

1959

Tracy-Collins Trust Co. and Vilate P. Devine v.
Marguerite Gessford Pierpont and Ella P. Meyer :
Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF:
THE ESTATE OF THOMAS
FAIRCLOUGH PIERPONT,
Deceased

TRACY-COLLINS TRUST
COMPANY and
VILATE P. DEVINE,

Appellants,

— vs. —

MARGUERITE GESSFORD
PIERPONT and
ELLA P. MEYER

Respondents.

FILED

MAY 7 - 1959

Clerk, Supreme Court, Utah

Case
No. 9022

APPELLANTS' BRIEF

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ELLA P. MEYER

Respondents.

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APPELLANTS' BRIEF

STATEMENT OF THE CASE

Thomas Fairclough Pierpont, hereafter called testator, died testate on September 14, 1954, in Provo, Utah. The testator's will was, on October 22, 1954, admitted to probate in the Fourth Judicial District Court in and for the County of Utah and Tracy-Collins Trust Company was duly appointed as executor (R. pp. 29, 467).

On October 2, 1957, the executor filed its second and final account and report, petition for confirmation of agreement, petition for construction of will and petition for final distribution. The hearing on this petition was held on October 18, 1957, and timely legal notice thereof was given to all interested parties. The petition was granted insofar as it requested final distribution of the estate and by an order effective as of October 18, 1957, the residue of the estate was distributed to Tracy-Collins Trust Company as trustee (hereinafter called trustee) for the use and benefit of certain persons named in the will (R. p. 467).

As the result of a demand made by the attorney for Mrs. Ella P. Meyer that the monthly payments be made for the period commencing with the testator's death, said petition also requested the probate court to interpret the meaning of subparagraph SEVENTH (i) of the Will* and to make an order directing the trustee as to the date from which payments to Mrs. Pierpont and Mrs. Meyer should be made. On October 25, 1957, the probate court, after a hearing in which Mrs. Meyer's counsel participated, ruled in a minute entry that the bequests in subparagraph SEVENTH (i) "are in the nature of annui-

* "(i) From the income of the Trust Estate and, if insufficient, from the principal thereof, my Trustee, subject to the provisions of subparagraph (k) of this Paragraph SEVENTH, shall make disbursements as follows:

- (1) To my wife MARGUERITE GESSFORD PIERPONT, subject to the provisions of Paragraph EIGHTH of this Will, the sum of Two Hundred Fifty Dollars (\$250.00) per month during her lifetime, PROVIDED EXPRESSLY that if she shall remarry such payments shall cease upon her remarriage; and
- (2) To my sister ELLA P. MEYER the sum of One Hundred Dollars (\$100.00) per month during her lifetime."

ties'' and as such commenced at testator's death. The minute entry also ruled that the matter was controlled by Section 74-3-14, U. C. A. 1953 and that the bequest to Mrs. Pierpont was in addition to the family allowance provided for her by paragraph SIXTH* (R. p. 468). Thereafter, the trustee filed a petition and an amended petition for rehearing the petition for construction of will and for reconsideration and cancellation of the minute entry to which respondents filed answers and amended answers (R. p. 468). The court granted the trustee's petition for rehearing, as amended, and such rehearing was had on June 30, 1958. Timely notice of this hearing was given to all heirs-at-law, legatees and devisees of the testator and all of the beneficiaries under the trust (R. p. 469). All the trust beneficiaries except John B. Pierpont appeared either personally or through a duly appointed guardian *ad litem* and all of said beneficiaries except respondents joined in the trustee's petition for rehearing as amended (R. p. 469). John B. Pierpont had not been found at the time of the hearing but a citation and summons had been duly served upon him by publication in the *Daily Herald*, a newspaper published in Provo, Utah (R. p. 373). John B. Pierpont later joined in the trustee's petition for rehearing as amended (R. p. 390).

After argument at the rehearing the court took the matter under advisement and in a second minute entry

* "SIXTH: It is my desire that my Executor shall cause provision to be made for the payment to my wife, MARGUERITE GESSFORD PIERPONT, of a family allowance of TWO HUNDRED FIFTY DOLLARS (\$250.00) per month from the date of my death until such time as my residual estate shall be distributed to my Trustee, as provided in Paragraph SEVENTH hereof."

dated September 24, 1958, adhered to its prior ruling (R. p. 463).

Thereafter the court entered findings of fact and conclusions of law which included findings that the provisions made by said subparagraph SEVENTH (i) of the testator's will were in the nature of annuities and controlled by Section 74-3-14, U.C.A. 1953; that the monthly payments should commence September 14, 1954, the date of death of the testator; that the will became effective as of the date of death of the testator and the trust provisions became effective as of that date; and that there was nothing in the will to indicate the testator intended to postpone the payments provided for in subparagraph SEVENTH (i) of the will until the estate was distributed to the trustee (R. pp. 460-466).

The court concluded and decreed that respondent Marguerite Gessford Pierpont was entitled to the sum of \$9,282.88 representing monthly payments from September 14, 1954, to October 18, 1957, the date on which the residue of the estate was distributed to the trustee together with interest on said \$250.00 payments found to be due her "from the dates that they became due at the rate of six per cent per annum." This amount was decreed to be *in addition* to the sum of \$8,750.00 representing the family allowance paid to the widow during probate and as to which there is no question. The court further concluded and decreed that Ella P. Meyer was entitled to the sum of \$3,713.16 representing monthly payments found to be due her under said will provision

from September 14, 1954, to October 18, 1957, "together with interest on said \$100.00 payments * * * from the dates that they became due at the rate of six per cent per annum."

The trustee and Vilate P. DeVine, one of the beneficiaries under the trust, duly appealed from said decree (R. p. 473).

STATEMENT OF FACTS

(a) *Circumstances under which the will was executed:*

Respondent Marguerite Gessford Pierpont is the widow of the testator. Mrs. Pierpont was many years younger than the testator and married him when he was at an advanced age (R. p. 370). Prior to the marriage the widow was employed by the testator as his private secretary (R. p. 370). The widow and the testator were married on January 17, 1951, so that at the date of testator's death on September 14, 1954, they had been married less than four years. Respondent Ella P. Meyer is the sister of the testator (R. p. 14).

The testator left the five following surviving children born of another marriage: Naomi P. Petit, Vilate P. DeVine, Thomas G. Pierpont, Ruth P. Eccles and John B. Pierpont who are residual beneficiaries under the testamentary trust (R. p. 16). Two of the decedent's children born of said other marriage, Clifford S. Pierpont and Margaret Pierpont Gardner, predeceased the testator and the children of said Clifford S. Pierpont: Clifford S. Pier-

pont, Jr., Smoot S. Pierpont and George S. Pierpont; and the children of said Margaret Pierpont Gardner: Reed P. Gardner, David P. Gardner and Vilate Gardner constitute the remaining residual beneficiaries under the testamentary trust (R. p. 16).

In addition to the above-named grandchildren, the testator left surviving him the following named ten grandchildren: Thomas P. Petit, Richard P. Petit, Diana D. Felt, Thomas C. Pierpont, Kay Pierpont, Susan Eccles, Barbara E. Coit, Dennis B. Pierpont, John B. Pierpont, Jr., and Cherie Pierpont. (R. p. 71-72) All the testator's grandchildren are beneficiaries under subparagraph SEVENTH (j)(1). The above-named living children of the testator, in addition to being residual beneficiaries under the trust are also direct beneficiaries under subparagraph SEVENTH (j)(2).

(b) *Nature of testator's estate:*

The inventory and appraisement shows that the value of testator's gross estate at death was \$325,443.91 (R. pp. 128-134). This included:

(i) Stock in corporations valued at.....	\$304,034.06
(ii) Vivian Park home valued at.....	7,200.00
(iii) Automobile valued at	1,900.00
(iv) Accounts receivable valued at.....	11,550.99

(Later in the first account (R. p. 300) an additional account receivable for \$3,524.00 was added

making total accounts receivable
of \$15,074.99.)

(v) Furniture valued at	750.00
(vi) Cash of only.....	8.86
	<hr/>
	\$325,443.91

In addition to the above property the state inheritance tax report (R. p. 172) included the following jointly owned property which vested in the widow at testator's death:

(i) Cash in joint checking account.....	\$ 240.23
(ii) Vivian Park real property.....	200.00
(iii) Provo Shakespeare Avenue home.....	12,000.00
	<hr/>
	\$12,440.23

An analysis of the first and second accounts filed in connection with the administration of the testator's estate appearing respectively at pages 208-213 and 297-305 of the record shows that none of the property in the estate produced any income during probate *except* that interest of \$244.75 was realized under the contract of sale of the Vivian Park home reported in the second account (R. p. 297). The other cash receipts reported in the two accounts consisted of loans to the estate (totaling approximately \$70,000.00; insurance payments and premium refunds; money received in the settlement of a law suit and money received in the conversion of estate assets. In this connection it should be noted that not until the

receipt of the cash distribution from the Provo Foundry and Machine Company on August 29, 1957, did the estate have any liquid principal assets not needed to pay the estate debts, taxes and expenses of administration (R. p. 297).

The net residual estate distributed to the trustee, after payment of expenses of administration, taxes and specific bequests was \$158,339.22. (R. p. 336)

(c) General contents of will and manner estate disposed of:

After providing for the payment of debts, taxes and expenses of administration in paragraph FIRST, the testator disposed of his estate in the following manner:

Under paragraph SECOND the widow was given the automobile and the furniture and equipment in both the Provo City and Provo Canyon homes (R. p. 11).

Paragraph THIRD made seventeen specific bequests totaling \$19,000.00 (R. pp. 11-12).

Paragraph FOURTH bequeathed a total of \$5,000.00 to Tracy-Collins Trust Company in trust for the use and benefit of John B. Pierpont and Thomas G. Pierpont (R. p. 12).

Paragraph FIFTH provided that estate assets were not to be sold unless the executor considered it could be done at a fair and reasonable price, "even though such course may involve delay in the distribution to be made

under this Will and in the settling of my estate.” (R. p. 13) Subparagraph SEVENTH (k) similarly provides that after distribution to it the trustee was not to sell principal assets at a sacrifice in order to obtain funds to make payments under the trust (R. p. 15). These provisions have important significance, hereafter commented on, owing to the want of liquid assets and the composition of the estate which consisted chiefly of stock in the Provo Foundry and Machine Company, a company which was organized, developed, controlled and managed by testator.

Paragraph SIXTH provided for the payment to the widow of a family allowance of \$250.00 per month “from the date of my death until such time as my residual estate shall be distributed to my Trustee, as provided in Paragraph SEVENTH hereof.” (R. p. 13) Under this provision the widow received a total of \$8,750.00 during probate as a family allowance (R. pp 212 and 300).

The residual estate was then bequeathed and devised in trust to appellant bank to be held and disposed of in accordance with the provisions of paragraph SEVENTH (R. pp. 13-16).

Paragraph EIGHTH provided an alternative \$20,000.00 bequest to the widow in lieu of all other bequests and devises given to her. (R. p. 17) The widow declined to accept this alternative bequest.

Paragraphs NINTH through THIRTEENTH contain general provisions (R. p. 17), some of which hereafter will be discussed in more detail.

STATEMENT OF POINTS

POINT I.

THE WILL SHOWS AN INTENTION THAT PAYMENTS UNDER SUBPARAGRAPH SEVENTH (i) SHOULD COMMENCE FROM THE DATE OF THE FINAL DISTRIBUTION OF THE ESTATE TO THE TRUSTEE.

POINT II.

THE WILL SHOWS AN INTENTION THAT THE TESTATOR INTENDED TO POSTPONE THE PAYMENTS PROVIDED FOR IN SUBPARAGRAPH SEVENTH (i) UNTIL THE ESTATE WAS DISTRIBUTED TO THE TRUSTEE.

POINT III.

THE PAYMENTS UNDER SUBPARAGRAPH SEVENTH (i) OF THE WILL ARE NOT ANNUITIES AND ARE NOT CONTROLLED BY SECTION 74-3-14, UTAH CODE ANNOTATED 1953.

POINT IV.

THE COURT ERRED IN HOLDING THAT INTEREST BE PAID TO RESPONDENTS ON THE AMOUNTS DECREED TO BE DUE THEM.

ARGUMENT

PRELIMINARY STATEMENT

Preliminary to arguing the above points, appellants emphasize four basic principles which, appellants submit, govern this appeal:

First, the interpretation of trust provisions of a will is inherently an equitable function of the court. No evidence was introduced at the hearings below and no questions of fact were tried or determined. The purported "findings of fact" made by the lower court were actually conclusions since they were founded only on the lower court's interpretation of the testator's will made without supporting evidence. These facts alter the usual appellate rule that a lower court's decree will be sustained if there is a reasonable basis for it, and impose on this court the duty to interpret the will *de novo* according to applicable law.

In *Wright v. Union Pacific R. Co.*, 22 Utah 338, 62 Pac. 317, 318 (Utah 1900) this court in commenting upon the scope of review in cases where no evidence is introduced in the trial court stated in part:

"The trial court found that the verdict was not a chance verdict, and it is claimed by respondent's counsel that, as the affidavits are conflicting, this finding is conclusive, and quotes, in support of this contention, the cases of *Nelson v. Southern Pac. Co.*, 15 Utah, 328, 49 Pac. 644, and *Mangum v. Mining Co.*, 15 Utah, 551, 50 Pac. 834. These cases have no application whatever to motions for a new trial, and are applicable only to trials by jury, or

by the court when a jury is not demanded. This court has frequently held that, even on appeals in equity cases, notwithstanding both questions of law and fact are subject to review, the findings of the trial court will not be set aside when the evidence is conflicting, unless the evidence is clearly insufficient. *Sidney Stevens Implement Co. v. South Ogden Land, Building & Improvement Co.* (Utah) 58 Pac. 846; *Klopenstine v. Hays*, 20 Utah, 45, 57 Pac. 712; *McCornick v. Mangum*, 20 Utah, 17, 57 Pac. 428; *Irrigation Co. v. Thomas*, 19 Utah, 360, 57 Pac. 30; and numerous other cases cited in foregoing decisions. All of these cases relate to findings in trials on the merits, and the reason on which they are based has no application whatever to motions for new trials. In a trial on the merits the witnesses are subject to cross-examination, and, being in view of the trial judge or referee, he has a better opportunity to judge of their credibility than the appellate court. On a motion for a new trial supported and resisted, as in the case at bar, on ex parte affidavits, those making the affidavits are not subject to cross-examination, and, not being before the trial judge, his opportunity to judge of their credibility and the weight of their statements is no better than the appellate court. *In all such cases, and in equity cases where the evidence consists exclusively of depositions, the reason upon which the decisions quoted are based fails, and the rule established by them has no application to such cases.* *White v. Pease*, 15 Utah, 170, 49 Pac. 416; *State v. Halford*, 18 Utah, 3, 54 Pac. 819; *Saunders v. Pacific Co.*, 15 Utah, 334, 49 Pac. 646.” (Emphasis added)

Second, the meaning of the will is to be ascertained “according to the intention of the testator” (§ 74-2-1, U. C. A. 1953).

Third, such intention is to be determined “from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations” (§ 74-2-2, U. C. A. 1953).

Fourth, meaning is to be ascertained not only from the will provisions in question but from all the will provisions “construed in relation to each other, and, if possible, so as to form one consistent whole” (§ 74-2-5, U. C. A. 1953).

POINT I.

THE WILL SHOWS AN INTENTION THAT PAYMENTS UNDER SUBPARAGRAPH SEVENTH (i) SHOULD COMMENCE FROM THE DATE OF THE FINAL DISTRIBUTION OF THE ESTATE TO THE TRUSTEE.

The judgment appealed from is founded in large part upon finding No. 7 (which is actually a conclusion) that the trust provisions of the will became effective on the date of testator's death. (R p. 464-465) The implication is that if the trust provisions became effective on that date the payments under subparagraph SEVENTH (i) commenced then.

The question of the time when the trust provisions became effective must be answered from an interpretation of the provisions of the will.

There is no provision of the will that states or suggests that the trust provisions became effective at the testator's death. On the other hand, there are a number of will provisions which show a clear intention that the trust provisions were to become operative only when the residual estate was distributed to the trustee.

Note how explicitly the testator delineated between the periods of probate and trust administration. Paragraph TWELFTH appointed Tracy-Collins Trust Company as executor of testator's will. Paragraph SEVENTH designated the bank as trustee of the testamentary trust. Paragraph FIFTH contains instructions to the executor about not selling assets at a sacrifice during probate and prior to distribution while subparagraph SEVENTH (k) contains similar instructions to the trustee relative to the trust estate. In paragraph THIRTEENTH the testator expresses the wish that the executor *and* the trustee would consult with his son and sons-in-law about matters relating to the administration and handling "of my estate or of said trust." These provisions show an unmistakable intention that there would be successive not simultaneous periods of administration by the executor and the trustee.

Note also the significant language of paragraph SIXTH where the testator defines the period during which the widow would receive the family allowance as being "from the date of my death until such time as my residual estate shall be distributed to my Trustee, *as provided in Paragraph SEVENTH hereof.*" (R. p. 13) (Em-

phasis added) Paragraph SEVENTH, which immediately follows, provides in part:

“I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situate, whereof I may be seized or possessed, or to which I may in any manner be entitled, or in which I may be interested at the time of my death, to TRACY-COLLINS TRUST COMPANY, of Salt Lake City, Utah, as Trustee, in trust, nevertheless, for the following uses and purposes: * * * (R. p. 13)

These two paragraphs read together distinctly show the testator intended that the distribution of the residual estate to the trustee referred to in paragraph SIXTH and the bequest and devise provided for in paragraph SEVENTH were to occur simultaneously after probate had been completed and the residual estate determined. In other words, the distribution referred to in paragraph SIXTH is synonymous with the devise and bequest in paragraph SEVENTH. This interpretation is corroborated by the important difference in the language of disposition used in paragraph SEVENTH and in paragraphs SECOND, THIRD and FOURTH.

Paragraph SECOND provides “*I hereby* give, grant, devise and bequeath to my wife, MARGUERITE GESSFORD PIERPONT” certain described personal property. (R. p. 11) In paragraph THIRD the testator made seventeen specific bequests using the words “*I hereby* give and bequeath.” (R. p. 11) In subparagraph FOURTH (a) the testator granted \$2,500.00 to Tracy-Collins Trust Company in trust for his son John B. Pier-

pont using the words “I *hereby* give and bequeath” and under subparagraph FOURTH (b) in creating a similar trust for his son Thomas G. Pierpont the testator also used the same words “I *hereby* give and bequeath.” (R. p. 12)

However, in paragraph SEVENTH the testator omitted use of the word “hereby” where he provided “I give, devise and bequeath all the rest, residue and remainder of my estate * * * to TRACY-COLLINS TRUST COMPANY * * *.” (R. p. 13)

The use of the word “hereby” can and does have significant meaning. For example, the language in an act “that there be, and hereby is, granted” was construed by the Utah Supreme Court in *Tarpey v. Deseret Salt Co.*, 5 Utah 494, 17 Pac. 631, 633, to mean the grant of legal title *in præsenti* whether the lands included in the grant were surveyed and selected or not.

Of greater significance in connection with the Pierpont will is the consistent use of the word “hereby” in each of the paragraphs making specific bequests and the omission of the word “hereby” in the grant of the residuary estate to Tracy-Collins Trust Company, as trustee.

Finally, the provisions of paragraph SEVENTH which prescribe and define the power and duties of the trustee demonstrate the fallacy of the lower court’s “finding” that the trust provisions of the will became effective at testator’s death.

Subparagraph SEVENTH (a) empowers the trustee to manage, contract with respect to, convey, deal with, exchange, lease or sell the trust property “as the Trustee would have the right to do if it were the individual owner thereof.” Subparagraph SEVENTH (b) empowers it to vote corporate stock belonging to the trust estate. Subparagraph SEVENTH (d) authorizes it to set up reserves out of income for taxes and assessments and for repair of buildings. Subparagraph SEVENTH (g) empowers it to invest and reinvest the trust estate as it seems “meet and proper.” (R. pp. 13-14) Obviously these powers could not have been exercised by the trustee before distribution of the residual estate to it as the property of testator’s estate was in the exclusive possession and control of the executor until that time. Yet the lower court found that the trust provisions became *effective* at the testator’s death. It is unreasonable to say as the lower court does that the testator intended to confer powers and duties upon the trustee effective at a time when it was impossible for the trustee to exercise or discharge them.

The only interpretation that gives meaning and coherency to all the various will provisions mentioned and analyzed above is that the trust property vested in and came into the possession of the trustee at the time of the distribution of the residual estate by the executor and the trust estate came into existence and the trust provisions with respect thereto became effective at that time.

POINT II.

THE WILL SHOWS AN INTENTION THAT THE TESTATOR INTENDED TO POSTPONE THE PAYMENTS PROVIDED FOR IN SUBPARAGRAPH SEVENTH (i) UNTIL THE ESTATE WAS DISTRIBUTED TO THE TRUSTEE.

The lower court's ruling that the subparagraph SEVENTH (i) monthly trust payments commenced at death is based upon the erroneous conclusion that said payments are annuities controlled by Section 74-3-14, U. C. A. 1953, which provides:

“74-3-14. *Legacies and Annuities — When due.* — Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease.”

Point III below explains the reasons why said payments are not annuities.

The basic question is: “When did the testator intend that the SEVENTH (i) monthly payments would commence?” The answer to this question must be founded on an interpretation of the will.

Said payments are directed to be paid “from the income of the Trust Estate and, if sufficient, from the principal thereof.” (R. p. 14) The trust estate did not come into existence until the testator's residual estate was distributed to the trustee on October 18, 1957. In fact, until probate was completed and all debts, taxes, expenses and specific bequests paid, there was no certainty that a trust estate would even exist. It is evident that prior to its

creation the trust estate could not have produced income nor could its principal have been invaded. The trustee, not the executor, was invested with the duties, powers and discretions of the trust. The manifest implication from this is that the payments to respondents under subparagraph SEVENTH (i) were intended to commence on October 18, 1957, when distribution of the residual estate occurred, particularly since there is nothing in the will showing an intention that such payments were to commence at an earlier date.

This interpretation finds support in the provisions of paragraphs SIXTH and SEVENTH pertaining to monthly payments to the widow.

Paragraph SIXTH authorizes the payment to the widow of a \$250.00 per month family allowance extending from the date of death until the residual estate "shall be distributed to my Trustee as provided in Paragraph SEVENTH hereof." (R. p. 13) Paragraph SEVENTH under which the trust estate vested in the trustee at the time of the distribution of the residual estate provides for the payment to the widow of a similar monthly sum, subject to certain expressed conditions, payable from the income of the trust estate and if insufficient, from the principal thereof.

It is significant that the monthly payments to be made from the trust were identical in amount to the authorized family allowance payments. Since the family allowance payments were to continue until the residual

estate was distributed to the trustee and the trust payments commenced then, the testator thus provided for the uninterrupted payment of stated amounts to the widow from the time of his death to the time of the widow's death subject only to the limitations of paragraph EIGHTH and subparagraphs SEVENTH (i) and (k). These provisions read together disclose a carefully devised plan considered adequate by the testator to provide for the widow's needs. The testator's decision as to the amounts of these payments doubtless was influenced by his intimate knowledge of the widow's habits of living and ability to work, by the size of his estate and the needs of the other beneficiaries.

Pursuant to these provisions the widow received \$250.00 per month during probate as a family allowance and since creation of the trust on October 18, 1957, she has received and is now receiving \$250.00 per month under subparagraph SEVENTH (i) and will continue to receive same unless and until one of the conditions specified in subparagraphs SEVENTH (i) or (k) occurs. Mrs. Meyer has received since October 18, 1957, and is now receiving the sum of \$100.00 per month paid in accordance with subparagraph SEVENTH (i).

Neither the appellants nor the other beneficiaries under the trust question the right of respondents to retain the payments already made to them or to their continued right to receive the monthly payments in accordance with said subparagraphs SEVENTH (i) and (k). Appellants do, however, question the right of re-

spondents to receive the amounts of \$9,282.88 (as to Mrs. Pierpont) and \$3,713.16 (as to Mrs. Meyer) decreed by the lower court to be due them which amounts are *additional* to those already received.

As to the widow, the effect of said decree is to give her a total of \$500.00 per month for the period between the testator's death and the distribution of the residual estate to the trustee. This is manifestly contrary to the clear intention of the testator that the payments from the trust commence as of the date of the distribution of the residual estate and that the widow receive \$250.00 per month. Furthermore, it creates an unreasonable result which is unfair and unjust to the other beneficiaries.

The chief asset of the estate was 390 shares of the capital stock of Provo Foundry and Machine Company, 75 shares of which were transferred to Brigham Young University during probate in settlement of a dispute (R. p. 300). The estate had only \$8.86 in cash and the property of the state produced a total of only \$244.75 in income during probate of the estate [see first and second accounts (R. pp. 208-213; 297-305)]. This required the executor to borrow a total of about \$70,000.00 during probate to pay taxes, debts, probate expenses and the family allowance (R. pp. 208, 297).

In the apparent expectation that sale of the Provo Foundry stock or liquidation of the company on a reasonable basis might prove difficult due to the nature of the business and the possible adverse impact upon it of

the death of its founder and president, the testator provided in paragraph FIFTH that estate assets should not be sold at a sacrifice "in order to raise funds to pay cash bequests made under this Will * * *." (R. p. 12) That the testator anticipated there might be a lengthy probate and delay in distribution of the residual estate to the trustee is further indicated by paragraph SIXTH which provided for the payment to the widow of a family allowance of \$250.00 per month from the date of death "until such time as my residual estate shall be distributed to my Trustee, as provided in Paragraph SEVENTH hereof." (R p. 13)

Paragraphs FIFTH and SIXTH disclose two obvious intentions, *first*, to preserve and maintain the estate assets evidenced by testator's instructions that the estate be not too hastily liquidated even though this course would delay distribution and *second*, that the widow receive \$250.00 per month from the date of death until distribution of the residual estate to the trustee.

An interpretation that payments under subparagraph SEVENTH (i) commence as of the date of distribution to the trustee would harmonize and give effect to both intentions. The interpretation made by the lower court that SEVENTH (i) payments commence as of the testator's death is not consistent with either intention, *first* because under it delay in liquidating and distributing the estate while avoiding loss of the estate through a hasty sale would result in its depletion through duplicate payments to the widow during the period of probate and *second* because such interpretation destroys the obvious design

that the widow receive, either from the estate or the trust, the sum of \$250.00 per month from the date of testator's death until her death or remarriage.

Reference is made to the attached Enclosure "A" which illustrates the unfair and unreasonable effect of the lower court's interpretation. The amounts decreed to be due respondents, including principal and interest, total \$14,115.50, which represents 8.91 per cent of the residual estate of \$158,339.22 distributed to the trustee. If the inability to make a reasonable sale or liquidation had extended probate for an additional three years or an additional five years, totals of \$26,426.75 and \$34,868.75 would be due respondents under the lower court's interpretation, representing respectively 16.69 per cent and 22.02 per cent of the residual estate distributed to the trustee. These amounts of course are *additional* to the monthly \$250.00 family allowance paid the widow who received the total of \$8,750.00 as family allowance during probate and who would have received, had probate been extended for an additional three or five years an additional \$9,000.00 or \$15,000.00. Assuming then that probate had been extended until September, 1962, the widow, under the lower court's interpretation, would be entitled to receive approximately \$24,906.25 plus the \$23,750.00 in family allowance she would already have received or a total of \$48,656.25, representing approximately 30 per cent of the estate distributed to the trustee, all this being additional to:

- (a) The home held in joint tenancy,

- (b) The real property at Vivian Park,
- (c) Cash in the joint checking account,
- (d) The family automobile,
- (e) The furnishings and furniture of the two homes,
- (f) The right to receive \$250.00 per month for life or until remarriage,
- (g) The right to receive additional needed amounts under paragraph SEVENTH (j)(2) of the will where illness, accident or other causes produces need.

An interpretation that the testator intended to grant to the widow, to whom he had been married for less than four years, this additional large amount to the detriment of his children and grandchildren is not only contrary to the expressed intention but is unreasonable and unjust. This is particularly so where, as is true here, the interpretation contended for by appellants provides the widow with an adequate assured monthly income for life which with the other above enumerated bequests and benefits to the widow leaves her in a secure and comfortable position enjoyed by few. Furthermore, the lower court's interpretation is not based upon any language that the testator intended this unreasonable result but rather upon the erroneous legal conclusion discussed

below that paragraph SEVENTH (i) created “annuities” which under the statute commence at death.

As to Mrs. Meyer the interpretation urged by appellants is not only consistent with the will provisions but is reasonable as it assures her a steady monthly income for life which has been paid since distribution of the residual estate on October 18, 1957, and which will continue to be paid.

In arguing, as they do above, that it is unreasonable to construe the will as the lower court did, appellants do not wish to be understood as implying or suggesting that the testator could not have given the widow and Mrs. Meyer what the lower court says he did or that he could not have omitted making any provision for his children and grandchildren if he had elected to do so. Of course, the testator had the power to dispose of his estate as he wished. But having in his will manifested a concern over and an intention to benefit his children and grandchildren, appellants assert it is unreasonable to interpret the will as the lower court has done, the effect of which is to give the respondents a disproportionately large share of the estate contrary to the expressed intention of the testator and to the detriment of his children and grandchildren.

POINT III.

THE PAYMENTS UNDER SUBPARAGRAPH SEVENTH (i) OF THE WILL ARE NOT ANNUITIES AND ARE NOT CONTROLLED BY SECTION 74-3-14, UTAH CODE ANNOTATED 1953.

The lower court found that the bequests made by subparagraph SEVENTH (i) of the will were "in the nature of annuities" controlled by Section 74-3-14, U.C.A. 1953, and that "as such annuities said bequests commenced September 14, 1954, the date of the death of said deceased." (R. p. 464)

Based upon that finding the lower court decreed that respondents were entitled to payments under said subparagraph SEVENTH (i) dating from the death of the testator.

Appellants urge that the lower court erred in making these findings and decree because (a) the bequests made by said subparagraph SEVENTH (i) are not annuities and are not controlled by said Section 74-3-14, U.C.A. 1953, and (b) in any event the provisions of the testator's will construed together show an intention that payments under said subparagraph SEVENTH (i) were not to commence until the distribution of the residual estate to the trustee.

The Utah Code defines annuities as follows:

(1) *Section 31-11-2, U. C. A. 1953:*

"* * * Annuities are all agreements to make periodical payments where the making or continuance of all or some of the series of such payments, or the amount of any such payment is dependent upon the continuance of human life, except payments made under the authority of the previous paragraph."

The payments excepted in the above quotation are dissimilar to the payments provided by subparagraph SEVENTH (i).

(2) *Section 74-3-1, U. C.A. 1953:*

“* * * (3) An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets as in case of a general legacy.”

Three essential elements of an annuity emerge from the above definitions:

1. The making, continuance or amount of the payments must be dependent upon the continuance of human life.
2. The payments must be specified and made periodically.
3. The right to receive or the duty to make the periodic payments must be certain or sure.

These correspond with the commonly accepted definition of an annuity as being “a gift of a specific amount payable periodically, absolutely and generally without contingency” (see 96 C. J. S. p. 351; Wills § 902) except that in Utah it is required in addition that the payments be dependent upon the continuance of human life.

Applying these tests, it is obvious that subparagraph SEVENTH (i) and subparagraph SEVENTH (k)* to which (i) is expressly made subject, do not create annuities.

As to the trust provision for Mrs. Pierpont, the making or continuance of payments to her was expressly conditioned (a) upon her not accepting the alternative bequest in paragraph EIGHTH and (b) upon her not remarrying. Had she accepted the bequest made by said paragraph EIGHTH the payments would never have commenced and should she remarry the payments will cease. Having declined to accept the paragraph EIGHTH bequest, payments to her are not now dependent alone upon the continuance of human life as Section 31-11-2 requires but upon the continuance of her unmarried status. Also because payments to the widow will cease upon her remarriage, the payments to her are not certain or absolute.

* “(k) If, at any time the income of the Trust Estate is insufficient to meet the payments required to be made by my Trustee, and principal funds are not available for such purpose, my Trustee may proportionately reduce the respective payments to be made to the extent required by the availability of funds; and, if necessary, may suspend further payments until funds become available through income of the Trust Estate or through orderly sale of all or part of the principal assets. In the event any payments specified to be made by my Trustee shall be so reduced or suspended, it is my desire that when funds become available, any so resulting deficiencies in monthly payments shall be made up. It is my desire and instruction that My Trustee shall not sell principal assets at a sacrifice in order to obtain funds to meet the payments specified in this Will. But it is my desire that when, if and as required, principal assets shall be converted into cash or readily salable securities in order to enable the Trustee to make the payments specified hereunder, provided that sale of principal assets can, in the sole judgment and discretion of the Trustee, be made at a price and in a manner consistent with sound business judgment.”

In addition, the provisions of subparagraph SEVENTH (k) disclose that under some circumstances the right of the respondents to receive the periodic payments is not certain and absolute but on the contrary is uncertain and conditional.

If the income of the trust is insufficient to make the payments and if there are no principal funds available for that purpose, the trustee in its discretion can *reduce* or even *suspend* the payments until "funds become available through income of the Trust Estate or through orderly sale of all or part of the principal assets." However, any such a sale is to be made *only* when the trustee in its "sole judgment and discretion" determines that it can be made "at a price and in a manner consistent with sound business judgment." (R. p. 15) This factor is important because if subparagraph SEVENTH (i) created annuities as the lower court ruled, respondents would be able to force a sale of trust assets to make the payments if there were no income or principal funds to pay them with. *Woodley v. Woodley*, 47 C. A. 2d 358, 117 P. 2d 722, 724 (California 1941), defines as follows the remedies available to an annuitant to enforce payment:

"The rule is well stated in 2 Am. Jur. p. 833 as follows: 'In the event of the nonpayment of an annuity, the old common-law writ of annuity, now obsolete, was a remedy resorted to by an annuitant to obtain redress. At the present day, however, the remedy for nonpayment is, in general, by a personal action of debt or covenant on the instrument creating the annuity (or in jurisdictions in which the old forms of action are abolished, a civil action upon the same theory), or by bill against the

trustee to compel an account. An annuity which is a charge on land in the form of a rent charge is enforceable by distress or an assize, if these remedies are still available in the particular jurisdiction involved, or a court of equity may appoint a receiver to collect the rents from such real estate and apply them to the satisfaction of a decree in favor of the annuitant; *or the person having the right to the arrears is entitled in equity to have them raised by sale or mortgage of the estate; and the court will decree accordingly, even though the person claiming relief is entitled to the legal remedies of distress and perception of rents.*'' (Emphasis added)

It is manifest that the testator did not intend to create annuities so as to put it within the power of respondents to force a sale of the trust assets. On the contrary he expressly negatived any idea that annuities had been created by conferring absolute power and discretion upon the trustee as to the time when trust assets would be sold.

Furthermore, when income or liquid principal assets are available after payments have been reduced or suspended, respondents do not have an absolute right that they be made up. The following provision of subparagraph SEVENTH (k), phrased as it is in language of desire or request, does not impose a duty on the trustee to make up reduced or suspended payments but leaves the matter within its sound discretion :

“In the event any payments specified to be made by my Trustee shall be so reduced or suspended, *it is my desire* that when funds become available, any so resulting deficiencies in monthly payments shall be made up.” (Emphasis added) (R. P. 15)

This interpretation is based upon the well-established rule of will construction that words of desire addressed to a trustee are generally regarded as precatory, not mandatory, unless a penalty for failure to carry out the testator's wish is imposed. The principle is well stated in the following quotation from 95 C. J. S., p. 803, Wills § 602 which also distinguishes language of desire directed to beneficiaries, executors and trustees:

“Distinctions have been drawn between expressions of desire directed to beneficiaries, to executors, and to trustees. A wish directed to a beneficiary is generally regarded as precatory, unless the words clearly express the testator's intention to the contrary; but where the words are addressed to an executor, they are more often regarded as mandatory, or at least *prima facie* mandatory. *Where such words are addressed to a trustee, they are generally regarded as precatory, unless a penalty for failure to carry out the testator's wish is imposed.*” (Emphasis added)

This general rule must, of course, yield to any expressed contrary intention of the testator. However, an examination of the Pierpont will, which obviously was worded with great care and skill, representing as it does the carefully thought out instructions of a man trained through long years of business experience to understand and appreciate the importance of accurate and explicit statement, supports the interpretation that the trustee has the discretion to make up or not make up reduced or suspended payments. Note the significant change in the language used in the second and third sentences of subparagraph SEVENTH (k).

In the second sentence in reference to the making up of deficiencies, the testator said "it is my desire that when funds become available" the resulting deficiencies be made up. In the third sentence which immediately follows, the testator states "it is my desire *and instruction* that my Trustee shall not sell principal assets at a sacrifice in order to obtain funds to meet the payments specified in this Will." (Emphasis added) Also in the last sentence of said subparagraph SEVENTH (k) in reference to the sale of principal assets, the testator uses only the precatory words "it is my desire," conferring upon the trustee discretion with respect to the liquidation of trust estate assets. But in the first sentence of subparagraph SEVENTH (l) the testator provides that it is his "desire *and instruction*" (emphasis added) that his Provo Canyon home be sold to his son Thomas G. Pierpont for a specified sum. (R. p. 15)

Had the testator intended that the trustee be required to make up reduced or suspended payments and not have discretion to make them up or not, he would have coupled the words "it is my desire" with the words "and instruction" as he did in the sentence immediately following and in the first sentence of subparagraph SEVENTH (l).

There are a number of reasons why the testator would have wanted to confer upon the trustee discretion in making up or not making up reduced or suspended payments. For example, suppose that existing economic or other conditions had prevented reasonable liquidation

of the Provo Foundry and Machine Company stock for some time after distribution of the residual estate to the trustee and that there was no income from said stock or the other trust assets thus requiring a suspension of payments to the respondents. Suppose also that shortly before liquid assets become available, both respondents die. If the trustee had no discretion in making up suspended payments under subparagraph SEVENTH (k) they would be payable, respectively, to the estates of Mrs. Pierpont and Mrs. Meyer and would pass to their heirs and legatees and would thus be diverted from the use of the other trust beneficiaries.

Certainly the testator did not intend that the respondents' heirs would benefit in preference to his children and grandchildren. Such a possibility was avoided by conferring discretion upon the trustee as to whether reduced or suspended payments would be made up when income from the trust or liquid principal assets were available to the trustee.

In re Pittock's Will, 102 Ore. 159, 199 Pac. 633, 635, 642-643 (Oregon 1921) which involved the interpretation of precatory language addressed to a trustee has important parallels with the Pierpont will. In that case the following provision of the will of Henry L. Pittock was in question:

“None of my stock in the Oregonian Publishing Company shall be sold, but shall be held intact during the entire period of this trust, I direct that my trustees shall vote said stock in favor of themselves as directors of said corporation, and it is my

desire and I request that C. A. Morden shall be elected manager of the Oregonian and shall be retained as such, and that Edgar B. Piper shall be retained as managing editor of the Oregonian until he shall become incapacitated or until he may voluntarily resign."

Decedent's daughter contended that this provision invalidated the will because it imposed an absolute duty upon the trustees to vote the stock of the Oregonian Publishing Company in a designated manner, thus creating a conflict between their duties as directors to the detriment of the latter relation. After discussing numerous cases, the Oregon court stated:

"Reverting to the Oregonian clause, we find that the will 'directs' the trustees to vote the stock in favor of themselves as directors of said corporation. Immediately the tone of the language changes, 'and it is my desire and I request,' etc. If the testator, familiar as he was from his experience as a newspaper man with the use of words and their shades of meaning, had desired to make the employment of Morden and Piper imperative, he most likely would have grouped all those matters under the mandatory word 'direct.' In the immediately preceding clause of the will he had declared that —

'The trustees shall have full and complete power and authority over my estate, they shall have full and complete possession and control of same.'

Finally in that clause, speaking directly about shares of stock, he employed this language:

'They shall have power to vote my stock in the various corporations at all meetings of the

stockholders of such corporations and shall have all powers incident to the ownership of such stock.'

In view of this strong and comprehensive language, the change of his expression immediately from 'direct' to 'desire' and 'request' is very significant, and we think it is legitimate to construe the latter clause as merely precatory and advisory, but not mandatory."

So here, in view of the strong and comprehensive language and the change in expression from "it is my desire" to "it is my desire and instruction," the former clause is merely precatory and advisory, but not mandatory.

For the above stated reasons appellants assert that the gifts made by subparagraph SEVENTH (i) cannot reasonably be interpreted as annuities.

There is a suggestion that the lower court recognized that said gifts were not in fact annuities. In its finding No. 4 (R. p. 464) and in paragraph 1 of its judgment and decree (R. p. 470) it is stated that the bequests made by subparagraph SEVENTH (i) of the testator's will "are in the *nature* of annuities" and controlled by Section 74-3-14, U. C. A. 1953. However, that section does not provide that bequests in the *nature* of annuities commence at the testator's death but only that annuities commence at that time. For the purpose of determining whether or not said Section 74-3-14 is controlling here, it must be determined whether or not annuities have been created. If they have not the section is not applic-

able. Bequests in the *nature* of annuities are insufficient to make it applicable.

In any event, said Section 74-3-14 only raises a presumption that annuities commence at the testator's decease, which presumption under Section 74-3-16 is controlled by the testator's express intention. Appellants respectfully submit that the provisions of testator's will analyzed and discussed in Points I and II above show an express intention that the payments under subparagraph SEVENTH (i) were not to commence until the trust estate had been created by the distribution of the residual estate to the trustee.

But even assuming said bequests are interpreted as annuities which commenced at testator's death, respondents would have the absolute right only to those payments that accrued between August 29, 1957, and October 18, 1957. Until August 29, 1957, there was no income and no principal assets from which the payments could have been made even had the trustee been in control of the property which later comprised the trust estate. Therefore, any payments for the period between the date of death and August 29, 1957, must be considered as suspended payments and under subparagraph SEVENTH (k) the question of whether such payments are to be made up is a matter that lies within the sound discretion of the trustee.

It is emphasized that the fact that the trustee has the discretion to make up such suspended payments is not to be interpreted as in any way questioning the rights of

the respondents to hereafter receive the stated monthly payments. The assets of the trust estate now consist of liquid income producing assets of sufficient quantity to insure that the respondents' monthly payments will hereafter promptly be made and the right of the respondents to hereafter receive such monthly payments is questioned by no one.

Attention is called to paragraph 4 of the decree (R. p. 471) which directs that the sums awarded respondents are to be paid directly to them. In this connection appellants note that the last sentence of paragraph NINTH of the will provides:

“Any share of the income or principal of the Trust Estate shall be payable and deliverable only and personally to the respective beneficiary entitled thereto or other legally appointed and acting persons, representatives of such beneficiary, provided that my Trustee may, in its sole and absolute discretion, make any payment of income or principal for the benefit of the beneficiary entitled thereto rather than directly to such beneficiary, if the Trustee deems this for the best interests of the beneficiary.”

and gives the trustee discretion to make payments to the beneficiaries either directly or to third parties for the benefit of the beneficiaries if the trustee in its “absolute discretion” so decides.

POINT IV.

THE COURT ERRED IN HOLDING THAT INTEREST BE PAID TO RESPONDENTS ON THE AMOUNTS DECREED TO BE DUE THEM.

The lower court directed that interest be paid to respondents on the sums decreed to be due to them payable "from the dates that they became due at the rate of six per cent per annum." (R. p. 471)

The award of interest obviously is erroneous if, as appellants assert, the testator did not intend that payments would commence until the trust was created by the distribution of the residual estate to the trustee.

In any event, the award is erroneous as to any payments for the period prior to August 29, 1957, since it is within the discretion of the trustee as to whether any such payments shall be made up.

CONCLUSION

Appellants respectfully submit that the lower court's decree should be reversed because the provisions of the testator's will construed together show (a) that the payments provided by subparagraph SEVENTH (i) are not annuities and (b) that the trust was to be created at the time the residual estate was distributed to the trustee and that the subparagraph SEVENTH (i) payments were not to commence until then.

In any event, the decree should be reversed as to any payments for the period prior to August 29, 1957, because

the question of whether any such payments are to be made up lies within the sound discretion of the trustee.

Furthermore, the decree is erroneous in ordering any direct payments to the respondents since the will gives the trustee "absolute discretion" as to whether any payments are to be made directly to the trust beneficiaries or to third parties for their benefit.

Respectfully submitted,

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ENCLOSURE "A"

Payments for Periods Ending	Payments to Mrs. Pierpont	Payments to Mrs. Meyer	Cumulative Total of Monthly Payments	Interest on Monthly Payments	Cumulative Total of Monthly Payments Plus Interest	Percentage of Gross Estate
10-14-54	\$250.00	\$100.00	\$ 350.00	\$	\$ 350.00	%
11-14-54	250.00	100.00	700.00	1.75	701.75	
12-14-54	250.00	100.00	1,050.00	3.50	1,055.25	
1-14-55	250.00	100.00	1,400.00	5.25	1,410.50	
2-14-55	250.00	100.00	1,750.00	7.00	1,767.50	
3-14-55	250.00	100.00	2,100.00	8.75	2,126.25	
4-14-55	250.00	100.00	2,450.00	10.50	2,486.75	
5-14-55	250.00	100.00	2,800.00	12.25	2,849.00	
6-14-55	250.00	100.00	3,150.00	14.00	3,213.00	
7-14-55	250.00	100.00	3,500.00	15.75	3,578.75	
8-14-55	250.00	100.00	3,850.00	17.50	3,946.25	
9-14-55	250.00	100.00	4,200.00	19.25	4,315.50	2.72
10-14-55	250.00	100.00	4,550.00	21.00	4,686.50	
11-14-55	250.00	100.00	4,900.00	22.75	5,059.25	
12-14-55	250.00	100.00	5,250.00	24.50	5,433.75	
1-14-56	250.00	100.00	5,600.00	26.25	5,810.00	
2-14-56	250.00	100.00	5,950.00	28.00	6,188.00	
3-14-56	250.00	100.00	6,300.00	29.75	6,567.75	
4-14-56	250.00	100.00	6,650.00	31.50	6,949.25	
5-14-56	250.00	100.00	7,000.00	33.25	7,332.50	
6-14-56	250.00	100.00	7,350.00	35.00	7,717.50	
7-14-56	250.00	100.00	7,700.00	36.75	8,104.25	
8-14-56	250.00	100.00	8,050.00	38.50	8,492.75	
9-14-56	250.00	100.00	8,400.00	40.25	8,883.00	5.61
10-14-56	250.00	100.00	8,750.00	42.00	9,275.00	
11-14-56	250.00	100.00	9,100.00	43.75	9,668.75	
12-14-56	250.00	100.00	9,450.00	45.50	10,064.25	
1-14-57	250.00	100.00	9,800.00	47.25	10,461.50	
2-14-57	250.00	100.00	10,150.00	49.00	10,860.50	
3-14-57	250.00	100.00	10,500.00	50.75	11,261.25	
4-14-57	250.00	100.00	10,850.00	52.50	11,663.75	
5-14-57	205.00	100.00	11,200.00	54.25	12,068.00	
6-14-57	250.00	100.00	11,550.00	56.00	12,474.00	
7-14-57	250.00	100.00	11,900.00	57.75	12,881.75	
8-14-57	250.00	100.00	12,250.00	59.50	13,291.25	
9-14-57	250.00	100.00	12,600.00	61.25	13,702.50	
10-14-57	250.00	100.00	12,950.00	63.00	14,115.50	8.91

Cumulative Total of Payments Extended Through September 14, 1960

9-14-60	250.00	100.00	25,200.00	124.25	26,426.75	16.69
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Cumulative Total of Payments Extended Through September 14, 1962

9-14-62	250.00	100.00	33,600.00	166.25	34,868.75	22.02
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