

1992

In the Matter of the Estate of Curtiss S. Scarritt, Deceased v. Ryan W. Scarritt : Reply Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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920284

IN THE UTAH COURT OF APPEALS

In the Matter of the Estate of

CURTISS S. SCARRITT,

Deceased.

RYAN W. SCARRITT,

Petitioner and Appellant.

District Case No. 913500084
Supreme Court Case No. 910478
Court of Appeals No. 920284-CA

Priority No. 16

APPELLANT'S REPLY BRIEF

Appeal from an Order of the
Fifth Judicial District Court for Washington County
The Honorable J. Philip Eves, District Judge

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COURT OF APPEALS

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SUMMARY OF ARGUMENT

The personal representative attempts to support the lower court's declaration of testacy by claiming that the lower court properly invoked the doctrine of equitable conversion, to change the real estate into personal property, so that it could pass as such under the will. The lower court's ruling never refers to this doctrine, so this Court's review will be the first analysis given the will under that principle. Equitable conversion by will has never been invoked in a Utah reported decision. The doctrine does not apply to this will.

The personal representative further claims that the will contains a personal property residue clause, which passes the "converted" real estate *and* the personal property that is not devised in the will. There is no effective residue clause.

The personal representative's attempts to defeat the arguments in Appellant's Brief fail, because the personal representative misstates the law to create the impression that this Court may disregard the language of the will. The personal representative seeks to create a will with presumptions and doctrines and citations from inapplicable cases. The personal representative seeks to establish *his own* understanding of the testator's intent, with an *affidavit* from the draftsman of the will. This is impermissible.

The personal representative departs from the plain reading of the will, all in a vain attempt to create testacy where there is intestacy.

ARGUMENT

I PRESUMPTIONS, BURDENS AND RULES ARE MIS-STATED BY THE PERSONAL REPRESENTATIVE

A. Ryan W. Scarritt Does Not Bear The Burden Of Establishing The Meaning Of The Will

Ryan W. Scarritt does not bear the burden of establishing the meaning of the will. The personal representative erroneously claims Utah Code Ann §75-3-407¹ places the burden of proving intestacy on Ryan W. Scarritt.² No such burden is established under that section or any other section of the Uniform Probate Code. Because intestacy is a result of interpretation of the will, there is no burden of persuasion or proof. The interpretation of the will is a legal conclusion of the effect of the document, not a factual issue. Interpretation of documentary language is a question of law. This Court is free to interpret the will as it sees fit without regard to the decision of the lower court. *Faulkner v. Farnsworth*, 714 P.2d 1149 (Utah 1986). There is no "burden of proof" on the petitioner.

B. The Presumption Against Intestacy is Inapplicable

The personal representative repeatedly cites *Matter of Estate of Gardner*, 615 P.2d 1215 (Utah 1980) to support his incantation of the "presumption of intestacy." The presumption, he argues, compels the court to strain the will toward testacy. *Gardner* was decided on the law existing prior to the adoption of the Uniform Probate Code. That statutory scheme included, as does the UPC, a series of sections on Interpretation of

¹ The statute reads:
Contestants of a will have the burden of establishing a lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation.

The statute applies only to burdens as to the validity of the will, not the interpretation of the will.

² Appellee's Brief at 11.

Wills.³ *Gardner* relied on former Utah Code Ann. §74-2-10 which stated a *preference* in interpreting a will:

Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy. (emphasis added)

This statute is a rule of construction, not a "presumption against intestacy" requiring the "presumption" of facts or the fabrication of testamentary language that does not exist. The statute merely stated a preference for construction toward testacy in ambiguous situations. The statute has been repealed! Consequently, reliance on *Gardner* is questionable at best.

Further, the statute (and the *Gardner* holding) applied only to avoid **total** intestacy. The statute stated a common sense rule that a person would not make a will which had absolutely no effect. The *Gardner* case applied the rule to avoid a total intestacy. But the statute and *Gardner* do not apply to partial intestacy because the making of a will is not inherently inconsistent with partial intestacy. A will is not futile when it disposes of some property. This case involves a partial intestacy.

The statute relied on in *Gardner* has been replaced by a much different statute, but the personal representative cites the current statute as if it were a legislative prohibition of intestacy. The new statute (Utah Code Ann. §75-2-604) simply allows a will to operate on after-acquired property.

The will should be interpreted to affect all the decedent's property, regardless of whether that property was acquired after the execution of the will.

The statute is not a mandate that the court must contort the language of the will so that it encompasses all the decedent's property. The court is simply authorized to read the language of the will broadly as to all property the decedent owned, regardless of the date of acquisition. A North Carolina court refused to create a residuary clause on the strength of a similar rule:

³ See Utah Code Ann. §74-1-1 et. seq. as in existence prior to 1975 and the current Utah Code Ann. §75-2-601 et. seq.

Even though there is a presumption in law that a testator meant to dispose of all property, the presumption will not prevail when the words employed by the testator refer only to personal property and are silent as to realty. *Matter of the Estate of Heffner*, 301 S.E. 2d 720, 725 (N.C. App. 1983)

Even if the Court finds a "presumption against intestacy" still exists in Utah, it should keep in mind that it is merely an aid in construction and never comes into play unless there is an ambiguity in the will. The court in *Lamphear v. Alch*, 58 N.M. 796, 277 P.2d 299, 302 (1954) stated:

We are not unfamiliar with the doctrine that where ambiguity does exist, resort may be had to aids in construction in arriving at the true intent of the testator, such as the presumption against intestacy. (emphasis added)

The court declined to use the presumption against intestacy to change the clear language of the will.

The presumption against intestacy found in *Gardner* is really a rule of construction, based on a statute now repealed. The present statute is not nearly so affirmative, and certainly does not rise to the level of a "presumption" which creates an evidentiary state. The statute cannot be used to create meanings that are not set forth in the four corners of the will. More importantly, any presumption against intestacy which may exist in Utah is uniquely counterpoised opposite the presumption against applying the doctrine of equitable conversion.⁴ The presumption against intestacy comes into play only if the will is ambiguous; but if the will is ambiguous, equitable conversion cannot be invoked.

Finally, the *Gardner* case is not good judicial work. The *Gardner* opinion states that a court can employ "any reasonable construction" of a will to avoid intestacy. This case is poor precedent because it actually uses an "unreasonable" construction in order to achieve an objective. The will in *Gardner* preceded its only dispositive clause with the words "In the event my husband precedes me in death" The husband did not in fact predecease the wife but the Supreme Court gave the dispositive clause effect by

⁴ See Point II.B below.

obliterating the conditional language and interpreting the dispositive clause as unconditional. This Court should not follow the stated reasoning nor the example of *Gardner* in "rebuilding" a will.

C. There Is No Restraint on the Ability of Ryan W. Scarritt to Take His Intestate Inheritance

The personal representative argues that the effect of the clause stating Ryan W. Scarritt takes nothing under the will is to effectively prohibit a determination of intestacy.⁵ However, that clause has no effect on intestacy. First of all, it is not a disinheritance clause but is only a declaration that nothing is granted under the will. By its own terms it does not affect intestacy. The clause can be given no more effect than its literal language.

The only way for the decedent to effectively bar the intestate succession of his heirs is to ensure that he dies testate, as to all his property.

An attempt to exclude legal heirs from participation in the estate of decedent is successful only as to such property as is disposed of by the will A testator must do more than merely evince an intention to disinherit before the heirs' right of succession can be cut off. He must make a valid disposition of his property. (citations omitted) *Estate of Munson*, 330 P. 2d 302, 304-305 (Cal. App. 1958)

The fact that a person is disinherited by the will does not prevent his sharing as an heir at law, in property the testamentary disposition of which has failed by lapse. . . . A testator cannot disinherit his heirs by words alone, but in order to do so the property must be given to somebody else. *Estate of Stroble*, 6 Kan.App.2d 955, 636 P. 2d 236, 242 (Kan. App. 1981).

The clause noting that Ryan W. Scarritt takes nothing under the will has no effect on his inheritance rights or on the construction of the will.⁶

⁵ Appellee's Brief at 48.

⁶ This subject was fully briefed in Petitioner's Memorandum In Support Of Petition For Formal Probate Of Will, Construction Of Will, Declaration Of Partial Intestacy, And Supervised Administration, R____. The lower court placed no reliance on this provision of the will, and the personal representative has not cross-appealed this implicit determination that the clause has no bearing on the rights of Ryan W. Scarritt in this proceeding.

.D. The Testator's Intent must be Determined from His Will

The personal representative fails to understand the distinction between *construing the will to effectuate the testator's intent* and *determining the testator's intent from the will*. Point I of the personal representative's argument is entitled

THE WILL MUST BE CONSTRUED TO EFFECTUATE THE TESTATOR'S INTENT.

However, all the authorities cited in that section are for the proposition that **the testator's intent is determined from the will**. The personal representative would have the court construe or contort the will to effectuate an intent conceived in the personal representative's mind. The personal representative's individual subjective impression of the testator's intent has no meaning for this Court. The will cannot be bent to effectuate that intent. The intent of the testator is determined from the language of the will.

The intention of a testator as expressed in his will controls the legal effect of his dispositions. Utah Code Ann §75-2-603.

The Court must rely on the will, standing alone, as a declaration of the testator's intent.

If [the testator] sees fit for any reason not to dispose of any part of his estate, or such is the result of ignorance or oversight, the courts cannot supply the gap or hiatus and reconstruct the will. To do so would be a perversion of the functions of the court and deprive a testator of the right to dispose of his property." (emphasis added) *In re Swape's Estate*, 398 Pa. 494, 119 A.2d 57, 59 (1956).

The Court must not supply language to dispose of real estate and other personal property which is not disposed of in the will.⁷

E. Resort To Extrinsic Evidence is Inappropriate

At three points in his brief, the personal representative refers to an Affidavit of James M. Park.⁸ These references to a document outside the will are entirely improper.

⁷ For a more in depth discussion of this subject see Appellant's Brief on Appeal at 11 through 13.
⁸ Appellee's Brief at pages 18, 33, and 43

The issue of consideration of extrinsic evidence was briefed below and the court repudiated any resort to the affidavit.

Resort to extrinsic evidence is permitted only when the testator attempts to state his intention in the will, but does so ambiguously. Memorandum Decision, R.112 at 113-114.

The court below placed no reliance on the affidavit and this Court should likewise disregard it as an invalid attempt to supplant a valid testimony declaration. The personal representative has not appealed the lower court's refusal to consider the affidavit.

Not only is all extrinsic evidence inadmissible in this case, but the particular affidavit sought to be admitted is lacking in evidentiary value and is inadmissible even if extrinsic evidence were permitted.⁹ The lower court did not rely on such evidence and this court must not rely on such evidence:

In determining the testator's intention, the true purpose of the inquiry is to ascertain not what he meant to express apart from the language used, but what the words he has used do express. Accordingly where there is no dispute as to what words were written in the will it is a fundamental principle that the extrinsic evidence cannot be received to show that the testator intended something outside of and independent of, such written words, to add words to those in the will, to contradict his language, or to take words away from those in the will, even though the court may believe that the actual disposition of the testator's property which results through changing circumstances, was not contemplated by him. (emphasis added) *Lamphear v. Alch*, 58 N.M. 796, 277 P.2d 299, 302 (1954) quoting 4 Page on Wills, § 1617, 622-625.

Finding ambiguity where there is none "opens wide the door to allowing the substitution of another's will for that of the testator." *Id.*

⁹ The inadmissibility of extrinsic evidence and the defects in this particular affidavit were briefed below. Point I, Reply Memorandum in Support of Petitions of Ryan W. Scarritt, pages 5-9, R. ____.

F. The Lack of a Residuary Clause Does Not Justify Heroic Rewriting of the Will

In *Lamphear v. Alch*, 58 N.M. 796, 277 P.2d 299 (1954) the Court was invited to stretch a residuary clause to embrace real estate, even though the clause did not mention real estate. The court asked the question:

At the outset the naked question emerges whether a purported disposal of property reading:

"After the payment of my just debts and funeral charges I devise and bequeath as follows: To Lorena J. Stallard all my personal property . . ."

may with propriety and correctness be given effect as if it read:

"After the payment of my just debts and funeral charges, I devise and bequeath as follows: To Lorena J. Stallard all my estate, real, personal and mixed, of whatever it may consist and wherever situated."

277 P.2d at 300-301

The court defined its dilemma as one of re-writing the will to accomplish a desired result, and avoid intestacy. This clear formulation of the issue helped the court in its decision-making.

The equally clear answer to the question was "no." The court found that the real estate was not disposed of under the residuary clause, and that it passed in intestacy. The wisdom behind the ruling was that departure from the language of the will invited a morass of problems:

We think any construction which carries us away from the plain, understandable and commonplace meaning of the words here employed leads us into a lush growth of tangled conjecture, which indulged, makes any declaration of intent on the part of the testator pure guesswork, as likely to defeat as to carry out his true intent. 277 P.2d at 302

The court rejected the invitation to re-write the will to achieve a "fair" result.

If the testator in the present case intended to devise his real estate, he certainly could have named a devisee. As it now stands, there is no language supporting the view that he intended his real estate to pass under the will or to whom he intended it be distributed. Trying to make such a determination is pure guesswork.

II THE BACKGROUND AND CONTEXT OF EQUITABLE CONVERSION SHOW IT IS INAPPLICABLE IN THIS CASE

The personal representative recognizes that the only way real estate can pass under the will is by invoking the fiction of equitable conversion.¹⁰ If there is no conversion, the real estate clearly passes by the rules of intestacy. If the real estate is converted to personal property by the will, then assuming the will disposes of that category of property, the real estate proceeds would pass with the personal property residue.

The Appellees Brief devotes considerable attention to this doctrine which he did not brief at the trial level. The personal representative's analysis of the doctrine is flawed and incomplete.

Before moving to an analysis of the specific susceptibility of this will to equitable conversion, this section will review the background and context of equitable conversion.

A. The Doctrine of Equitable Conversion Only Applies Where The Legal Result Would Contradict The Will's Clear Expression of the Testator's Intent

The doctrine of equitable conversion by will is a device used when strict application of the law would do violence to a testator's intent. The doctrine allows a legal real estate interest to be treated as if it were personal property. The disregard of the legal truth is justified by a claim that equity is being done. "Equity regards as done that which should be done." Hence, a real estate contract seller's interest in land (apparent fee simple) may be exempted from judgment liens, to protect the purchaser of the land from an unwarranted lien. *Lach v. Deseret Bank*, 746 P. 2d 802 (Utah Ct. App. 1987)

Obviously, since the doctrine is a fictional treatment to avoid a legal result, it must be invoked with caution and on definite standards. Otherwise the fiction swallows

¹⁰ Appellee's Brief at 12.

reality. Its application requires constant watchfulness to guard against the tendency to become a formal rule *de jure* without regard to its real purpose and necessity.

Its application requires constant watchfulness to guard against the tendency to become a formal rule *de jure* without regard to its real purpose and necessity. *Shaffer v. Shaffer*, 354 Pa. 517, 47 A.2d 702, 704 (1946).

"[E]quity does not regard and treat as done what *might* be done, or what *could* be done, but only what *ought* to be done." *In re Packards Estate*, 174 Ohio St. 349, 189 N.E.2d 434,439 (1963).

B. The Presumption Is Against Equitable Conversion

In determining whether to invoke this fiction, the Court must remember the strong presumption against applying the doctrine of equitable conversion:

Few testators have any knowledge of the doctrine, or any actual intent to change the nature of their property . . . the presumption, therefore, no matter what the form of words used, is always against conversion; and even where it is required it must be kept within the limits of actual necessity. *Shaffer v. Shaffer*, 354 Pa. 517, 47 A.2d 702, 704 (1946).

Courts will not easily resort to a construction of the will which treats realty as personalty because testators cannot be presumed to intend what they do not understand.

In Re Shareff's Estate, 143 Pa. Super. 465, 17 A.2d 623, 624 (1941) similarly stated that the law does not favor a conversion and that "a conversion will never be enforced in doubtful cases . . . Therefore the presumption is always against conversion, and, even where it is required, it must be kept within the limits of absolute necessity." (emphasis added). See also *Matter of Estate of Achilli*, 389 N.E. 2d 644, 647 (Ill. 1979).

The personal representative must demonstrate that the will clearly requires the doctrine to be applied. If the will is ambiguous or it is doubtful that the will requires a conversion, the doctrine cannot be invoked. "The burden of proof rests on the party seeking to show conversion." 18 C.J.S. *Conversion* §15.

C Equitable Conversion Cases Vary Depending on the Legal Result the Court is Trying To Avoid

The doctrine of equitable conversion by will is employed to defeat varying legal results. The application of the doctrine varies in the different types of cases.¹¹ This is to be expected, as different equities are present in each type of case. Attempts to invoke Equitable conversion by will have been made for the following reasons:

1. To pay taxes and debts when cash in the estate was insufficient and realty was not specifically devised. *In re Shareff's Estate*, 143 Pa. Sup. 465, 17 A.2d 623 (1941).
2. To satisfy specific cash gifts when cash in the estate was insufficient and realty was not specifically devised. *Talbott v. Compher*, 110 A.100 (Md. 1920).
3. To prevent a creditor of a beneficiary from executing against realty under a will in the estate. *Greenman v. McVey*, 126 Minn. 21, 147 N.W. 812 (1914); *Citizens Nat'l Bank v. First Nat'l Bank*, 222 P.935 (N.M. 1924).
4. To prohibit partition of realty in the estate, allowing it to be sold by the executor. *Keller v. Schobert*, 58 Ill.2d 137, 317 N.E.2d 510 (1974); *Dinkins v. Conyers*, 382 So.2d 1129 (Ala. 1980); *Shaffer, Hahn v. Verret*, 11 N.W.2d 551 (Neb. 1943); *John v. Turner*, 6 S.E. 480 (W.V. 1939).
5. To pass the proceeds of real property as personalty to one individual or group, and preventing it from passing as realty to another individual or group.
6. To pass the proceeds of real estate as personalty under a specific provision in a will to avoid intestacy. *Lamphear v. Alch*; *Grove v. Willard*, 280 Ill. 247, 117 N.E. 489 (1917).

The language in opinions that seemingly reflects different tests for invoking conversion arises in part from the different factual circumstances. The equitable considerations are different when the tax man is involved than when the dispute is between family members! Even tax cases will vary in their language because in some cases the tax is avoided by conversion, while in others conversion would create taxability.

¹¹ It should be recalled that almost all cases invoking equitable conversion are older and from the eastern states.

Courts are most reluctant to apply the doctrine where the rights of personal property vs. real property beneficiaries are at stake (the last two categories of cases) since the result of the conversion is to change the recipient of property. The intention to pass the *proceeds* of the real estate in that form must be readily apparent for a court to take such action. Otherwise, the intention of the testator as expressed in the document is not being fulfilled.

The doctrine interferes with the basic rule that real estate devolves on the date of death to the devisee or heir of the decedent, subject only to administration of the estate. Utah Code Ann. §75-3-101. To order conversion, a court must be able to say that the will so clearly treats the real estate as being sold with the decedent's death that the estate had no interest in realty but merely an interest in personalty. The fiction is that there was no realty to descend or be devised; only personal property. Equitable conversion under a will introduces insecurity to the legal real estate records because it converts the recorded real estate interest into personal property by a non-record document. For that reason, it must be applied with caution, so that predictability and certainty are maintained.

Some cases therefore require an absolute direction to sell, and a clear treatment of the realty as personalty in the language of the will, while others allow intent to be shown by a power of sale coupled with a "necessity to sell" to carry out will provisions. Thus, the language in some cases, taken out of context, may imply more flexibility to the doctrine than is truly present.

D. The Need for Equitable Conversion has Declined since Adoption of the Uniform Probate Code

The usefulness of the doctrine has declined since adoption of the Uniform Probate Code. Utah Code Ann §75-3-902 and 75-3-916 govern abatement and tax apportionment, and would resolve cases listed above in the first two categories. *See also* Utah Code Ann §75-3-101. It would also be unlikely for Utah courts to apply the

doctrine in partition cases (the third category above) since these could be handled under Utah Code Ann §75-3-911. This is significant because in all cases involving contextual necessity, Utah statutes remove the need to use the doctrine of equitable conversion.

In Utah, after the Uniform Probate Code, equitable conversion could only be useful to prevent creditors from levying on real property in the estate and in cases where parties are trying to change beneficiaries in a will (case types 5 and 6 above).

III THIS WILL DOES NOT FIT WITHIN THE CATEGORIES OF CASES IN WHICH EQUITABLE CONVERSION IS ALLOWED

The personal representative claims that there are three types of provisions in wills which will invoke equitable conversion.¹² This is correct. However, the personal representative mis-states the three indications of an intent to convert.¹³ The categories actually are:

[W]e have stated that the three indications of an intent to convert are: (1) a positive direction to sell, (2) an absolute necessity to sell in order to execute the will, or (3) such blending of realty or personalty as to show clearly that testator intended to create a fund out of both real and personal estate, and to bequeath that fund as money. (citations omitted) *Estate of Felice*, 409 A.2d 382, 385 (Pa. 1979).

This section of the brief will explain why this will fits within none of the categories. All of the categories are related. They all fit within the larger umbrella of principles enunciated earlier for equitable conversion - the law presumes against it; the cases vary depending on the equities; and many cases might be decided on a statutory basis since adoption of the Uniform Probate Code. In addition, and most importantly, the categories

¹² Appellee's Brief at 23.

¹³ The Appellee's Brief claims the categories are:

A testator's intent to convert real property into personal property may be shown in three different ways: (1) a positive direction to sell, (2) an implied direction to sell, or (3) necessity to sell in order to carry out the provisions of the will.

These categories are not found in any of the cases cited by the personal representative and are apparently his synthesis of the cases.

are simply ways of fitting like cases together. **But all the cases require that the will's language unmistakably require conversion.**

A. A Will Must Clearly Require Sale of Land and Provide for Distribution of Proceeds for Equitable Conversion To Be Found

Because equitable conversion is a fiction, and the presumption is always against it, all courts require that a testator's intent to **convert** his property and **dispose** of it as personal property be absolutely clear in the will:

If it is apparent that it was his undoubted intention to dispose of his property in its converted form, then an equitable conversion of the property is effected. 27 Am. Jur. 2d *Equitable Conversion* §6. (emphasis added)

Note that conversion and disposition must be shown:

1. It must be apparent that it is the undoubted intention of testator to convert real estate to personal property; and
2. It must be apparent that it is the undoubted intention of the testator to dispose of the converted personal property as such.

The coupling of these requirements ensures that the testator's intent is being fulfilled.

The cases show the difficult circumstances that caused the creation of doctrine. The following sections will examine and distinguish numerous cases, including all the cases cited by the personal representative. We will also show the actual provisions of the wills. The personal representative has not shown the Court the language of these wills, which are so dissimilar from the will in this case.

B. Wills With a Mandate to Sell and Mode of Distribution Invoke the Doctrine

In *Keller v. Schobert*, 58 Ill. 2d 137, 317 N.E. 2d 510, 512 (1974) the will contained a typical clause invoking the conversion doctrine:

CLAUSE 2: My Executor, hereinafter named, is hereby authorized and directed to reduce all of my estate into cash as soon after my death as may be conveniently done and distribute the net proceeds of such sale or sales as is hereinafter set forth. (emphasis added)

This sort of clause is found in most wills in equitable conversion cases. This clause contains a direction to sell and a clear reference to distribution of the proceeds. The court found this language sufficient for equitable conversion to occur because there was a mandatory direction to sell and it was clear that the proceeds were to be distributed to designated beneficiaries. The opinion warns that conversion could only be ordered when sale and distribution of proceeds were ordered by the will:

For there to be an equitable conversion of realty under the terms of a will, the will must contain a definite expression and direction, showing a definite intention, that the land be sold and turned into money, and that the proceeds then be distributed to the beneficiaries. If the executor, or other fiduciary charged, is given a choice, option or discretion whether the property be sold, then equitable conversion does not occur because there rests upon the fiduciary no duty to sell the land. (emphasis added) *Id.* at 513.

The personal representative cites many cases with similar wills mandating sale of land. *Holzhauser v. Iowa State Tax Comm'n*, 62 N.W.2d 229, 231 (Iowa 1953)¹⁴; *Kuiken v. Simonds*, 3 N.J. 480, 70 A.2d 740, 742 (1950)¹⁵; *In re Myers' Estate*, 234 Iowa 502, 12 N.W.2d 211, 212 (1943)¹⁶ In each case the will makes it apparent that sale is necessary. Those cases invoke conversion.

The will in this case does not mandate a sale of land.¹⁷ The personal representative argues that the direction that the personal representative *borrow* against the ranch creates a necessity of *selling* the ranch. The SEVENTH Article of the will contemplates that sums may be borrowed against the ranch, which would be secured by

¹⁴ 6. All of the remainder and residue of my estate shall be converted by my executor into cash, and the same shall be divided among my legal heirs according to the Statutes of the State of Iowa. [Emphasis Added]

Cited in Appellee's Brief at 18, 20.

¹⁵ Fourth: Upon the death of my said wife Margaret Simonds, I order and direct my executors hereinafter named or the survivors of them, to sell and dispose of all my real estate then remaining and to divide all my then remaining estate both real and personal as follows [Emphasis Added]

Cited in Appellee's Brief at 20, 23, 44.

¹⁶ The sixth clause directs that after the death of testator and his wife his executors shall as soon as practicable and consistent for the best interests of the estate proceed to sell and convert into cash all of the real estate in which his wife was devised a life interest. [Emphasis Added]

Cited in Appellee's Brief at 26.

¹⁷ See Appellant's Brief at 17-18.

the ranch, which quite obviously would be paid whenever the ranch is sold, under today's due-on-sale practices. However, there is nothing in the SEVENTH Article which dictates when the ranch shall be sold. It may be sold by the personal representative or it may be sold after the ranch, subject to the debt, is distributed from the estate. Clearly, such a secured debt would pass with the ranch property.

The personal representative makes a selective quotation from the will, giving the impression that the borrowing of funds shall end at "such time as the ranch is sold."¹⁸ The personal representative neglects to quote the entire phrase. Borrowing, maintenance, payroll, etc., are authorized "until such time as the ranch is sold or for a period of time which shall be left to the sole discretion [sic] of my personal representative." The fact that the personal representative is authorized to borrow against the ranch does nothing to create an unavoidable necessity of sale of the ranch to satisfy the debt *prior* to the distribution of the property.

In any event, even if there were a mandate to sell the ranch concealed in that authorization to borrow, there is still no direction as to disposition of the proceeds. This deficiency is fatal to the claim of equitable conversion, since there is no clear compelling reason the realty would need to be converted.

C. Wills With Less Than a Mandate to Sell Have Clear Language Showing the Sale is to Take Place and That Proceeds are to be Distributed

As the personal representative points out, some cases allow conversion where the will lacks language compelling executor to sell. Those wills contain mere authority or requests to sell, but they all contain clear reference to distribution of the proceeds of the sale. Therefore, the sale becomes necessary to implement the testator's intent expressed in the will. These declarations of authority to sell and directions for distribution of proceeds are almost always found in the same paragraph of the will:

¹⁸ Appellee's Brief at 13, quoting the SEVENTH Article.

A. Third. I desire that my executrix and executor, at the expiration of two years from the date of my demise, shall have the property sold at public auction or otherwise, and after paying all indebtedness standing against it, to divide the net proceeds of such sale into six equal parts or divisions, and to distribute the same, share and share alike, to my heirs and devisees as hereinafter set forth. *In re Pforr's Estate*, 77 P.825, 826 (Cal. 1904)¹⁹

I Nellie M. Bilhorn do hereby will and bequeath to my husband . . . and request that he sell the Ranch on Western Avenue Los Angeles at the earliest convenience and give to each of my brothers Geo B and John D McCaughna the price of 40 acres. *McCaughna v. Bilhorn*, 10 Cal. App. 2d 674, 52 P.2d 1025, 1026 (1935)²⁰

The other cases cited by the personal representative are *In re Edwards' Estate*, 168 Pa. Super. 471, 79 A.2d 138, 139, 140 (1953)²¹; *Zulver Realty Co., Inc. v. Snyder*, 62 A.2d 276, 279 (Md. Ct. App. 1948)²²; *Read v. Maryland General Hospital*, 146 A. 742, 743 (Md. Ct. App. 1929)²³; *Talbott v. Compher*, 110 A. 100, 101 (Md. Ct. App. 1920)²⁴; *Grove v. Willard*, 280 Ill. 247, 117 N.E. 489 (1917)²⁵; *Martin v. Preston*, 94 P. 1087, 1088 (Wash. 1908)²⁶; *Fahnestock v. Fahnestock*, 25 A. 313, 315 (Pa. 1892)²⁷

¹⁹ Cited in Appellee's Brief at 21, 23, 24.

²⁰ Cited in Appellee's Brief at 22, 23, 24, 25, 26, 28.

²¹ Testatrix's will contained no residuary clause. The Franklin Street property is nowhere mentioned in the will, but in a codicil dated March 24, 1948, testatrix provided: "Charlie hasn't been in to influence me and I want him to have \$500 more from the sale of property between John and Charlie and \$500 from the sale of property on Franklin St."

The only mention of the Franklin Street property is in the codicil where testatrix bequeaths to Charles F. Edwards "\$500 from the sale of property on Franklin St." This implied a sale of the Franklin Street property. (emphasis added)

Cited in Appellee's Brief at 23, 25, 31, 32, 33.

²² [the will] bequeaths the sum of \$1,000 to this daughter with the express direction that it shall be paid to her "when the Executors shall sell my Garrison Avenue Home."

Cited in Appellee's Brief at 20, 23, 25.

²³ First: I hereby authorize and empower my Executor hereinafter named to sell all my real estate, either at public or private sale, in parcels, lots, or in its entirety, except that portion known as the cemetery lot in the rear of my home, which is to be kept intact forever, as in his discretion he may deem proper for the best interest of my estate, and make distribution of the proceeds derived therefrom in conformity with the following paragraphs of this My Last Will and Testament. (emphasis added)

Cited in Appellee's Brief at 29, 33.

²⁴ I wish the said farm to be sold to the best advantage and the money divided equally between my surviving children.

Cited in Appellee's Brief at 23, 26.

²⁵ First—I will, order and direct that all my personal property and real estate shall be held and controlled by my beloved wife, Amelia Grove, and that she shall have full power, after my decease, to sell or dispose of any or all of it as she shall think for the best interest of herself and

It is obvious that these wills show clear intent to sell the land with a plan of distribution that requires the sale. Therefore, in those cases it can be said that the will requires the conversion to fulfill the obvious plan of the will.

In the present case, the will does not show a definite, clear intention that the land be sold and that the proceeds be distributed to designated beneficiaries. Sale is only "authorized" and the proceeds of any such sale are "added to the estate." (SEVENTH Article) The will does not say that the proceeds are to be distributed as personal property and it certainly does not say the proceeds are to be distributed under paragraph E.2. There is no expressed intention of distribution that will be frustrated if the conversion does not take place.²⁸ There is no language in the will that compels the conclusion that the testator intended.

D. "Discretion to Sell" is Not Enough to Invoke Conversion; Discretion as to Time of Sale is Not Fatal to Conversion

The personal representative states that discretion as to the time, manner or terms of the sale is entirely consistent with equitable conversion, giving the impression that

family, and upon the sale of my personal property and my real estate, my said wife, Amelia Grove, shall divide the proceeds of such sale in the following manner to wit . . . (emphasis added)

Cited in Appellee's Brief at 21, 24, 25, 26.

²⁶ Josephus M. Moore . . . died and left a will, by the terms of which he devised to his daughter Mary Louisa Preston, along with other property, the following: "The one-half of the proceeds of lots when sold of the undivided one-third interest of lots in Pullman unsold at my death." He also devised to his minor son Amos Abbott Moore, along with the other property, the following: "The one-half of the proceeds of lots when sold, of the undivided one-third of Pullman lots unsold at my death, his share of said proceeds to be invested to make a fund for him when he becomes of age."

Cited in Appellee's Brief at 21, 23, 24.

²⁷ The *Fahnestock* will contained authority and power to sell in its second paragraph. Thereafter, several paragraphs, in considerable detail, outlined distribution of shares of the estate as small as one-twenty-fourth part, which were to be distributed to various family members. The will outlined the uses of interest and income from the various portions of the estate, and to the investments deemed appropriate. The will also provided that the devisees could purchase at the contemplated sale, using their interest in the estate as credit.

. . . it plainly appears that effect cannot be given to material provisions of the will without the exercise of this power, the conclusion is irresistible that a conversion is as effectually accomplished by the will, and the duties of the executors under it are the same, as if it contained a positive direction to sell.

Cited in Appellee's Brief at 29, 30, 32.

²⁸ This has already been briefed on pages 17-18 of Appellant's Brief on Appeal.

mere discretion to sell is enough to invoke the conversion.²⁹ However, the cases cited by the personal representative stand for the proposition that discretion as to the manner of sale will not *defeat* a conversion, so long as the will is **clear and definite** that it is **required** that the real estate be sold and the proceeds be distributed. In *Trotter v. Van Pelt*, 195 So. 215, 218 (Fla. 1940) the court stated that although some discretion as to time of sale was given, conversion was accomplished because "the fact of selling it is mandatory." The will provided:

All other real estate will be disposed of as conditions are favorable for realizing full market value.

The will went on to dispose of the proceeds. The will in *In re Livingston's Estate*, 9 P.2d 159, 160 (Mont. 1932) allowed conversion under a will which "ordered and directed [the] executor to sell," although discretion as to time and terms were allowed. The will considered in *In re Myers' Estate*, 12 N.W.2d 211, 213 (Iowa 1943) required that the "executors shall as soon as practicable and consistent for the best interests of the estate proceed to sell and convert into cash all of the real estate." The will went on to divide the proceeds of the sale among several children. The discretion as to time, place and manner of sale was held not to defeat the conversion. Other cases cited by the personal representative have the same language and result: *Camden Trust Co. v. Haldeman* 33 A.2d 611 (N.J. Ch. 1943), *aff'd*, 40 A.3d 601 (N.J. 1945)³⁰; *In re Ellertson's Estate*, 157 Kan. 492, 142 P.2d 724, 727 (1943)³¹

These cases do not involve discretion as to the *fact* of sale; they involve discretion as to the *time* and *manner* of sale. But in each case, the sale is inevitable

²⁹ Appellee's Brief at 26.

³⁰ She said that her real estate was "to be held for awhile for best possible price or rather not sold immediately in order to close my estate *hurridly*." The necessity for sale is beyond doubt.

Cited in Appellee's Brief at 25.

³¹ [I]t is my will that . . . my real estate shall be held and managed by my brother . . . until such time as in his uncontrolled discretion it can be sold to the best advantage; and upon the sale thereof, the proceeds therefrom shall then be divided and distributed as in the case of my personal property.

Cited in Appellee's Brief at 20, 23.

and mandatory by the terms of the will and the will contains a disposition of proceeds which would be frustrated without a sale.

The present will does not clearly show sale must occur. The will grants authority to sell "at such time or times and upon such terms and conditions as shall seem advisable." The personal representative is to operate the ranch "for a period of time which shall be left to the sole discretion [sic] of my personal representative."

SEVENTH Article. The personal representative is to consult with the lawyers for the estate "in the selection and distribution of my real and personal property." TENTH Article. Surely if sale of the ranch were contemplated as essential, the personal representative would have been told to consult the lawyers on that subject as well. The scheme of this will does not indicate an inevitability of sale. Therefore, the discretion to sell is fatal to the claim of conversion.

E. A Mere Insufficiency of Funds Will Not Force Conversion

The personal representative claims that *In re Suppes Estate*, 185 A. 616 (Pa. 1936) establishes that a mere insufficiency of assets to pay debts of the estate will cause a conversion. The will in that case however, contained "explicit authority to sell either real or personal property" for stated purposes. Without sale of some real estate, other provisions of the will relating to paying the operating costs of the homestead and describing the uses of income from invested proceeds of the estate would have been meaningless. There was much more than a mere insufficiency of assets.

Intent to convert is not shown merely because an estate does not have enough cash to pay debts or specific bequests. A lack of funds may result from many other circumstances:

A testator at the time of making a will may overestimate the value of his personal estate or he may anticipate additions to it during his lifetime which never materialize, or his personalty may be sufficient for the payment of debts and legacies when the will is executed and may become inadequate by subsequent depreciation in value. The personal property was insufficient for these purposes in this estate. But that fact does not work a conversion from necessity. . . The

question of conversion is to be determined from the intention of the testator from the will itself and is not affected by the accidental fact that the personal estate may prove insufficient for the payment of legacies or decedent's debts. *In re Shareff's Estate*, at 625. (emphasis added)

In another case, creditors of the estate contended that since "the estate was insolvent, it was decedent's intention that the realty be sold to pay his debts and that this gave rise to an equitable conversion." The court disagreed, noting that authority to sell is found in almost all wills:

Both the power to sell property of the estate and the direction to pay the testator's just debts are no more than a 'standard forms' power and direction given to the executor under most wills. We decline to hold that by inserting such standard clauses a testator intended an equitable conversion to occur, in the event that his estate was insolvent." *Achilli* at 647.

If conversion were made under all wills containing authority to sell or in all estates without sufficient funds to pay debts or taxes, most real estate devisees would be divested of all their inheritance!

The personal representative's assertion that "it is undisputed that the testator's estate lacks sufficient assets for the payment of his debts, the estate taxes, the cost of administration, and the cost of maintaining the ranch, while at the same time satisfying the specific bequest made in the will," is misleading.³² All of the specific bequests made in the will (See Articles THIRD and SIXTH) can be made without selling any real estate. In fact, the record also establishes that the estate taxes have been paid without a sale of the ranch! The personal representative's assertions that there is a need to sell the real estate is contrary to the record and is not entitled to any consideration by the Court.

Even if it were necessary to sell a portion of the real estate in order to pay taxes this would not compel conversion. In Utah, payment of taxes and abatement issues are handled by statute, not by equitable conversion.

³² Appellee's Brief at 14, 28 and 29.

F. Other Cases Cited by the Personal Representative Are Inapplicable

The personal representative has used the generous language about conversion from several cases which are wholly inapplicable because they deal with contract conversion [*Parson v. Wolfe*, 676 S.W.2d 689 (Tex. Ct. App. 1984)³³; *Lampman v. Sledge*, 502 S.W.2d 957 (Tex. Ct. App. 1973)³⁴; *In re Stephenson's Estate*, 177 N.W. 579 (Wis. 1920)³⁵] or beneficial interests in trusts [*Wollard v. Sulier*, 55 N.M. 326, 232P.2d 991, 994 (1951)³⁶; *Citizens' Nat'l Bank v. First Nat'l Bank*, 222 P.935, 943 (N.M. 1924)³⁷] The Court must carefully ignore this inapplicable dictum.

Also, the personal representative cites a New York Surrogate Court case with no precedential value or analysis (*In Re Bondy's Estate*, 118 N.Y.S.2d 93 (Sur. Ct. 1952)³⁸ and a "hard case" which made bad law. In *Greenman v. McVey*, 126 Minn. 21, 147 N.W. 812 (1914)³⁹ the will gave a life estate in land to the surviving spouse and made specific cash bequests to the decedent's nine children. The decedent had no personal property from which the bequests could be paid and the will contained no residue clause disposing of the remainder interest in the real estate. The court held that there was a conversion of the real estate and thus prevented a judgment creditor from levying on a son's real estate interest. The fiction of the conversion was used to defeat the claim of the creditor, while preserving the entire value of the estate for the son.

³³ Cited in Appellee's Brief at 18, 20, 21, 22, 23.

³⁴ Cited in Appellee's Brief at 29, 23.

³⁵ Cited in Appellee's Brief at 21, 24, 25.

³⁶ The rule as to equitable conversion of realty into personalty by creation of a trust with direction to the trustees to sell and distribute the proceeds is stated in Scott on Trusts, Vol. 1, Sec. 131, as follows:

"Where a testator devises real property in trust and directs the trustees to sell the property and hold the proceeds in trust or distribute them, the interest of the beneficiaries is personal property, whether or not the trustee has sold the property."

Cited in Appellee's Brief at 20, 23, 25, 27, 29, 32.

³⁷ So in this case, it being necessary, the executors took the title in fee as trustees, and there was no title, legal or equitable, in the beneficiaries in and to the land, they taking only a distributive share in the proceeds of rents and sales.

Cited in Appellee's Brief at 19, 23, 24, 25.

³⁸ Appellee's Brief at 25.

³⁹ Cited in Appellee's Brief at 21, 24, 25, and 27.

G. There is no Precedent to Support Equitable Conversion under this Will

The personal representative cites no case allowing conversion where there is no mandate to sell, where there is no express and apparent disposition of the proceeds, and where discretion to sell or need to pay debts was, alone, enough to allow conversion. The decedent's will does not leave the unmistakable conclusion that conversion must occur to fulfill the testator's intent. If "there is a doubt as to the intention of the testator, in a direction for the conversion of land into money, the original character of the property will not be changed." 27 Am.Jur. 2d *Equitable Conversion* §5.

This case is much like *Hahn v. Verret*, 11 N.W. 2d 551 (Neb. 1943)⁴⁰ which considered a will with authority to sell, in the face of an indefinite disposition of residue and an apparent lack of ability to satisfy bequests. The court declined to convert the real estate, since there was no imperative.

The authority given to the executors to sell does not either require or direct them to do so nor does it provide any purpose for which it should be sold but expressly makes it "subject to the terms of this Will." 11 N.W. 2d at 559.

Similarly, nothing in this will compels conversion. Conversion ". . . to add the proceeds of any such sale to my estate" is conversion for no purpose at all.

IV THE LANGUAGE OF SUBPARAGRAPH E.2. INDICATES IT IS NOT A PERSONAL PROPERTY RESIDUE CLAUSE

After the determination of whether real property is converted into personal property by the will, the *disposition* of all the personal property residue is still in doubt. The personal representative claims that subparagraph E.2. of the THIRD Article is an effective disposition of this personal property. Ryan W. Scarritt has argued that this is not true, given the language used in the clause, its position in the will and its mode of

⁴⁰ Cited in Appellee's Brief at 20, 23, 24, 25.

disposition.⁴¹ Construing the clause as disposing of personal property also compels the court to ignore the SEVENTH article, which states that there will be tangible personal property and livestock "not effectively disposed of" by the THIRD ARTICLE.

The personal representative claims that the language of subparagraph E.2. is carefully chosen, and reflects an intent to dispose of the personal property residue. The personal representative claims that clause uses the words "personal property" as that phrase is defined by statute, making many references to the Uniform Probate Code definitions of personal property.⁴² However, the testator did not use the term "personal property" in a way that evidences his intention of drawing definitions from external sources. In fact, the will itself shows that the term "personal property" as used in subparagraph E.2. should be read as "personal effects."

The SIXTH Article of the will shows how the testator used the term "personal property" and even refers to the use of that term in the THIRD Article. The SIXTH Article devises "all articles of personal, household or domestic use or adornment. . . excluding. . . such personal property as may be selected and distributed pursuant to the provisions of Article THIRD hereof." The only "selection" of personal property in the THIRD Article occurs in Subparagraph B.2.

Thus, the SIXTH Article intends to exclude some already selected and distributed "personal property" from the "articles of personal, household or domestic use or adornment" to be distributed to Curtiss S. Scarritt, Jr. This shows that in the mind of the testator "personal property" meant things that were within the broad group "articles of personal, household or domestic use or adornment." That broad category of "things around the house" certainly includes personal effects. That broad category certainly includes the shotgun and sherry set included in subparagraph E.2. But that broad category does not include "all personal property." The testator could not have

⁴¹ Appellants Brief at 20-26.
⁴² Appellee's Brief at 39-46.

used "personal property" to mean more than personal effects. Read as a whole, the will belies the personal representative's attempts to give a broad meaning to the words "personal property" as used in subparagraph E.2. and the SIXTH Article. Subparagraph E.2. is only a disposition of "personal effects." This is made abundantly apparent by the SIXTH Article's use of the same term for the same meaning.

CONCLUSION

After all of the legal arguments are set out, we must return to the will. On first reading, it is clear that real estate is not devised. It is also clear that there is no conclusive, apparent scheme requiring sale of the real estate and distribution of the proceeds. Further, there is no disposition of the personal property residue. Subparagraph E.2. of the THIRD Article is merely a disposition of personal effects. The personal representative would have the Court hold that this subparagraph is the essential purpose of the will, that disposes of all the residue of the estate, when the SEVENTH Article says that it will not, and the SIXTH Article refers to it only as a disposition of personal effects.

The decedent died intestate as to all his real property and personal property residue.

DATED THIS 26th day of May, 1992.

SNOW, NUFFER, ENGSTROM & DRAKE
A Professional Corporation



DAVID NUFFER
Attorney for Petitioner and Appellant

MAILING CERTIFICATE

I hereby certify that on the 26th day of May, 1992, I served four copies of the foregoing REPLY BRIEF on the following by depositing them in the U.S. Mail, postage pre-paid, addressed to:

MICHAEL M. LATER
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MICHAEL W. PARK
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A handwritten signature in black ink, appearing to read 'David Nuffer', is written over a horizontal line.

David Nuffer