. But the Court held that since the nominor’s right to be appointed himself had lapsed, so likewise had his right to designate a successor.

In the case of *D. E. Prum’s Estate v. Soards*, 26 Cal. App. 2d 319, 79 P. 2d 414, the Court held in determining the right of a nominee to be appointed Administratrix of the estate, that such nominee, insofar as any adverse interest to the estate is concerned, must be treated as standing in the same position as the nominor. Thus in the instant case, if the Walker Bank and Trust Company is to be considered to be the nominee of the Appellant, it

must be considered to have the same adverse interests to the estate, which its nominor Appellant has, and therefore disqualified to act.

A very recent case which presents a very similar situation to the one here involved is that of *In the Matter of the Estate of Eli S. Adkins* (Montana 1957), 319 P. 2d 512, where the Montana Supreme Court (in interpreting a statute very similar to ours granting the surviving wife, or "some competent person whom she may request to have appointed" the prior right to administer the estate of the deceased husband), after reviewing the authorities, including the Farnsworth Case, *supra*, concludes as follows:

"These cases announce the rule applicable here, and condemn the appointment of the widow, or one whom she might nominate."

A good statement on the matter is contained in *Volume 2 of Bancroft's Probate Practice, 2nd Edition, Section 251, Page 67*, as follows:

"While, in limine, the surviving spouse has an absolute right to nominate, once she accepts letters in her own name the right to nominate another is waived. *In case of removal for misconduct or because of an assertion of rights adverse to the estate, the surviving spouse of the decedent, who has been acting as representative, by having accepted letters in her own name has waived her right to nominate another; and, furthermore, she should not be permitted to nominate a successor by reason of the probable bias of her nominee in favor of her adverse claim.*" (Emphasis supplied)

POINT II.

REGARDLESS OF WHETHER APPELLANT DID OR DID NOT HAVE A PREFERENTIAL STATUTORY RIGHT TO DESIGNATE AN ADMINISTRATOR, THE COURT DID NOT ERR IN REFUSING TO APPOINT WALKER BANK AND TRUST COMPANY UNDER THE FACTS AND CIRCUMSTANCES AND THE EVIDENCE IN THIS CASE.

Appellant maintains that even if the Court should determine that she in some manner waived or conducted herself as administratrix so as to lose her preferential right to nominate a successor, nevertheless, the Walker Bank and Trust Company by its attempted withdrawal of its rejection of appointment (R. 114) should have been permitted to qualify as the administrator. However, the authority cited by Appellant in support of this proposition does not in fact do so. *Section 47 (d) of Volume 33, C.J.S. on Executors and Administrators* states that “the question of permitting a retraction is committed to the sound discretion of the Court. *Generally speaking, however, retraction should not be permitted while proceedings for appointment of another are pending.*” (Emphasis supplied)

Here we have a situation where, at the time of the attempted retraction, proceedings were pending for the appointment of another administrator. The attempted retraction does not state any reasons for desiring to retract except that the bank has “had an opportunity to more fully consider its actions with reference” thereto. Mr. Mortensen in his testimony on that matter stated as follows:

“Mr. Nielsen correctly stated to the court, his statement awhile ago, the circumstances as they came about between Mr. Nielsen and the Bank and between a daughter of the decedent and the Bank. When I, after I had talked to Mrs. Hayward I felt that I couldn’t make commitments that would be satisfactory to her and rather than to have any dissatisfaction on the part of some of the heirs that I just preferred to step aside for someone else. *But I later found that Mrs. Voorhees thought that we ought to accept and if she had any prior right of appointment that she had some say about it also.* So I decided that stepping aside wasn’t going to solve all the problems of this estate anyway. They seemed to increase rather than decrease. So I decided that maybe we could render the estate a service by qualifying, withdrawing the previous objection. And for that reason I have decided that if the court sees fit to appoint us to take the estate we will do the best job that we can.” (Tr. 129) (Emphasis supplied)

It is therefore readily apparent that the Bank sought only to take advantage of what it understood (apparently from Appellant’s counsel) was the preferential right of appellant to nominate the administrator. Even under such circumstances, the retraction of its previous rejection was conditioned upon the court seeing fit to appoint the bank to take the place of Mrs. Voorhees. The Court did not see fit to appoint the bank, because as the court found, the bank had a policy against involving itself in litigation which might be necessary for the best interests of the estate.

Under the provisions of Section 75-7-1, U.C.A., 1953, an administrator “must make and return to the court . . .

a true inventory and appraisement of all of the estate of the decedent which has come to his possession or knowledge.” Likewise, Section 75-11-3 provides that the administrator “is entitled to, and must take possession of, all the real and personal estate of the decedent, and shall receive the rents and profits of the real estate until the state is settled or delivered over by order of the Court.”

Under this latter quoted section, the Court has held that it is ordinarily the duty of every administrator to ascertain and defend the property and rights of the estate as against any adverse claimant. *In re Picot's Estate*, 53 Utah 195, 178 Pac. 75. The Picot Case illustrates very pointedly the problem which results from an administratrix asserting adverse claims to the estate. There the wife of the decedent on being appointed administratrix filed an inventory, the appraisement of which amounted to approximately \$25,000.00. Based upon this inventory the Court fixed the amount owing the State of Utah for inheritance taxes. Later the State Treasurer set up that the decedent owned at the time of his death, certain notes and mortgages which he had purported to assign, but which assignment was not effective. That as a result thereof, the estate should have included such notes and mortgages of the reasonable value of approximately \$280,000. The trial court upon hearing the matter determined that the administratrix, to whom the assignment of the notes and mortgages had purportedly been made within a day or two prior to the death of decedent, had failed to report said property as a part of the assets of the estate when in truth and in fact it belonged there, because said assign-

ment had not been completed at the time of the death of the decedent. From an order of the court including these assets in the estate, the administratrix appealed. The Supreme Court in noting such appeal stated:

“We remark that the appeal in this case presents a somewhat anomalous situation. Here the administratrix of the estate appeals from a judgment which is most favorable to the estate, in that by the judgment the assets of the estate are increased to the extent of more than \$280,000.”

The Court went on to state:

“Ordinarily, it is the duty of every administrator to ascertain and to defend the property and rights of the estate as against any adverse claimant.

“If, therefore, the legality of the assignments of the notes and mortgages were merely doubtful, the administratrix should at least have obtained the judgment of the court respecting their legality, and should not have determined that question for herself. If, therefore, the administratrix represents the estate on this appeal she manifestly is not serving the best interests of the estate, but is defending her own interests as against the estate.”

In the light of the testimony of Mr. Mortensen, the trial court found “that the Walker Bank and Trust Company desired only to serve as a ‘stake holder’ and not to act for the best interests of the estate as required by law.” This finding surely should be sufficient to justify the trial court in refusing to allow Walker Bank and Trust Company to withdraw its rejection of appointment, and in any event should justify the trial court in

refusing to appoint the Walker Bank and Trust Company under any circumstances, regardless of the right of Appellant to designate a successor.

This court has always taken the position, even where it has affirmed a right of a person to designate a nominee, that such right is always subject to the condition that the right must be recognized “in the absence of showing of some good and sufficient reason to the contrary.” See *In re Johnson’s Estate*, 84 Utah 168, 35 Pac. 2d 305; *In re Pingree’s Estate*, supra. We submit the evidence in the case, and the Findings of the Court, establish that “good and sufficient” reason why Walker Bank and Trust Company should not be appointed administrator of the Estate.

Finally, we again call the court’s attention to its decision in *In re Robison’s Estate*, supra, to the effect that the probate courts are and, “as a matter of necessity must be given a wide discretion in the conduct of estates.”

A good statement of the responsibility of the appellate court in reviewing an order of the probate court in a matter such as this is contained in *Bancroft’s Probate Practice*, 2nd Edition, Vol. 2, Sec. 314, Page 234, as follows:

“On appeal, moreover, every intendment is in favor of the order of the probate court. Removal of an administrator on a petition charging neglect, incompetency, mingling of property, etc., and *the appointment of a successor for such administrator, should not be disturbed on appeal where the evidence is conflicting and discretion does not appear to have been abused.*” (Emphasis supplied)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the trial court appointing Tracy-Collins Trust Company as successor administrator to Pearl O. Voorhees should be affirmed.

Respectfully submitted,

ARTHUR H. NIELSEN

Attorney for Respondents

510 Newhouse Building

Salt Lake City, Utah