

1958

In the Matter of the Estate of David T. Burraston, Sinda Burraston Wilkinson v. Sarah B. White : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the **FILED**
STATE OF UTAH OCT 20 1958

Clerk, Supreme Court, Utah

IN THE MATTER OF THE ESTATE

of

DAVID T. BURRASTON, also known
as DAVID THOMAS BURRASTON,
Deceased.

SINDA BURRASTON WILKINSON,
Petitioner and Appellant,

SARAH B. WHITE,
Cross-Petitioner and Respondent.

} Case No.
8930

BRIEF OF APPELLANT

GRANT MACFARLANE,
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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	14
ARGUMENT	14
POINT I. THE EVIDENCE DOES NOT ESTABLISH DUE EXECUTION AND PUBLICATION WITHIN THE REQUIREMENTS OF SECTION 74-1-5, U.C.A. 1953, WHERE THE TESTATOR DID NOT DE- CLARE OR ASSENT TO THE EXECUTION OF THE WILL, AND HE DID NOT REQUEST THE WITNESSES TO SIGN AS ATTESTING WIT- NESSES.	14
POINT II. WHERE THERE ARE SUSPICIOUS CIRCUM- STANCES INDICATING UNDUE INFLUENCE, THERE SHOULD BE ADEQUATE PROOF THAT THE TESTATOR KNEW AND UNDERSTOOD THE CONTENTS OF THE WILL.....	23
CONCLUSION	24

AUTHORITIES CITED

CASES

Alexander's Estate, In re, 139 P. 2d 432	15
Amsden's Will, In re, 121 N.J. Eq. 571, 191 A 801	19
Dong Ling Hing's Estate, In re, 2 Pac. 2d 902 at page 909	19
Fiske's Will, In re, (1947, S.U.R.) 69 N.Y.S. 2d 655	20
Hale's Will, In re, 21 N.J. 284 121 A 2d 511, 60 A.L.R. 2d 113....	19

	Page
Lawrence v Lawrence (1951), 35 Tenn. App. 648, 250 S.W. 2d 781	21
Ludlow v. Ludlow, 36 N.J. Eq. 597-599 (E.A. 1883)	19
Moore's Will, In re, 109 App. Div. 762, 96 N.Y.S. 729	20
Roger's Will, In re, (1907) 52 Misc. 12 N.Y.S. 423	22
Sarasohn's Will, In re, (1905) 27 Misc. 635, 95 N.Y.S. 975.....	21
Van Handlyn's Will, In re, (1913) 83 N.J. Eq. 299, 89 A. 1010....	21
Wolcott's Estate, In re, 54 Utah 165, 180 P. 169 at page 170, 4 A.L.R. 727	16

STATUTES

Section 74-1-5, Utah Code Annotated, 1953	9, 13
Section 101-1-5, R.S.U., 1933, (U.C.A., 1943)	15
114 Am. St. Rep. 219	20

TEXT

60 A.L.R. 2nd 124	23
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SINDA BURRASTON WILKINSON,
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SARAH B. WHITE,

Cross-Petitioner and Respondent.

BRIEF OF APPELLANT

STATEMENT OF FACTS

David T. Burraston, also known as David Thomas Burraston, died in the Sevier County Hospital at Richfield, Utah, on March 16, 1958. He was at the time of his death, a resident of Annabella, Sevier County, Utah, and left an estate subject to probate in said County.

On the 7th day of April, 1958, Sinda Burraston Wilkinson filed a petition for probate of a will dated the 21st of October, 1918, and asked that Letters of Administration with Will Annexed be granted thereon to H. D. Kimball, R. 18-19. That thereafter amendments were filed to her petition, R. 1-2. Objections were made to the probate of said will by Sarah B. White on the 8th day of May, 1958, R. 10-11.

On the 15th day of May, 1958, said Sarah B. White filed for probate a document dated October 12, 1943, purporting to be the last will and testament of said David T. Burraston and asked that Letters of Administration with Will Annexed be issued to Myron Hanchett, R. 20-21-22-23-24. Sinda Burraston Wilknsnson filed objections on May 29, 1958, R. 12-13-14-15, to the admission of said will to probate on the ground that the same had been obtained by fraud and undue influence and that the will had not been executed and published in accordance with the Laws of the State of Utah.

After hearing the testimony adduced in behalf of each of said wills and of the objections filed thereto by the adverse parties, the trial court found that both wills had been executed in accordance with the Laws of the State of Utah, R. 148; but that, by the terms of the second will dated October 12, 1943, the first will had been revoked and issued Letters of Administration with Will Annexed to Myron Hanchett, as prayed for in the petition of said Sarah B. White, R. 5-6-7-148-149. From the ruling of the trial court, Sinda Burraston Wilkinson has taken an appeal to this court.

At the time of the execution of the first document dated October 21, 1918, David T. Burraston was living with his wife, Sinda Burraston Wilkinson, in Annabella, Utah. The marriage was consummated in 1897, R. 58; and they continued to live as husband and wife for a period of forty-five years and until a Decree of Divorce was granted to Sinda Burraston Wilkinson in 1942, R. 58-63.

The first document was written entirely in the handwriting of the said David T. Burraston, except the signatures and addresses of the subscribing witnesses, A. B. Nebeker and K. E. Roberts. By the terms of this will, all of his estate, both real and personal, was left to "my dear wife, Mrs. Sinda Burraston." At the trial, the court found that said will dated October 21, 1918, had been properly executed in conformity with the Laws of the State of Utah, R. 148. The handwriting in said document was identified as the handwriting of the decedent, David T. Burraston, R. 55. The handwriting of the attesting witness, K. E. Roberts, was identified as his handwriting by his daughter-in-law, R. 33; and the handwriting of A. B. Nebeker was identified as his handwriting by his daughter, R. 41-43.

The decedent indicated on all occasions his deep love and affection of his wife and always spoke highly of her. John A. Hooper, called as a witness for Sarah B. White, testified as follows: R. 146.

Q. Now, during the times that you saw him in 1943, did you ever discuss his feelings towards his former wife, Sinda Burraston?

A. Well, he brought it up once in a while.

Q. And did he ever speak in other than complimentary terms?

A. Never did.

Carl J. Spafford, a neighbor, testified as follows:
R. 139.

Q. During your conversations, did he ever indicate to you that he held Mrs. Wilkinson in less regard than he formerly did?

A. No, he never did.

Q. Did you have any reason to believe that she was no longer the natural object to his bounty?

Objection.

A. No, I think that he always did, up to the time he died, thought that sometime that they would be reunited, he didn't seem to have any other object. R. 140.

Sarah B. White testified as follows: R. 120.

Q. Did David ever discuss Sindy after their divorce with you?

A. No, he never did, no. He always spoke a good word for Sindy that I have ever heard him.

Q. He always said a good word for her?

A. Yes, he did.

Q. Yes.

A. He never spoke ill of Sindy to my knowledge. R. 121.

Q. Well, when she was mentioned, was that on trips that he made to Goshen?

A. Well, no, a lot of time we would discuss

how Sindy used to dance and how nice she could sing and like of that and we would comment on it.

Q. He was proud of her singing?

A. Sure he was.

Q. Did the time—did you ever visit at her home when she was living with David as his wife?

A. Yes, I was down once.

Q. Did she take good care of him?

A. I thought they both looked pretty darn good.

Q. You think she took pretty good care of him?

A. He did her and she did him.

Lincoln Robinson testified as follows: R. 130.

Q. Did you have any conversation with him in 1950?

A. Yes.

Q. Was that at his home in Annabella?

A. Yes, it was.

Q. And do you remember the conversation?

A. Yes, I do.

Q. Would you relate it please?

A. Well, he complained about being alone, being a very lonely man and disappointed about losing Aunt Sindy, the fact that he had to live alone after living with her for so many years, and thinking so much of her. He seemed to have a very deep devotion for Aunt Sindy, and he said he wanted to build her a home there on the prop-

erty and he took me out to the shed and showed me a pile of lumber that he had hauled down the mountain for the express purpose of building her a home. He said he had been accumulating it over quite a number of years. He still wanted to build Aunt Sindy a home at that time in my opinion. R. 131.

Q. Thereafter did you visit him after 1950?

A. Yes, I did.

Q. Was the lumber still there?

A. It was.

Q. And did he ever mention Aunt Sindy during those visits of yours?

A. Frequently, every time I would go in there her name would come into conversation.

Q. And in what regard did he hold her at that time?

A. He seemed to hold her in very high regard, seemed to have a very deep devotion for her. In fact, so far as I could determine, she was the only one in his life.

Sinda Burraston Wilkinson, R. 61, lived for 45 years with the decedent in a house that had no electric lights or water, had no bathtub; but she always kept the house in good order and her husband well-dressed and groomed. She did all of her own sewing, including the making of shirts for her husband. She made soap and salted down meat for the winter, played at dances to increase the family budget, cut the decedent's hair all during their married life and was generally a dutiful wife and was the natural object of his bounty. R. 62.

The second document dated October 12, 1943, R. 9, was presented for probate by the sister of the decedent, Mrs. Sarah B. White, the sole beneficiary named therein. This document was written in the home of Rex White and Sarah B. White in Goshen, Utah, and is entirely in the handwriting of Rex White, the husband of said sole beneficiary, except the signatures of David T. Burraston, the testator, and William H. Burraston. Rex White and William H. Burraston, brother of the deceased, appear as witnesses. At the time of the execution of this document, the decedent had five sisters and one brother living. One of these sisters, Mrs. Rebecca Jaspersen, was a twin sister to Sarah B. White. By the terms of this document, four sisters and the only surviving brother were disinherited. Sinda Burraston Wilkinson, who had been the wife of said decedent for a period of forty-five years, was not mentioned or provided for in said purported will.

According to the testimony of Rex White, the decedent and William H. Burraston, his brother, came to his home in Goshen, Utah, at about 8:30 on the morning of October 12, 1943. Rex White testified that the following conversations were had: R. 101

A. Well, he came to my house on the 12th of October, 1943, and asked me if I would do some writing for him. I told him I would and so I got a—

Q. Was he staying at your home?

A. No, sir, he was not.

Q. Where was he staying, Mr. White?

A. Well, I think he stayed with his brother Will.

Q. With Will Burraston?

A. I never asked him, but I think he stayed with Will.

Q. Then would you go ahead.

A. And he came to my house and asked me if I would do some writing and I got a piece of paper and he dictated to me a Will and after we got part way down in the Will I questioned him.
R. 102.

Q. Mr. White, I show you what purports to be a Last Will and Testament of David T. Burraston dated the 12th day of October, A. D. 1943, and ask you if you can identify that instrument.

A. Yes, sir, I wrote every line of that, except the persons.

Q. Except the signatures?

A. Except the signatures.

Q. And you were also one of the witnesses?

A. Yes, sir, I was.

Q. To that Will, is that correct?

A. Yes.

Q. Now will you go ahead and tell us just how you happened to be writing it and how it came about on that day?

A. Well, he came to the house and asked me if I would write it and I told him I would and so he dictated it and I wrote it.

Q. Did you write just as he dictated it to you?

A. I questioned him on one part of it, but he said no, I want you to write it just like I tell you. He said I have been in the court several times and he said I know exactly how I want it.

Q. Then did you write exactly as he dictated it?

A. I did.

Q. What part of the Will did you question him about in the dictation he gave you, do you recall?

A. In the place here where he said—subscribed his name at Annabella, Sevier County, Utah, this 12th day of October, A. D. 1943. I questioned him and asked him if he wouldn't like me to put his residence as Annabella that date. R. 103.

Q. I see.

A. And he said, "No, I want you to transcribe it or write it just like I give it to you."

Now while this Will was being written was William H. Burraston in the room at the time it was being written?

A. Yes, sir.

Q. And the Will, then did David Burraston declare this to be his—

Objection.

Q. Would you in regard to the signing of the Will itself could you state what occurred, Mr. White?

A. Well, after writing the Will, why we subscribed our names.

Q. Did you also write this clause which reads as follows: "The foregoing instrument was subscribed at the end thereof by David T. Burraston, who published and declared by David T. Burraston as and for his Last Will and Testament in our presence and in the presence of each of us and we at the same time at his request and in his presence and in the presence of each other hereto subscribed our names and residences as attesting witnesses this 12th day of October, 1943?" Did you write that? R. 104.

Objection.

A. I did.

Q. You wrote that and did you write that at the direction of David Burraston?

A. I did.

Q. And you wrote that as he dictated it: is that correct?

A. I did.

Q. And then was that signed by yourself?

A. Yes, sir.

Q. And then was it signed by William H. Burraston?

A. Yes, sir.

Q. And did David T. Burraston sign in the presence of the subscribing witnesses?

A. Yes, sir.

Q. Now, after that was done, Mr. White, what did you do with the Will? R. 105.

A. Well, he took it and I never did know

what happened to it until they found it in his home here. Never did see it again.

Q. You did not see the Will again after that?

A. No, sir, I never did.

Rex White testified on cross-examination as follows:
R. 107-108.

Q. And will you be good enough to relate the conversation as it began at the door and as it ended when they left please as nearly as you can, what they said and what you said during that period?

A. Well, I don't remember of much of any conversation. He asked me if I'd do some writing for him and I told him I would and I wrote it and then, as I mentioned a little bit ago, sometime ago that I had a water turn to take care of and I couldn't spend much time. I had to leave and go do that irrigating.

Q. And he just asked you if you would do some writing and he dictated this document?

A. Yes, sir.

Q. And then when it was completed why you told him you would have to go to your water turn?

A. That's exactly right.

Q. And that's all that occurred?

A. Yes, sir.

Q. And that's the only conversation that occurred?

A. Yes, sir.

Q. Now had you ever talked to Mr. Burraston about making a Will prior to this time?

A. No, sir, I never mentioned it in my life and he never did to me until that morning.

Q. I see. Were you ever in the company of your wife and others when the making of a Will by David was mentioned by him or any other persons?

A. No, sir.

STATEMENT OF POINTS RELIED UPON

POINT I.

THE EVIDENCE DOES NOT ESTABLISH DUE EXECUTION AND PUBLICATION WITHIN THE REQUIREMENTS OF SECTION 74-1-5, U.C.A. 1953, WHERE THE TESTATOR DID NOT DECLARE OR ASSENT TO THE EXECUTION OF THE WILL, AND HE DID NOT REQUEST THE WITNESSES TO SIGN AS ATTESTING WITNESSES.

POINT II.

WHERE THERE ARE SUSPICIOUS CIRCUMSTANCES INDICATING UNDUE INFLUENCE, THERE SHOULD BE ADEQUATE PROOF THAT THE TESTATOR KNEW AND UNDERSTOOD THE CONTENTS OF THE WILL.

ARGUMENT

POINT I.

THE EVIDENCE DOES NOT ESTABLISH DUE EXECUTION AND PUBLICATION WITHIN THE REQUIREMENTS OF SECTION 74-1-5, U.C.A. 1953, WHERE THE TESTATOR DID NOT DECLARE OR ASSENT TO THE EXECUTION OF THE WILL, AND HE DID NOT REQUEST THE WITNESSES TO SIGN AS ATTESTING WITNESSES.

Section 74-1-5, U.C.A., 1953, provides the manner of execution and attestation of wills as follows:

“Every will, other than nuncupative will, must be in writing, and every will, other than an olographic or nuncupative will, must be executed and attested as follows: (1) It must be subscribed at the end thereof by the testator himself; (2) The subscription must be made in the presence of the attesting witnesses; (3) The testator must at the time of subscribing the same declare to the attesting witnesses that the instrument is his will; and (4) There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator’s request, in his presence, and in the presence of the other.”

Our Supreme Court, speaking through Mr. Justice McDonough, in the case of *in re Alexander’s Estate*, reported at 139 P. 2d 432, in interpreting paragraphs one and two of Section 101-1-5 R.S.U., 1933, (U.C.A., 1943) as to whether or not the testator was required to sign the will in the presence of subscribing witnesses, the court said:

“It is within the province of the legislature to prescribe whatever formalities in the execution of a will which its judgment dictates; and where such formalities are prescribed a failure to comply therewith may not be excused by showing that in a particular case there was no fraud, nor indeed, by demonstrating that a less stringent requirement would as effectively prevent fraud.

“The provisions under discussion is a definite prescription. To attempt to construe it other than literally would amount to a substitution of our judgment for that of the Legislature as to legis-

lative policy. This court in upholding the judgment of the lower court rejecting a proffered nuncupative will, speaking through Mr. Justice Thurman in *re Wolcott's Estate*, 54 Utah 165, 180 P. 169, at page 170, 4 A.L.R. 727, said:

“There is no doubt that the deceased intended the document to be her will, but the right to dispose of property by will is governed and controlled entirely by statute. Such statutes are mandatory, and, unless strictly complied with, the instrument, as a will, is void.

“In either case the instrument cannot be sustained as a will without arbitrarily setting the statute aside and substituting our will for that of the Legislature. This we have no right or power to do, however much as we may appreciate the hardship incident to a strict construction in the present case.”

In the *Alexander* case, the appellant contended that the acknowledgment by the testatrix to the subscribing witnesses that she had previously signed the instrument is equivalent to signing the same in their presence, citing cases, Mr. Justice McDonough, in speaking for the court, said: “However, the statutes construed in those cases did not expressly require that the will be signed in the presence of the subscribing witnesses. As far as our research discloses only New Mexico and Utah have a statutory provision which requires the testator to sign in the presence of the subscribing witnesses. Formerly New Jersey had such a statute, and its courts in construing such statute repeatedly held that unless the will was signed in the presence of the attesting witnesses it was invalid.”

In the case at bar, there is no testimony that the testator requested the subscribing witnesses to sign the will; and there is no declaration by him that this was his last will and testament. The witness, Rex White, testified that the testator requested him to do some writing and then dictated the document which has been presented for probate as the last will and testament of said testator. R. 101-103-104.

Rex White further testified that the other witness was in the room at the time the purported will was dictated but did not testify that after writing the will he read the same aloud so that the testator would know that the purported will had been transcribed as he had dictated the same, nor is there any testimony that even though the other subscribing witness was in the room that he heard the dictation which the testator was dictating to the other subscribing witness, or that he knew the document was a will. R. 100-111.

It is worthy of note that the document in which Rex White acted as scrivener was an exact duplicate with an exception of two or three minor words and the deletion of the words "my dear wife, Sinda Burraston" and the insertion of "my sister, Sarah B. White" as the sole beneficiary in said document.

Rex White testified that the testator dictated this document, evidently from memory, which feat appears impossible to the ordinary person to be able to dictate verbatim a copy of an instrument which was prepared in 1918, twenty-five years before.

Attention of the court is further called to the fact that the will executed October 21, 1918, was entirely in the handwriting of the testator except the names and addresses of the subscribing witnesses and that such document was given to Sinda Burraston Wilkinson, the sole beneficiary and wife of said testator, who lived with him for a period of forty-five years and was certainly the natural object of his bounty.

The second document dated October 12, 1943, was retained by said testator. The effect of said document was to disinherit four sisters and his only brother in naming Sarah B. White sole beneficiary. Testimony indicates that Sarah B. White had only visited her brother three times in sixty years; that when the testator came to Goshen, he stayed in his mother's house while she was alive. When she passed away, when he made trips to Goshen, he stayed with his brother, Will; and upon his brother Will's passing, he stayed with his sister, Mrs. Rebecca Jasperson, R. 89-90, having only stayed one night with Sarah B. White and her family. This indicates that the testator, if the will were actually signed by him, did not know the natural object of his bounty at the time he said document was signed.

It is also noteworthy that the document of October 12, 1943, indicated that the same was signed in Annabella; while in fact, all of the testimony indicates that the document was signed in Goshen, Utah, R. 101.

The New Jersey Supreme Court in a case decided March 26, 1956, in the matter of the probate of the alleged

will of William Hale, Deceased, 21 N. J. 284, 121 A 2nd 511 60 A.L.R. 2nd 113, in interpreting the New Jersey Statute which provides that the requirements for a valid will are as follows: A will to be valid shall be in writing and signed by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will in the presence of two witnesses present at the same time who shall subscribe their names thereto as witnesses in the presence of the testator.

The court held that unless these elements appear in some form or manner, there is no legal significance to devise, pass, or bequeath the estate and property of the testator, citing *Ludlow vs. Ludlow*, 36 N. J. Eq. 597-599 (E. A. 1883). The court further quoting from *in re Amsden's Will*, 121 N. J. Eq. 571, 191 A 801, that: "We have no right to accept anything short of positive proof in conformity with the statutory requirements."

The court further held that:

"Literal compliance with regard to publication means that 'in the presence of 2 witnesses present at the same time' there must be some conscious indication by the testator, unmistakable in its import, that the act he is about to perform is, or the act he has performed was, the signing of his last will and testament."

The Utah Court in speaking through Mr. Justice Folland in the case of *in re Dong Ling Hing's Estate*, 2 Pac. 2d 902 at page 909, said:

"The only evidence with respect to a publication by the testator of the will is the testimony

of Mrs. Levey that when he came to her home with the two witnesses he said he would sign his will. The act of publication is not complete until the attesting witnesses understand from the testator that the instrument they attest is his will. In re Moore's Will, 109 App. Div. 762, 96 N.Y.S. 729; note 114 Am. St. Rep. 219. There is no evidence in the record that these attesting witnesses did so understand."

The procedure set out by the Legislature for the signing and publication of wills is strictly construed as this court has repeatedly held in re Alexander's Estate, Supra, and in re Wolcott's Estate, Supra.

It is clear that the subscribing witnesses signed said will prior to the signature of the testator, and there is no testimony of a request being made of said witnesses to sign other than the dictation of the attestation clause testified to by Rex White. There is no testimony indicating that the attesting witness, William H. Burraston, was ever asked to sign said will as an attesting witness or that he knew the nature of the document he was signing, nor is there any testimony that David T. Burraston, in the presence of William H. Burraston, had declared the instrument to be his last will and testament, R. 100-11.

It was held in re Fiske's Will (1947, Sur.) 69 N.Y.S. 2nd 655 that the requisite statutory publication was not proved where it appeared that the instruments in question were prepared by one of the witnesses, the testatrix referred to them as codicils in a preliminary conversation with the scrivener; that on the occasion of the execution of the instruments the testatrix did not charac-

terize the respective instruments as codicils or wills, nor did he refer to them as such in the presence of the other witnesses; and that the witnesses, other than the scrivener, testified that they had no knowledge of the contents of the paper writings and, in fact, did not know that they were intended to be testamentary dispositions.

Where the scrivener, who was a witness, stated that he did not understand that he was preparing a will but, on the contrary, believed it to be a bill of sale, and the brother of the testatrix, who was also a witness, stated that the word "will" was not mentioned, and the third witness testified to the due publication of the instrument as a will. It was held in *re Van Handlyn's* (1913) 83 N. J. Eq. 299, 89 A 1010, that there was no sufficient publication of the instrument.

Where the nature of an instrument as a will was kept secret from one of the subscribing witnesses, it was held in *re Sarasohn's Will* (1905) 27 Misc. 635 95 N.Y.S. 975, that probate would be refused. The court finding as a fact that the decedent did not at any time declare to the witness that the propounded paper was his will.

Where the surviving subscribing witness testified that the testatrix stated that the document which she signed was her will and requested both subscribing witnesses to sign as witnesses, but in another part of her testimony, she attested that no one told her that it was the will of the testatrix and that she did not know that it was the testatrix's will. It was held in *re Lawrence vs. Lawrence* (1951) 35 Tenn. App. 648 250 S. W. 2d, 781,

that the will would be denied probate on the ground that the testatrix did not signify to the attesting witnesses that the instrument was her will.

The taking of an acknowledgment by a notary public and the witnessing of the signature of the deceased by the scrivener, who was not an attorney, was held in re Roger's Will (1907) 52 Misc. 12, N.Y.S. 423, not a publication of the will where it appeared that neither the scrivener nor the notary pretended that at the time the deceased was asked if the paper was his last will and testament did not request the scrivener and notary to sign as witnesses.

Section 74-1-5, U.C.A., 1953, not only prescribed the manner of execution and attestation of wills but also sets out the order in which the various procedures must be followed: (1) It must be subscribed at the end thereof by the testator himself; (2) The subscription must be made in the presence of the attesting witnesses; (3) The testator must at the time of subscribing the same declare to the attesting witnesses that the instrument is his will; and (4) There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request, in his presence, and in presence of the other.

The order of signing the will which the court admitted to probate is found in the testimony of Rex White, R. 104, in which he testified:

Q. And you wrote that as he dictated it; is that correct?

A. I did.

Q. And then was that signed by yourself?

A. Yes, sir.

Q. And then was it signed by William H. Burraston?

A. Yes, sir.

Q. And did David T. Burraston sign in the presence of the subscribing witnesses?

A. Yes, sir.

This testimony affirmatively shows that the statutory provisions for due execution of a will were not followed. The scrivener signed first as an attesting witness, then William H. Burraston signed as an attesting witness; and then the testator signed.

Our Supreme Court has repeatedly held that this Statute must be strictly construed. In *re* Alexander's Estate, *supra*, in *re* Wolcott's Estate, *supra*, in *re* Doug Ling Hing's Estate, *supra*.

There is no testimony that the subscribing witness, William H. Burraston, knew the nature of the document or that he was requested by the testator to sign as an attesting witness, R. 100-11.

See annotations in 60 A.L.R. 2nd 124.

POINT II.

WHERE THERE ARE SUSPICIOUS CIRCUMSTANCES INDICATING UNDUE INFLUENCE, THERE SHOULD BE ADEQUATE PROOF THAT THE TESTATOR KNEW AND UNDERSTOOD THE CONTENTS OF THE WILL.

The will was written in the home of the sole beneficiary, Sarah B. White, R. 101. It was written in the handwriting of her husband, Rex White, R. 102. Rex White did not read the will aloud after he had transcribed it, R. 104. The testator did not read the will after it was transcribed by Rex White, R. 104. There is no testimony that the subscribing witness, William Burraston, heard the will dictated, R. 100-111. There is no testimony that he was asked to sign as an attesting witness, R. 100-111. The will created the sole beneficiary in the word "my sister, Sarah B. White", R. 9. It disinherited his former wife, who had lived with him for forty-five years and who he had characterized as his sole beneficiary in the terms "my dear wife, Mrs. Sinda Burraston", R. 8.

The testator did not disclose to Sarah B. White that he had remembered her in his will, R. 116. She only visited him two times in sixty years, R. 114. He had only spent one night in his life at her home, R. 115. He disinherited by the will admitted to probate his four sisters and his only brother.

How do we know Rex White wrote what the testator dictated? Only by the testimony of Rex White and he the husband of the sole beneficiary.

Certainly, this is not adequate proof that the testator knew or understood the contents of his purported will.

CONCLUSION

Appellants submit that the purported will of David T. Burraston, dated October 12, 1943, was not executed

and published in accordance with the Laws of the State of Utah and the judgment admitting said will to probate should be vacated and set aside; and the will dated October 21, 1918, should be admitted to probate.

Respectfully submitted,

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