

1958

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

Utah Supreme Court

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Olsen & Chamberlain; Attorneys for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF
THE ESTATE OF
DAVID T. BURRASTON,
also known as
DAVID THOMAS BURRASTON,
Deceased.

SINDA BURRASTON
WILKINSON,
Petitioner and Appellant,

— vs. —

SARAH B. WHITE,
Cross-Petitioner and Respondent

FILED

NOV 25 1958

Clerk, Supreme Court, Utah

Case
No. 8930

BRIEF OF RESPONDENT

OLSEN and CHAMBERLAIN
Richfield, Utah
Attorneys for Respondent

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No. 8930

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The Petitioner and Appellant, Sinda Burraston Wilkin-son, will be referred to as the Appellant and the Cross-Petitioner and Respondent, Sarah B. White, will be referred to as the Respondent.

The Appellant's Statement of Facts is substantially accurate up to and including page 4 of her Brief. There-

after the Appellant isolates certain testimony and matters from the record which present her case in the best possible light even though those portions of the record are disputed and in many cases directly contradicted. The Court, on the other hand, must view all disputed evidence in the light most favorable to the party prevailing below. *Sugar v. Miller*, 6 Utah 2d 433, 315 P. 2d 862.

Testimony not commented upon by the Appellant includes the uncontradicted evidence that at the time of execution of the first document, dated October 21, 1918, and the one on which Appellant bases her case, David T. Burraston was married and living with his wife, who was then Sinda Burraston. During the year of 1942 the deceased was divorced from Sinda Burraston (Tr. 34) and immediately prior thereto had a fight and violence with George Wilkinson, the man whom Sinda Burraston Wilkinson later married. (Tr. 51, 54, 116)

The document admitted by the Trial Court to probate as the Last Will and Testament of David T. Burraston was executed 25 years later, on the 12th of October, 1943. (Tr. 105) This document was in the possession of David T. Burraston from the date of its execution until the date of his death on March 16, 1958. The document was therefore found, in April, 1958, at the home of the decedent among the personal effects.

STATEMENT OF POINTS

POINT I

THE EVIDENCE CLEARLY ESTABLISHES DUE EXECUTION AND PUBLICATION WITHIN THE REQUIREMENTS OF SECTION 74-1-5, UCA 1953, AND ADEQUATELY PROVES THAT THE TESTATOR DID IN FACT DECLARE AND ASSENT TO THE EXECUTION OF THE WILL AND DID REQUEST THE WITNESSES TO SIGN AS ATTESTING WITNESSES.

POINT II

THERE WAS ADEQUATE PROOF THAT THE TESTATOR KNEW AND UNDERSTOOD THE CONTENTS OF THE WILL AND THERE WERE NO CIRCUMSTANCES WHATSOEVER INDICATING UNDUE INFLUENCE.

ARGUMENT

POINT I

THE EVIDENCE CLEARLY ESTABLISHES DUE EXECUTION AND PUBLICATION WITHIN THE REQUIREMENTS OF SECTION 74-1-5, UCA 1953, AND ADEQUATELY PROVES THAT THE TESTATOR DID IN FACT DECLARE AND ASSENT TO THE EXECUTION OF THE WILL AND DID REQUEST THE WITNESSES TO SIGN AS ATTESTING WITNESSES.

David T. Burraston brought with him his brother, William H. Burraston, and came to the home of Rex White on the 12th of October, 1943. (Tr. 77, 83) David T. Burraston asked Rex White to write for him and

dictated to Rex White in the presence of his brother, William H. Burraston, the Last Will and Testament which was admitted to probate. (Tr. 79) At the completion of the dictation the Will was signed by David T. Burraston in the presence of each of the subscribing witnesses and the subscribing witnesses signed their names as such witnesses after hearing the entire Will dictated, and after hearing the attestation clause dictated wherein they acknowledged that they were to act as witnesses to the Last Will and Testament of David T. Burraston and that they were to subscribe their names as such witnesses after said Will was subscribed to by David T. Burraston, and each was to subscribe in the presence of all. (Tr. 79, 80)

Where it appears that the execution of a Will followed closely the testator's announcement of his intention or desire to make a testamentary disposition of his property, the sufficiency of the publication is recognized. *In Re Dourassa's Estate* (1935), 171 Okla. 64, 41 P. 2d 851.

It appears to be universally accepted that where a testator himself, by his own dictation in the presence and hearing of both witnesses, dictates his will to a scribe, including the attestation clause, he has properly published his will. 60 ALR 2d 167, et. seq.

In the case of *In Re Rathke's Will* (1953) 124 N.Y.S. 2d 218, the testator, in the presence of two subscribing witnesses, asked his wife to write his Will and told her

what provisions to incorporate into it. After it was ready, the Testator read it over and signed it. The wife then asked the witnesses to sign as witnesses. The Testator stated to one of the witnesses after he signed it, "Bob, it's up to you," and the other witness testified that the Testator also asked her to witness the Will. It was held that the Will was published to the subscribing witnesses, and that when they signed they did so as witnesses to the execution of the document as a testamentary instrument.

And in the case of *In Re Silva's Estate* (1915), 169 California 116, 145 Pac. 1015, the Will was properly executed where the decedent stated that he wished to make a Will and asked a certain person to write it, and after it was written the paper was handed to the decedent, who signed it and passed it back to the scrivener, who signed it as a witness, and then handed it to another person who signed it as a witness. In that case it did not appear in evidence that the Testator in words asked these persons to sign as witnesses or declared to them that the document was a will. The Court held that there was sufficient evidence of the execution of the document as a Will, and the Court stated that from the whole transaction it was clear that all of them understood that the decedent was promulgating the document as his Will, and he desired these persons to sign the same as witnesses, and that they were signing in compliance with his desire manifest by his manner and actions.

In *Re Dourassa's Estate*, 171 Okla. 64, 41 P. 2d 851, holds that the dictation by the deceased of an instrument

to a scrivener as his Will, and the execution of it in the presence of the witnesses, who attested the Testator's signature in his presence and in the presence of each other, is fully sufficient to imply a declaration on the part of the deceased that the instrument is his Will and a request that the witnesses attest the signature.

In the present case the undisputed testimony is that the Will was dictated in the presence of the witnesses Rex White and William H. Burraston and that the Will included the following paragraph which was dictated to Mr. White, one witness, in the presence of the other witness, William H. Burraston:

“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 hereunto subscribed our names and residences as attesting witnesses this 12th day of October, 1943.” (Tr. 80, also see the Will, Record 105)

William H. Burraston, brother of the decedent and one of the witnesses, died during the year of 1945 and Rex White was the only surviving witness to the Will. Mr. White testified that the Will was signed by David T. Burraston in his presence and in the presence of William H. Burraston and that they as witnesses signed the Will in the presence of each other and in the presence of the testator. (Tr. 80)

We submit that the Will admitted to probate was

executed under the full requirements of Section 74-1-5, UCA 1953. The Will was subscribed at the end thereof by the Testator; there was no dispute or doubt concerning his signature; the subscription was made in the presence of the attesting witnesses, William H. Burraston and Rex White; the Testator, immediately prior to subscribing his Will, dictated the Will in the presence of both witnesses, and both witnesses knew the entire contents thereof and knew that they were present to act as subscribing witnesses to the Will; each of the two attesting witnesses signed his name as a witness at the end of the Will, at the Testator's request, in the Testator's presence, and in the presence of each other.

Each of the cases cited by the Appellant in support of her position can be clearly distinguished from the case now before the Court. In the cases cited the witnesses were found either not to have signed the instrument purporting to be a Will, or they did not sign in the presence of one another or in the presence of the Testator, or the Testator did not sign in their presence. None of these situations is found in the instant case.

POINT II

THERE WAS ADEQUATE PROOF THAT THE TESTATOR KNEW AND UNDERSTOOD THE CONTENTS OF THE WILL AND THERE WERE NO CIRCUMSTANCES WHATSOEVER INDICATING UNDUE INFLUENCE.

The Appellant has not shown, and cannot show, to the Court any evidence of undue influence exercised upon

David T. Burraston, Testator in the Will admitted to probate. The fact of the matter is that all of the testimony evidences that David T. Burraston was in good health at the time of making the Will and in good mental condition. Each of the witnesses called either for the Appellant or for the Respondent, who had any knowledge of the matter, testified that they noted nothing in the conduct, speech, or demeanor of the Testator that would indicate other than than good mental and physical condition during the year of 1943. (Tr. 14, 21, 48, 64, 81, 118) It should also be noted that David T. Burraston was appointed and served as administrator of William H. Burraston's estate during the year of 1945. (Tr. 64) It appears to us that the natural reaction of a husband who had been divorced and who had had serious difficulties and violent altercations with the man who later became the husband of his former wife, Sinda Burraston Wilkinson, would be to change a Will which would have provided that Sinda Burraston Wilkinson would be his sole beneficiary.

Myron Hanchett, who was a close friend of David T. Burraston during his lifetime, stated that David T. Burraston had told him during the year of 1943 that he was going to change the Will he had. (Tr. 45) David T. Burraston also had informed Myron Hanchett that he did change the Will. (Tr. 45)

It should be noted that David T. Burraston had the Will prepared at his direction which was executed on the 12th day of October, 1943. Immediately after its execution, the Will was given to David T. Burraston who had it in his possession and among his personal effects at the time of his death. (Tr. 46, 58, 59, 98) If the Testator had not intended this Will to govern disposition of his estate he could have destroyed the Will at any time during the 15 years in which it was in his possession.

In Re Lavelle's Estate, 122 Utah 253, 248 P. 2d 372, employs the following language which we believe is controlling upon the point now at issue:

“The contest over the validity of a Will is an action at law, rather than equity. Consequently, the decision of the lower court cannot be overturned if there is any substantial evidence to support it. To declare a Will invalid because of undue influence there must be an exhibition of more than influence or suggestion, there must be substantial proof of an overpowering of the testator's volition at the time the will was made, to the extent that he is impelled to do that which he would not have done had he been free from such controlling influence, so that the will represents the desire of the person exercising influence rather than the Testator. . . .”

We submit that there is nothing in the record to show any undue influence or fraud exercised upon the Testator in this case.

CONCLUSION

The Respondent submits that the Will of David T. Burraston, dated October 12, 1943, was properly executed and published in accordance with the laws of the State of Utah and that the Judgment admitting the Will to probate should be affirmed.

Respectfully submitted,

OLSEN and CHAMBERLAIN
Attorneys for Respondent

In the
Supreme Court of the State of Utah

MILNE TRUCK LINE, INC., a corporation,
SALT LAKE-KANAB FREIGHT
LINES, INC., a corporation, PALMER
BROS., INC., a corporation, GRANT
CROCKETT, doing business as MURRAY
AND MIDVALE TRUCK LINE, CON-
SOLIDATED FREIGHTWAYS, INC., a
corporation, and CARBON MOTORWAY,
INC., a corporation,

Petitioners,

—vs.—

PUBLIC SERVICE COMMISSION OF
UTAH and HAL S. BENNETT, DONALD
HACKING and JESSE R. S. BUDGE,
Commissioners of the Public Service Com-
mission of Utah, and UNION PACIFIC
MOTOR FREIGHT COMPANY, a corpo-
ration,

Respondents.

BRIEF OF PETITIONERS

S. N. CORNWALL,
WOOD R. WORSLEY,
HAROLD N. WILKINSON,
Attorneys for Petitioners.

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