2017

Gordon Douglas Womack, Appellant/Petitioner v. Stacey Lee Womack Leavitt and Nicholle Womack Hendricksom, Appellees/ Respondents : Reply Brief of Appellant

Utah Supreme Court

IN THE UTAH SUPREME COURT

IN THE MATTER OF THE ESTATE OF GORDON WARREN WOMACK, Decedent,	Supreme Court No.: 20160544-SC
GORDON DOUGLAS WOMACK, Appellant/Petitioner, v. **STACEY LEE WOMACK LEAVITT and NICHOLLE WOMACK HENDRICKSON,** Appellees/Respondents.	District Court No. 893800021 Court of Appeals No. 20130782-CA

REPLY BRIEF OF APPELLANT

ON CERTIORARI REVIEW TO THE UTAH COURT OF APPEALS' *OPINION* IN *IN RE ESTATE OF WOMACK*, 2016 UT APP. 83, 372 P.3D 690, FROM THE *RULING AND ORDER* ENTERED BY THE EIGHTH DISTRICT JUDICIAL COURT, IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

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ORAL ARGUMENTS/PUBLISHED OPINION REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Caselaw: **Page**

Rules, Statutes and Constitutions

Other

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ARGUMENT

I. THE WILL HAS NEVER BEEN, BUT SHOULD BE, CONSTRUED REGARDING THE DECEDENT GRANTING THE LIFE ESTATE HOLDERS "THE OIL, GAS AND MINERAL RIGHTS *UNDER* THE SAID PROPERTY", AS SEPARATE FROM THE REAL PROPERTY AND THE EXISTING INTERESTS VESTED IN DECEDENT AT THE TIME OF HIS DEATH.

Black's Law Dictionary defines "mineral right" as "[a]n interest in minerals in land, with or without ownership of the surface of the land. A right to take minerals or a right to receive a royalty." *Ibid.*, Abridged Sixth Ed., p. 687 (1991). The Will at issue herein specifies as follows under Section VI(1) pertaining to Special Provisions:

1. I am the owner of 160 acres in Uintah County, State of Utah, described as follows:
   Township 3 South, Range 1 East, Uintah Special Base and Meridian
   Section 16: Northwest Quarter

> Said property should be divided among my aforesaid children, share and share alike, including to the lawful issue of any deceased child as set forth in Paragraph V above, except that the property bequeathed to each child is subject to a right of first refusal upon sale thereof in each of my other children. ***Furthermore,*** the oil, gas and mineral rights under the said property together with any other oil, gas and mineral rights of which I am seized or possessed at the time of my death, are devised to each of my children, share and share alike for life, remainder to the children of each of my children, each of my grandchildren to divide their parent's share by representation per stirpes and not per capita.

R0011; R0122 (emphasis added). This is the provision of the Will at issue in these proceedings. Appellant's requested below that their "mineral rights" separately granted to them in the Will be construed, particularly after extraction of such minerals occurred under the joint lease with Crescent and since Crescent could not ascertain to whom the proceeds should be distributed. Appellant requested that the allocated "mineral rights" be interpreted or construed by the district court to mean that the decedent's children, or life estate holders of the property, were afforded the right to extract and receive royalties, the decedent having granted "oil, gas and mineral rights ***under*** the said property" as differentiated from the property itself, and as differentiated from "any other oil, gas and mineral rights of which I am seized or possessed at the time of my death..." by separate references to those rights. Appellant's position relies upon the plain language of the instruments themselves.

Appellee's focus has been on a separate portion of this same provision that says "...remainder to the children of each of my children, each of my grandchildren to divide their parent's share by representation per stirpes and not per capita." R0011; R0122. Appellees do not acknowledge they are speaking of a different portion of the provision than Appellant, simply expecting that their portion overrules or summarily disposes of Appellant's request to construe by rendering them "remaindermen." Appellees interpret the Estate Order, dated June

3, 1991 to "state that all of Decedent's grandchildren are to have a remainder interest in oil, gas, and mineral rights that are included in any asset distributed to their parents." *Brief of Appellees* at p. 3. Appellees also claim that "[o]n June 3, 1991, the District Court entered Findings of Facts and Conclusions of Law, and Order to Reopen Estate, where among other things, the Will was construed concerning the bequest of mineral rights as to the grandchildren, pursuant to provision VI(1) of Decedent's Will." *Id.* Appellees claim that failing to construe the Will would not result in an impasse, but rather the royalties would be held by Crescent until the life estate holders pass away then distributed to the remaindermen. However, Crescent has indicated that it will not distribute until judicial determination, so this process likely will not resolve the issue.

Appellees have not pointed to any instrument nor order that has construed what was granted to the life estate holders when decedent specifically stated "the oil, gas and mineral rights ***under*** the said property ... are devised to each of my children, share and share alike for life, ..." R0011; R0122 (emphasis added). Appellees believe this was an empty and meaningless provision, providing nothing to the life estate holders regarding the mineral rights; however, that would undermine the plain language provided by the decedent in the Will. General provisions contained in instruments are not construed to render portions of that instrument meaningless. *See, Café Rio, Inc. v. Larking-Gifford-Overton, LLC*, 2009 UT 27, ¶ 33, 207 P.3d 1235 ("We will not interpret a general contractual term such that it renders an explicit right meaningless."); *see, e.g., Fairbourn Commercial, Inc. v. Am. Hous. Partners, Inc.*, 2004 UT 54, ¶ 11, 94 P.3d 292.

Nonetheless, the Decision from the Court of Appeals had this effect. By determining that the 1992 Amended Estate Order construed the Will as intending to create life estates in mineral rights—noting these happen very rarely—it then declared that "[l]ife estates in mineral rights, by default, do not encompass a right to any proceeds from new mineral extraction." *Id.* at ¶17, *citing Calvert Joint Venture #140 v. Snider* and *Hynson*. This "rule" was ultimately found not to apply in the *Hynson* case, which court acknowledged deviations from this rule and then applied one—a statutory provision—to reverse and remand to allocate proceeds to the life estate holder. Another deviation noted in *Hynson* was the plain language of the instrument that could overrule this "default." Thus, *Hynson* itself was not a sufficiently sound case on which the Court of Appeals could rely.

The Decision mistakenly ruled in the first instance, without all the facts being presented below or on appeal, that an "extraction-proceeds provision" was required to be specifically set out in the Will, with any absence of this provision being construed in favor of the remaindermen. No prior Utah law required the decedent herein in 1989 to include a specific extraction proceeds provision. Although this was improper procedure for the court of review to make factual findings not meritoriously ruled on by the trial court, its dicta did not even address the separate issue of the impact of the plain language of the Will granting mineral rights under the property to the life estate holders. Instead, the plain language was ignored in favor of law from Mississippi that actually provided for the existence of deviations, not the least of which was based on language of the instrument itself.

UTAH CODE ANN. §75-3-107(1) sets a three-year limitation after decedent's death on bringing an informal probate proceeding or a formal testacy proceeding. However, UTAH

CODE ANN. §75-3-107(2) states that this limitation "do[es] not apply to proceedings to construe probated wills..." The "probated will" herein is evidenced by the Estate Order and Amended Estate Order given the formal testacy proceedings. *See,* UTAH CODE ANN. §75-3-412(1). Contrary to Appellees' confusing analysis in their brief at Argument I(C), the finality of an order probating a will in -412(1) is not separate and apart from -107(2) for proceedings to construe "probated wills." *Brief of Appellees* at p. 26. They can and should be read in harmony to avoid any absurd result. *See, Berneau v. Martino*, 2009 UT 87, ¶ 12, 223 P.3d 1128 ("[W]e avoid an interpretation that would 'embrace a result ... so absurd that it could not have been intended by the legislature.'" *citing Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 28, 163 P.3d 615). After a "probated will" is evidenced by final order under -412(1), a proceeding may be brought outside the three-year limitation of -107(1) to construe that probated will. UTAH CODE ANN. §75-3-107(2). The finality of the order does not bar a proceeding to construe. Thus, the lack of a limitation period in -107(2) applies to final orders under -412(1).

Appellant's "mineral rights" separately granted to them in the Will need to be construed, particularly since Crescent could not ascertain to whom the proceeds should be distributed. It is Appellant's position that Decedent's children, or life estate holders of the property, were afforded the right to extract and receive royalties by being granted "oil, gas and mineral rights ***under*** the said property" as differentiated in the Will from the property itself, and "any other oil, gas and mineral rights of which I am seized or possessed at the time of my death..." The Appellees and the Court of Appeals mistakenly address these rights as though they are specifically tied to the property; however, the Will does not read this way. Further, such holdings only pertain to the rights maintained by decedent at the time of his death, while

the granting of rights under the property infer receiving proceeds from future excavation and extraction. Nonetheless, this issue is simply presented here to indicate that there was no statute of limitations that should have foreclosed the Petition to Interpret, and Crescent's questions remain unanswered and the proceeds remain undistributed.

II. THE GILLESPIE AFFIDAVIT IS PAROLE EVIDENCE TOWARDS ASSISTING THE QUESTION OF AMBIGUITY, NOT "LATE-DISCOVERED FACTS."

"If the will is ambiguous, any rule of construction normally used in other writings must yield to the intention of the testator as revealed in the instrument." *Estate of Ashton v. Ashton*, 804 P.2d 540, 542 (Utah App. 1990), *citing In re Johnson's Estate*, 228 P. 748, 749 (Utah 1924); *In re Poppleton's Estate*, 97 P. 138, 140 (1908). "In construing a will, a court must look to the testator's intent as expressed in the will." *Id.* "The intent may be 'ascertained not alone from the provision itself, but from a scrutiny of the entire instrument of which it is a part, and in the light of the conditions and circumstances in which the instrument came into existence.'" *Id.*, *citing Poppleton* at 140 (additional citations omitted). "Thus, extrinsic evidence may be used to ascertain what the testator intended." *Id.* Allowing this information to be presented is not akin to presentation of a new will, contrary to Appellees' assertion in their brief.

For the purpose of assisting the trial court in ascertaining the decedent's intent regarding the mineral rights under the property being granted to the life estate holders, Douglas presented an affidavit from William Herbert Gillespie, who was the decedent's attorney who drafted the Will. The Gillespie Affidavit states as follows:

> I understood that Mr. Womack's understanding of the life estate created in paragraph number IV of his Will was that all income and benefits from the oil, gas and mineral rights, including the rights to receive all rents, royalties, bonuses and other income from production of said oil, gas and minerals, as well as the

> executive right to enter in to oil, gas and mineral leases on behalf of the grantee and the remaindermen without liability of waste, would belong to each life tenant (each of his children) during his or her lifetime. Then, upon death of the life tenant all of those benefits would go to the remaindermen (his grandchildren).

R0127.

In the *Brief of Appellees*, the Comment to the Probate Code is cited as "intent" of the drafters, stating that "an order in a formal testacy proceeding serves to end the time within which it is possible to probate after-discovered wills, or to give effect to late-discovered facts concerning heirship." *See, ibid.* For the first time, the Appellees argue that the Gillespie Affidavit contains "late-discovered facts" that cannot be raised.

While the Decision indicated that there is no "ambiguity of intent" created by the lack of an extraction proceeds provision, it fails to acknowledge the differing interpretations that the parties hererin have with regard to the provisions of the Will, particularly with regard to the granting of mineral rights under the property to the life estate holders with remainder to the grandchildren or remaindermen. Further, such differing interpretations have caused Crescent to cease distributing proceeds. As noted above, this question has not yet been properly resolved since the Petition to Interpret was erroneously dismissed on statute of limitations grounds.

If the Will is subject to varying interpretations and is ambiguous, the decedent's intention becomes the focal point in resolving such ambiguity. *Estate of Ashton* at 542, *citing In re Johnson's Estate* at 749; *In re Poppleton's Estate* at 140. First, the testator's intent in the Will is ascertained. *Id.* After discussing disposition of the real property, the plain language states "[f]urthermore, the oil, gas and mineral rights under the said property together with any other

oil, gas and mineral rights of which I am seized or possessed at the time of my death, are devised to each of my children, share and share alike for life, remainder to the children of each of my children, each of my grandchildren to divide their parent's share by representation per stirpes and not per capita." Appellant believes this intent is apparent to grant the life estate holders mineral rights and royalties; however, the Appellees interpret it to mean that nothing was afforded the life estate holders with regard to the mineral rights, with all royalties for the benefit of the remaindermen only. If the testator's intent in the Will cannot be determined, then a court is required to scrutinize "the conditions and circumstances in which the instrument came into existence." *Id.*, *citing Poppleton* at 140 (additional citations omitted).

The Gillespie Affidavit was thus admitted as extrinsic evidence to ascertain what the testator intended. *Id.* Since these facts were never at issue before, they could mistakenly be thought of as "late-discovered facts"; however, their purpose is to aid in construing an ambiguity in the Will, without which the court would be left only to deal with the plain language. While Douglas feels the plain language may be sufficient, the Appellees' dispute rendered the Gillespie Affidavit assistive, particularly where Appellees' position—as adopted by the Court of Appeals' Decision—is that the Will does not address these matters without a specific extraction proceeds provision. The Gillespie Affidavit indicates that is precisely what the decedent intended with this provision.

The Gillespie Affidavit was properly admitted in the trial court to aid in Appellant's request to construe the Will. It was not "late-discovered facts" barred by the proceedings to construe, even under the Comment cited by Appellee, particularly since such Comment

pertained to finality of formal testacy orders rather than to proceedings to construe a Will under UTAH CODE ANN. §75-3-107(2).

III. A COURT CAN PROPERLY ENTER FINDINGS AND CONCLUSIONS ON REQUESTS TO CONSTRUE A WILL WITHOUT REOPENING A FINAL ESTATE ORDER.

UTAH CODE ANN. §75-3-107(2) governs the time frame in which parties can bring proceedings to construe probated wills. In *Estate of Ashton v. Ashton*, the Court was asked to construe ambiguous wording in a will. *Ibid.*, 804 P.2d 540, 542 (Utah App. 1990). As noted *supra,* that task required a look to extrinsic evidence not located in the instruments to decipher the decedent's intent. The *Ashton* Court stated that, "[o]nce a court determines intent, it must then 'find the facts specially and state separately its conclusions of law thereon....'" *Id.*, *citing* UT. R. CIV. P. 52(a). "The findings 'must show that the court's judgment or decree "follows logically from, and is supported by, the evidence."'" *Id.*, *citing Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987)(*quoting Smith v. Smith*, 726 P.2d 423, 426 (Utah 1986)). "The findings also ' "should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached."'" *Id.*, *citing Acton* at 999 (*quoting Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979)).

Appellees claim Douglas' opening brief is internally contradictory where it states that he is not intending to reopen the probate, but seeks "to include" a specific provision, reappoint representatives and correct deeds. The *Brief of Appellee* states this is "improper procedurally and illogical to request for a judicial finding concerning the probated Will, where the Amended Estate Closing Order has been entered, without reopening that matter so it can be addressed judicially."

UTAH CODE ANN. §75-3-107(2) anticipates proceedings to construe probated wills which, as indicated *supra,* are evidenced by estate closing orders. Where a proceeding to construe a Will is brought, it is neither "improper" nor "illogical" to expect a court to enter findings to judicially determine the matter without reopening the estate closing order. It is more akin to a collateral proceeding to touch on matters not previously addressed, at the conclusion of which a court is expected to "find the facts specially and state separately its conclusions of law thereon" as dictated by our rules of procedure. *Estate of Ashton* at 542, *citing* UT. R. CIV. P. 52(a). It would be "illogical" to have proceedings to construe a will and bar the trial court from entering its determination simply because a final estate order exists. This would render the statute authorizing proceedings to construe meaningless. Denying parties the ability to construe probate instruments as issues arise in the future would have a chilling effect on probate in general. This Court should thus decline to adopt Appellees' position on this matter.

IV. THE EXISTENCE OF THE LEGAL CAUSE OF ACTION FOR WASTE DOES NOT AUTOMATICALLY BAR TESTATORS FROM STATING OTHERWISE IN THEIR WILLS.

Appellee cited UTAH CODE ANN. §78B-1001, which states that, "[i]f a ... tenant for life or years, ... of real property commits waste on the property, any person aggrieved by the waste may bring an action against the person." According the to *Brief of Appellee,* the concept of waste and life estates are "synonymous" with one another. The Appellee claims that "[t]here can be no dispute that Petitioner's use, as a life estate holder, of the oil, gas, or mineral rights constitutes waste as to the remainders." *Brief of Appellee* at p. 22. This argument, however, ignores the fact that the Will deliberately grants the life estate holders oil, gas, and mineral

rights under the property, which would be separate from the real property. Thus, they could not be charged with waste of rights specifically granted to them.

It is not unusual for a testator to set up their will in this manner. "While the testator may intend the life tenant to use the property freely with no liability for waste, it is not at all unusual that he also clearly intends that what is not so used is to pass to other named parties." *Estate of Landers v. C.I.R.*, 38 T.C. 828, 835 (U.S. Tax Ct. 1962)(the will expressed that "whatever of this property remains" indicating an intent that wife be permitted to invade corpus). At least one state has indicated that "[n]othing in Kentucky law precludes a testator from granting a life tenant the power to invade the principal of the estate, even to the complete extinguishment of the remainder interests, if such an intention is clearly manifested." *Duvall v. United* States, 246 F.Supp. 378, 379-380 (E.D. Ken. 1965). Appellant is aware of no Utah law, and Appellee has cited no Utah law forbidding a testator to arrange their estate in this manner, which arrangement would entirely foreclose any cause of action under UTAH CODE ANN. §78B-1001. Thus, Appellees' analysis is insufficient to show that Appellant would be liable to the remaindermen for waste under the Will at issue herein based only on the existence of a cause of action for waste in the law.

V. *WELBORN* AND OTHER CITED CASES ARE DIFFERENTIATED IN ADDRESSING REAL PROPERTY RIGHTS OF LIFE ESTATE HOLDERS AND REMAINDERMEN, NOT MINERAL RIGHTS OF THE SAME; ALTHOUGH SOME OF APPELLEES' CITED CASES ACKNOWLEDGE THE IMPACT OF CONVEYANCE OF MINERAL RIGHTS AND NOT JUST REAL PROPERTY RIGHTS.

In *Welborn v. Tidewater Assoc. Oil Co.*, the 10th Circuit rendered a very short opinion, holding that a guardian who held a life estate in the land and made an oil and gas lease of the remainder interest but did not consent to lessee's development of the land only afforded lessee

a contingent right to enter the land and develop it after the death of the life tenant. *Ibid.*, 217 F.2d 509, 510 (10th Cir. 1954). Since the term of the lease expired before the life tenant died, lessee obtained no title that could be slandered by a lease executed jointly by the life tenant and remainderman. *Id.* In the midst of its analysis, the Court opined that "A life tenant and remainderman may lease the land by a joint lease and they may agree as to the division of the rents and royalties." *Id.* at 510 (footnote omitted). It found that, where no agreement was entered into, the life tenant was not entitled to any part of the royalties, but only to the income from such royalties. *Id.* at 510-511. What is absent from *Welborn* is the question as to how specific language in a Will granting mineral rights to a life estate holder would impact this decision. It can thus be easily differentiated from the instant case.

In *Burden v. Gypsy Oil Co.*, the Kansas Court found that "[w]here life tenant and remainderment join in oil and gas lease, they may agree as to divison of rents and royalties, and in absence of agreement life tenant is entitled either to have royalties invested and to receive income therefrom, or to receive apportionment of royalties dependent on value of his expectancy." *Ibid.*, 40 P.2d 463, 468 (Kan. 1935). However, the court noted in this case that "[o]il and gas in the ground are part of the real estate..." *Id. Burden* represents a historical practice. It used to be that real property ownership included owning the land, a column of dirt down to the center of the earth and a column of air up to the sky. This is no longer the case. It has become commonplace to sell the surface of land separate from the mineral rights on that land. *Burden* does not address when mineral rights are separately afforded to a life estate holder.

Interestingly, *Union Gas & Oil Co. v. Wiedermann Oil Co*, which was cited by Appellees, entirely determined its case based on *Ball v. Clark. Ibid.*, 277 S.W. 323, 324 (Ky. 1924), *citing Ball,* 150 S.W. 359 (Ky. 1912), *overruled in part on other grounds, Terteling Bros. Inc. v. Bennett,* 287 S.W.2d 607 (Ky. 1956). In *Ball,* the Kentucky Court found as follows:

> ...the surface ownership of land may be in one man and of the minerals in another; that both in such a case are landholders; that the owner of land may convey the surface to one and reserve to himself and estate in fee in the minerals, or vice versa, or may convey the surface to one and the minerals to another; that the effect of such a conveyance will be to create an estate separate and distinct in the sundered properties, the one from the other, entire and complete in fee simple.

Id. at 360. This was likewise acknowledged in *Union Gas & Oil Co.*

The case of *Carter Oil Co. v. McQuigg* acknowledged the idea that life tenants cannot take oil from the land over which they have their tenancy, but did not address a life estate in mineral rights themselves. *Ibid.*, 112 F.2d 275, 280 (7th Cir. 1940). The case of *Barnes v. Keys* determined similarly without addressing a life estate holder being bequeathed mineral rights. *Ibid.,* 127 P. 261 (Okla. 1912). The case of *Shulthis v. MacDougal* is likewise differentiated from this case. *Ibid.*, 162 F. 331, 343 (8th Cir. 1907).

In *Wilson v. Youst*, the Court stated the same concept that a life tenant cannot make a lease for the corpus of the estate; however, it acknowledged that minerals "may become, by severance, personalty, or there may be a right to use or take it, originating in custom or prescription ... whenever conveyance is made of it, whether that conveyance be called a 'lease' or 'deed,' it is, in effect, the grant of part of the corpus of the estate, and not of the mere incorporeal right." *Ibid.*, 28 S.E. 781, 785 (W.Va.App. 1897).

Thus, the cases upon which Appellees relied in their *Brief of Appellees* do not govern the issues that were brought in the Petition to Interpret, particularly not in a manner that forecloses a court's authority to construe the Will that contains the different provision. In fact, some of those listed indicate that the standard rule the Appellees front and that the Court of Appeals adopted in the Decision should not apply where rights to minerals rather than just real property are at issue.

The Court of Appeals first erred in determining Douglas was seeking modification or vacatur of the 1992 Amended Estate Order. The nature of the Petition to Interpret does not fit any proceeding in the probate code that is subject to time restrictions for the trial court to foreclose the matter under the statute of limitations or for the Court of Appeals to affirm on such grounds. If the Petition to Interpret was subject to a statute of limitations, the record was either unclear when such a limitation would begin and required further investigation, or Douglas was within the appropriate time frame. Lastly, the Court of Appeals erroneously reweighed the evidence and decided matters not properly before it in affirming the dismissal by the district court. The Decision should therefore be reversed, and this matter remanded to the district court with instructions to rule on the merits of the Petition to Interpret.

CONCLUSION

WHEREFORE, based upon the foregoing, Douglas respectfully requests this Court to reverse and remand the Opinion in this matter, and enter any such further order it deems necessary.

DATED this 8th day of February, 2017.

/s/ Justin Rammell
Justin C. Rammell
Attorney for Gordon Douglas Womack

CERTIFICATE OF COMPLIANCE WITH UTAH R. APP. P. 24(f)(1)(C)

Counsel hereby certifies the foregoing *Brief of Petitioner* complies with the type-volume limitation as follows: 4493,words are contained herein, which is in compliance with UTAH R. APP. P. 24(f)(1)(A) and was determined by the word processing system used to prepare *Brief of Appellant.*

DATED this 8th day of February, 2017.

/s/ Justin Rammell
Justin C. Rammell
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Gordon Douglas Womack

CERTIFICATE OF MAILING

I hereby certify that I emailed a true and correct copy of the foregoing *Brief of Petitioner* with attachments, on this 8th day of February, 2017, to the following, with hard copies and an electronic copy on disc to follow in accordance with Standing Order #11:

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