

1959

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

Utah Supreme Court

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Senior & Senior; Francis M. Biggins; Attorneys for Appellants;

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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**

SEP 14 1959

Clerk, Supreme Court, Utah

Case  
No. 9022

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## APPELLANTS' REPLY BRIEF

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## APPELLANTS' REPLY BRIEF

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- I. THE TIME OF VESTING OF THE RESIDUAL ESTATE IN THE TRUSTEE AND THE EFFECTIVE DATE OF THE TRUST PROVISIONS ARE CONTROLLED BY THE TESTATOR'S INTENTION, NOT BY STATUTORY OR CASE AUTHORITY.

A basic issue involved here is the time when title to the trust property vested in Tracy-Collins Trust Company as Trustee and the time when the trust provisions of the will became effective.

Appellants urge that this question must be answered from an interpretation of the will and that under the will provisions analyzed at pages 13-18 of Appellants' Brief, the residual estate vested in the Trustee, both in title and possession, on distribution from the Executor and the trust provisions became effective only then.

On the other hand, Respondents argue that the answer lies in an application of §74-2-25, U. C. A. 1953 and certain cited case authorities which, they assert, caused title to the residual estate to vest in the Trustee at the Testator's death. The essential difference in these contentions is shown by the following quotation from page 9 of Respondent Meyer's Brief:

"Counsel \* \* \* argues in brief the intention of the testator. We will stick with the law and show that the cases throughout the land are against Appellants' position and will confirm this court in affirming the lower court."

The leading case cited by Respondents to support their argument is *In re Platt's Estate* (California), 21 Cal. 2d 323, 121 P. 2d 825. Of the *Platt* case Respondent, Pierpont, states at page 14 of her brief:

"*In re Platt's Estate* cited supra deals with nearly all of the problems concerned in this Pierpont will and appeal and this case follows the rule of the Restatement §234 Trusts also cited above. Platt holds that the trust vests at the testator's death."

Respondent, Meyer, quotes at length from this case at pages 12 to 14 of her brief and at page 11 states:

"So here we have the whole case in a nutshell, decided in the highest court in California, over-

ruling an erroneous line of prior authority, with a rationale that must be followed here *because our statutes are the same*, and the logic is identical \* \* \*'' (Emphasis added)

In fact, the California and Utah statutes governing the time of vesting of Testator's estates are very dissimilar. Because of this difference, the *Platt* case and other similar California cases are not controlling or even persuasive here, except as an application of their reasoning leads to the result contended for by Appellants.

Section 28 of the California Probate Code is identical with §74-2-25, U. C. A. 1953, and provides that testamentary dispositions are presumed to vest at the Testator's death. However, this presumption can be overcome by the Testator's expressed intention that title vests at a later time. (See *In re Lowe's Estate*, 68 Utah 49, 249 Pac. 128 where this court held, in interpreting §6371, Compiled Laws 1917, which is identical with said §74-2-25, U. C. A. 1953, that title to the decedent's estate vested at death under the will involved there *because* there was "nothing in the will to indicate an intention on the part of the testatrix that the vesting of the bequests and devises made therein should be postponed beyond her death.")

However, in California there is an additional statutory provision governing the vesting of decedents estates not found in the Utah Code which accounts for the unqualified statement in the *Platt* and other similar cases that testamentary dispositions vest at the testator's death. Section 300 of the California Probate Code provides:

“When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as provided in division II of this code; but all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of division III of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowances to the family, except as otherwise provided in this code.

Thus, under the California statutes, title to a testator's property vests in the will beneficiaries at the testator's death despite the provisions of the will.

Starting from the premise that the residual estate vested in the trustee at the testator's death subject to the executor's possession and control during probate, the court in the *Platt* case concluded that payments from the trust accrued from that date. It said:

“Unquestionably the rule of the restatement is based upon sound reasoning. As title to all testamentary dispositions vests at the testator's death \* \* \* the title of the trustee to Mr. Platt's property vested as of that date even though the trust estate was residuary in character.”

In *In re Hyland's Estate*, 58 Cal. App. 2d 556, 137 P. 2d 273, 275, the California court commented as follows on the *Platt* case:

“The opinion of the Supreme Court points out that *under the law of this state* the title under a testamentary disposition vests as of the date of



death of the testator, that as a result the trustee's title and that of the beneficiary vest as of that date, and concludes that the life tenant is therefore entitled to income from that date *as an incident of that title.*" (Emphasis added.)

Under this reasoning a delay in the vesting of title would inevitably lead to a corresponding delay in the commencement of payments from a trust created by will.

The lower court in this case said in its minute entry of September 24, 1958:

"An examination of the cases and the restatement of the Law of Trusts appears to support the view expressed in the prior ruling of the Court." (R. p. 463.)

It is evident that both the lower court and Respondents are ignorant of the important difference in the California and Utah statutes and have erroneously assumed that title to the trust estate vested in the Trustee at the Testator's death, notwithstanding the express provisions of the will to the contrary. Likewise, they have failed to comprehend that the reasoning supporting the California cases and the rule of the Restatement was based upon this assumed vesting of title in the trustee at testator's death and that if, in fact, title vested in the trustee at a later time, the commencement of payments from the trust logically would be deferred until then. Thus, an application of the reasoning of the California cases and the Restatement here necessarily lead to the result contended for by Appellants, since the Pierpont will clearly provides that title to the residual estate would vest in the Trustee at the time of distribution.

*In re Dare's Estate*, 196 Cal. 29, 35; 235 Pac. 725; *In re Hyland's Estate*, 58 Cal. App. 2d 556; 137 P. 2d 73, 75; *In re Schiffman's Estate*, 86 Cal. App. 2d 638; 195 P. 2d 484, 488; and *In re Hill's Estate*, 149 Cal. App. 2d 779; 309 P. 2d 39, cited by Respondent, Pierpont, at pages 13 and 14 of her brief are inapplicable here because they either cited and followed the *Platt* case or involved will provisions essentially the same as those in the *Platt* case.

*Lightenberg v. Burdell*, 101 Cal. App. 20, 281 Pac. 518 and *Western Pacific Railway v. Godfrey*, 36 Pac. 284, cited by Respondent, Meyer, at page 19 of her brief, correctly state the California rule that the estate of a decedent vests in his devisees and legatees immediately upon his death but, of course, have no applicability in Utah.

*Eldredge v. Eldredge*, 9 Cushing (Mass.) 516; *In re Gaffer's Estate*, 5 N. Y. S. 2d 671; *Parkhurst v. Ginn*, 117 N. E. 202 (Mass.); *In re Will of S. C. Leitsch*, 201 N. W. 284 (Wis.), 37 A. L. R. 547; *State Bank of Chicago v. Gross*, 344 Ill. 512; 176 N. E. 739; 75 A. L. R. 172; *Caughy v. State Deposit & Trust Co.*, 196 Md. 252; 76 A. 2d 323, cited in one or the other of Respondents' briefs, are not controlling, or even persuasive here. The will provisions involved in those cases are far different from the will provisions in question here. Almost without exception, those cases make the statement that the first duty of the court was to ascertain and give effect to the intention expressed in the testator's will. Similarly, interpretation of the Pierpont will is the chief duty of the court here.

## II. IN THE INTERVAL BETWEEN TESTATOR'S DEATH AND FINAL DISTRIBUTION, TITLE TO THE RESIDUAL ESTATE WAS VESTED IN TRACY-COLLINS TRUST COMPANY AS EXECUTOR OF THE ESTATE.

As Respondent, Meyer, correctly points out at page 20 of her brief, at common-law title to personal property of a testator vested in the executor upon its appointment. Some jurisdictions, like California, altered this common-law rule to provide that at death both real and personal property descend directly to the beneficiary with a qualified right of possession in the personal representative for the purpose of administering the estate. In such jurisdictions the executor functions in a manner similar to a receiver in that possession but not title is in the executor and it lacks the power of disposal except by court order.

However, Utah has not wholly abolished this common-law rule. Our statute only raises the *presumption* that title to a testator's personal property descends directly to the beneficiaries which, of course, is controlled by the testator's intention.

Since the Pierpont will expressly provides that the residual estate would vest in the Trustee only after the estate had been probated and since the residual estate consisted wholly of personal property, title to that property vested in Tracy-Collins Trust Company as executor of the estate at Mr. Pierpont's death, where it remained vested until distributed to the bank as Trustee.

## III. THE RIGHTS AND POWERS OF TRACY-COLLINS TRUST COMPANY AS EXECUTOR OF THE PIER-

**PONT WILL ARE SEPARATE AND DISTINCT  
FROM THE RIGHTS AND POWERS IT HAS AS  
TRUSTEE.**

It is elementary and unquestioned law that one person can simultaneously act in several legal capacities and that the holding or exercise of rights and powers in one legal capacity does not constitute the holding or exercise of rights and powers in another simultaneously occupied legal capacity. So the rights and powers of Tracy-Collins Trust Company in its capacity as Executor are distinct from its rights and powers as Trustee.

Despite this, Respondent, Pierpont, makes the unfounded statement at page 12 of her brief that in Utah the "fiction of the separation between executor and trustee as to their powers and duties" had been abolished, citing *In re Lowe's Estate*, 68 Utah 49, 249 Pac. 128, as authority. Counsel either did not fully read this decision or read it and did not understand what it held. The case did not involve a question of the exercise of any rights or powers by the executor or the trustee. Rather, it involved the question of whether a trust beneficiary could, during probate of the estate, exercise a power granted by the will to designate a substitute trustee. The will provided that upon the exercise of that power the trustee designated in the will would be required "to transfer and convey all of such property at the time in its hands and possession to such other trust company." The appellant trust company contended that this language implied that the beneficiary could not exercise the power until the trust estate was distributed to the trust

company as trustee. In rejecting this contention, the Supreme Court stated:

“Such language merely shows, in our judgment, that it was her intention that whenever Mrs. Hampton in writing designated another trust company to act as trustee in place of the Bankers’ Trust Company, then the latter should transfer and convey the title to and deliver possession, if it then had possession, of the trust estate to its successor in trust.”

The court then went on to point out that the title to the trust estate vested in the trustee at the moment of the testatrix’s death and that the reason for this holding was that there was nothing in the will to overcome the statutory presumption that title vested in the trustee at the testatrix’s death. Observe the language of the court which followed a reference to the statute which created a presumption that title vested at the testatrix’s death:

“There is *nothing* in the will to indicate an intention on the part of the testatrix that the vesting of the bequest and devises made therein *should be postponed beyond her death*.” (Emphasis added.)

At page 10 of her brief Respondent, Meyer, states in reference to *In re Lowe’s Estate*, that reversal here can be made on no grounds other than a reversal of that decision. This statement is incorrect and ignores the fact that in will interpretation cases the results, which are dependent on the testator’s intent, vary as will provisions vary. A reversal here would, therefore, be entirely consistent with *In re Lowe’s Estate* if based upon the proper ground that the will provisions overcame the

statutory presumption. In fact, because of the explicit language providing for the vesting in the trustee of title to the residual estate at the time of distribution, an affirmance here would constitute a reversal of the principle upheld in *Lowe's Estate* that a testator's expressed intention will overcome the presumption and control.

#### IV. MR. PIERPONT'S INTENTION CANNOT BE ASCERTAINED FROM WHAT SOME OTHER TESTATOR PROVIDED.

The pertinent provisions of the testator's will in *In re Sears' Estate*, 18 Utah 193, 55 Pac. 83 (cited by Respondent, Pierpont, at page 19 of her brief and by Respondent, Meyer, at pages 32, 36 and 44 of her brief) provided as follows:

“ ‘First, I give, bequeath, and devise to my executors, hereinafter named, all the property, both real and personal, of which I may die possessed, after the payment of my debts and the expenses of administration, in trust for the following purposes: (1) To pay to my wife, Melissa Sears, during her life, such sums of money as my said trustees may, in their sound judgment and discretion, think reasonable and sufficient for her maintenance, having regard for her position and station in life; said sums to be paid monthly, beginning at the date of my decease. (2) To pay to my sister, Maria Liddle, during her life, for the support of herself and her children living with her, the sum of fifty dollars each month, beginning with the date of my decease. (3) To pay to my nurse, Mary A. Anderson, the sum of two hundred and fifty dollars, as soon as there shall be sufficient moneys in their hands; said two hundred and fifty dollars being intended by me as a gift to her for her faithful services during my

late sickness and in addition to compensation for such services.' ''

After the payment of debts, expenses of administration and a monthly allowance to the widow during probate, which lasted about a year, only \$617.87 remained in the estate. The issue was whether the sister, Maria Liddle, was entitled to payments under subparagraph (2), quoted above, in preference to payments provided for the nurse, Mary A. Anderson, under subparagraph (3). The trial court held that the nurse was entitled to payment in preference to the sister. The Supreme Court reversed, holding that the bequest to the sister was an annuity which commenced at the testator's death and was preferred over the bequest to the nurse.

The *Sears* case did not involve a question as to the payments provided to be made to the wife and the statements made by Respondent, Pierpont, at page 19 of her brief are erroneous.

Because of the language of the will, the *Sears' Estate* decision was correct in holding that an annuity was created for the sister. First, the amount of the payments was definite (\$50.00 per month) and the duty to make them was unqualified and unconditional. Also, the will expressly provided that the payments were to commence at the testator's death. These provisions removed any question about the testator having provided for a time of commencement of payment other than the date of death.

It is apparent that the will involved in *Sears' Estate* is not even remotely similar to the pertinent provisions

of the Pierpont will. Had the testator in *Sears' Estate* made the payments to the sister conditional and failed to provide that the payments were to commence at his death, as is true here, the holding would have been different.

Obviously, *In re Sears' Estate* has no applicability and the citation of it by Respondents points to the futility of attempting to decide the meaning of the provisions of one testator's will on the basis of what some other testator provided. As was stated in *In re Luckel's Estate* cited by Respondent, Pierpont, at pages 14 and 21 of her brief:

“A will is to be construed according to the intention of the testator as expressed therein, and this intention must be given effect if possible. Each case depends on its own particular facts and precedents are of small value.”

#### V. RESPONDENTS HAVE FAILED TO INTERPRET THE WILL AS A WHOLE.

Although this appeal involves a question of will interpretation, neither of the Respondents has seriously attempted to analyze and interpret the various provisions of Mr. Pierpont's will. Their briefs devote much space to cases interpreting the intention of other testators but little to interpreting what Mr. Pierpont intended. In the instances when Respondents do make reference to the Pierpont will, it is usually to an isolated clause or sentence taken out of context and usually is made without comment as to what preceded or followed it. In effect, it seems that when Respondents do look at the will, it is done with blinders so as to exclude from view anything



inconsistent with the narrow segment being read. The following references to the Respondents' briefs demonstrate this:

1. In the last few lines of page 6 of her brief, Respondent, Pierpont, states:

"It is significant that paragraph 7 (i) instructs that the trustee *shall* make disbursements 'from the income of the trust estate and if insufficient, from the principal thereof' indicating the full extent to which the testator was willing to go to see that these monthly payments would be made."

The brief neglects to mention that the above quoted provision is qualified by the language "subject to the provisions of subparagraph (k) of this paragraph SEVENTH."

2. At the top of page 7 of Pierpont's brief it is stated in reference to subparagraph SEVENTH (k):

"It provides that if income is insufficient and principal funds are not available that the trustee 'may' reduce and if necessary 'may suspend' further payments until funds become available through income or orderly sale of all or part of the principal assets, but in the event any payments specified to be made by trustee shall be so reduced or suspended, when funds become available, any so resulting deficiencies shall be made up."

The brief fails to point out that the words "it is my desire" precede the provision "that when funds become available, any so resulting deficiencies in monthly payments shall be made up."

3. Also at page 7 of her brief, Respondent, Pier-

pont, refers to the words "To make the payments *specified* hereunder" as indicating the payments provided for under subparagraph SEVENTH (i) were absolute and unconditional. This, however, ignores the fact that the payments which are "specified" or described there are expressly made subject to all the provisions of subparagraph SEVENTH (k). The respondent would like to interpret "specified" in its mandatory rather than its descriptive sense. However, when the word is examined in context, it is apparent that it cannot be so interpreted.

4. At the top of page 20 of her brief Respondent, Pierpont, in referring to the provisions of subparagraph SEVENTH (k) regarding the making up of reduced or suspended payments, quotes the words "shall be made up" out of context without mentioning the qualifying, precatory language "It is my desire" contained in the same sentence.

5. In paragraph 1 page 8 of her brief Respondent, Meyer, similarly fails to note the qualifying precatory language "it is my desire" and sees only the words "shall be made up." It is significant that in *In re Pittock's Will* cited at page 33 of Appellants' brief, the provision interpreted by the court as *not* imposing a mandatory duty on the trustee was:

"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."

Consistent with established principles of will construc-

tion, the precatory language was there held to confer discretion on the trustee, notwithstanding the repeated use of the word "shall".

6. At the top of page 18 Respondent, Meyer, quotes the following portion of subparagraph (k) "any so resulting deficiencies in monthly payments shall be made up" and ignores the qualifying precatory language "It is my desire."

7. Again at page 35 of her brief Respondent, Meyer, looks only at the words "shall be made up."

8. At pages 37 and 39 Respondent, Meyer, argues that the words "payments required to be made" in line 2 of subparagraph SEVENTH (k) are to be interpreted as making the SEVENTH (i) payments absolute and unconditional. Again Respondent prefers to ignore the other provisions of the paragraph in the light of which the quoted words must be read. In addition Respondent loses sight of the fact that the word "require" has two meanings: one mandatory "to ask for authoritatively or imperatively, or as a right; to demand, claim, insist on having"; the other definition "to call for or demand as appropriate or suitable in the particular case; to need for some end or purpose." (Oxford Universal Dictionary 1955 p. 1711) The "required" payments referred to in subparagraph SEVENTH (k) are, of course, the SEVENTH (i) payments which are expressly made subject to all of the provisions of subparagraph SEVENTH (k). It is apparent that under these circumstances the word "required" was used in the sense of the second above mentioned definition. If the interpretation argued for

by Respondent, Meyer, were adopted it would necessarily follow that the SEVENTH (i) payments could be neither reduced or suspended as provided in SEVENTH (k), nor, in fact, could any of the provisions of SEVENTH (k) operate to limit or qualify the absolute requirement to pay the monthly sums. It would be difficult to think of a better example than this one to demonstrate the absurdity of attempting to interpret testamentary intention from an isolated phrase, wrested out of context.

The evident reason for Respondents' failure to interpret the will as a whole is that to do so leads to a result contrary to the one they have asserted on appeal.

**VI. THE PHRASE "DURING HER LIFETIME" USED IN PARAGRAPH SEVENTH (i) (1) and (2) HAS NO BEARING ON THE QUESTION OF WHEN THE PAYMENTS TO RESPONDENTS WERE TO COMMENCE.**

Both Respondents argue that the phrase "during her lifetime" used in Paragraph SEVENTH (i) (1) and (2) express an intention that the respective payments were to commence at the Testator's death rather than at the time of distribution. No attempt is made in either answering brief to explain the reasoning processes by which this conclusion was reached, nor is any supporting authority cited.

Their contention is not based upon a literal interpretation of the language, since literally, the words would mean from the time of the Respondents' births until their deaths. Neither Respondent, however, contends that Paragraph SEVENTH (i) payments extend beyond the time of the Testator's death, which can only mean, there-

fore, that in their view the words have reference to a period commencing at some point in time after they were born and continuing thereafter during the remainder of their lives. They have arbitrarily, without reason or explanation, established that starting point as the date of the Testator's death. In answer, Appellants could, with equal arbitrariness and lack of reason, say that the starting point was the time of the distribution of the residual estate to the trustee. Neither argument standing alone has any force, however, and adds nothing to the attempt to get at the meaning of the Testator's will. It is obvious, therefore, that the words "during her lifetime" viewed alone have no bearing on the time when the payments to Respondents were to commence.

#### VII. SECTION 74-3-12 U. C. A. 1953 IS INAPPLICABLE HERE.

Section 74-3-12 U. C. A. 1953 referred to by Respondent, Meyer, at pages 5 and 8 of her brief provides: "In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death." This section is inapplicable here for two reasons. First, a trust consisting of an *uncertain* residual estate cannot be considered a "certain" sum or fund within the meaning of said §74-3-12. Second, §74-3-12 is controlled by §74-3-16 which provides "The four preceding sections are in all cases to be controlled by a testator's express intention." Here the testator expressly provided that the residual estate would not vest in the trustee, and the trust would not be created until final distribution from the executor. There could be no income from the trust until after it came into being.

Furthermore, during probate the property of the estate produced a total of only \$244.75 in income (R. pp. 208-213; 297-305). Therefore, any judgment in favor of Respondents based upon §74-3-12 would have to be limited to that amount.

At page 8 of her brief Respondent, Meyer, argues, in reference to said §74-3-12, that if income, which may vary in amount, accrues from the Testator's death, monthly payments, payable from income or principal, clearly commence then. This argument is based upon the false assumptions (1) that §74-3-12 is applicable to residual trusts uncertain in character, and (2) that the trust came into being at Testator's death and the payments from the trust commenced then. In addition, it erroneously assumes that the payments are absolute and unconditional and unvarying in amount. In other words, that the payments are annuities. However, annuities are controlled by §74-3-14 and not §74-3-12.

#### **VIII. SECTION 74-3-14 U. C. A. 1953 IS INAPPLICABLE HERE.**

At pages 18 to 19 of her brief Respondent, Pierpont, argues that even assuming the payments provided to be made from subparagraph SEVENTH (i) are not annuities, they are general legacies which, under §74-3-14 U. C. A. 1953 would be due and deliverable one year after Testator's decease. This argument ignores the fact that under §74-3-16 the Testator's intention controls §74-3-14, which leads us once again to the basic inquiry as to when the Testator intended that the residual estate would vest in the Trustee and the time when the trust provisions of the will would become effective.

**IX. THE CHECKS REFERRED TO BY RESPONDENT, MEYER, ARE NOT IN EVIDENCE AND REFERENCE TO THEM IS IMPROPER. EVEN IF ADMITTED IN EVIDENCE, THEY WOULD HAVE NO BEARING ON THE ISSUES INVOLVED HERE.**

At pages 25 to 28 of her brief Respondent, Meyer, refers to certain checks from the Testator to Mrs. Meyer which were offered in evidence at the hearing in the lower court. The court refused to admit the checks in evidence, ruling that no extrinsic evidence was admissible unless there was an ambiguity in the will. The court found that the will was clear and unambiguous. In answer to a question asked at the hearing, counsel for Mrs. Meyer conceded that the will was unambiguous. No assertion is made in the brief on appeal of Respondent, Meyer, that there is any ambiguity. It is, therefore, plain that not only are these checks not in evidence, but by counsel's own admission there is no basis on which they can be admitted in evidence. Notwithstanding this, the brief makes the unfounded and wholly inconsistent statement that:

“This court is bound to accept the proffer of proof that for eighteen to twenty months before his death, he (testator) maintained her with payments of at least \$100.00 per month.” (Br. p. 41.)

Obviously, no authority is cited to support this novel proposition.

But even if the checks had been admitted in evidence, they would not support the argument which Respondent, Meyer, makes that the Testator had maintained her prior to his death. The fact that the Testator gave her money is not evidence that he maintained her. It is possible



that the checks were given in payment of an obligation or for some other unknown reason as to which this Court can only speculate. The checks are not dated in monthly sequence. Six of them are for \$200.00 and one for \$50.00. The first of said checks was dated December 15, 1951, some fourteen months prior to the execution of the will and thirty-three months prior to the Testator's death. It is apparent, therefore, that the checks would be meaningless even if in evidence unless the Court intended to engage in speculation.

In asserting that the payments to Mrs. Meyer are for her maintenance, counsel apparently has in mind §74-3-15 U. C. A. 1953 which provides, in part, that legacies for maintenance "bear interest from a testator's decease." If this is the contention, it has no merit. The provisions of said §74-3-15 U. C. A. 1953 are controlled by §74-3-16 which provides that "the four preceding sections are in all cases to be controlled by a testator's express intention." Here the Testator did not grant a specific legacy of a certain amount of money to Respondent, Meyer, but rather devised and bequeathed the residue of his estate to the Appellant bank as Trustee and provided for the conditional payment to the Respondent of certain amounts from the trust. It was expressly provided that the trust would not come into existence and the title to the trust property would not vest in the Trustee until the final distribution of the estate from the Executor. Any payments provided to be made from the trust could not, therefore, commence or accrue until then.

It is significant that the Testator expressly provided for payments to his widow during probate under



Paragraph SIXTH of the will. If the Testator had intended that Mrs. Meyer receive payments during the period of probate, he would have so expressly provided as he did in the case of his widow.

In any event, this desperate attempt by Respondents' counsel to find another basis to support the lower court's decree is not timely made and cannot be asserted at this late date.

**X. HOLDING IN CASE CITED BY RESPONDENT, PIERPONT, IS CONTRARY TO PRINCIPLE FOR WHICH CASE CITED.**

At pages 11 to 12 of her brief Respondent, Pierpont, makes the following statement:

“When resort is had to a written instrument alone, the interpretation of the trial court, if reasonable, will be accepted by the appellate court, or if that interpretation is one of two reasonable views, it will be followed.”

In support of this statement, the brief cites *In re Platt's Estate*, 21 Cal. 2d 343, 131 P. 2d 825. Actually, the Respondent has cited the *Platt* case for a proposition which was asserted on appeal by the respondent, but which was rejected by the California Supreme Court. It was there urged that since the judgment of the lower court was “based upon a reasonable construction of the provisions of the will concerning the right to income \* \* \* this court may not substitute another interpretation for it.” In rejecting this contention and in reversing the trial court, the Supreme Court stated:

“An appellate court is not bound by a construction of the contract based solely upon the terms

of the written instrument without the aid of evidence (citing authorities) where there is no conflict in the evidence (citing authorities) or a determination has been made upon competent evidence (citing authorities). Under these circumstances, there is no issue of fact and it is the duty of an appellate court to make the final determination in accordance with the applicable principles of law.”

We also call the Court’s attention to the following statement from *In re Luckel’s Estate*, 151 Cal. App. 2d 481, 312 P. 2d 24, 31, cited by Respondent, Pierpont, at pages 14 and 21 of her brief:

“The probate court’s construction of the will was based solely on its terms without the aid of evidence. Accordingly, it is the duty of this court to construe it.”

**XI. RESPONDENTS’ FAILURE TO CITE CONTRARY AUTHORITIES OR TO SHOW THAT TESTATOR INTENDED A CONTRARY RESULT CONFIRMS APPELLANTS’ ARGUMENT THAT THE PAYMENTS UNDER PARAGRAPH SEVENTH (i) ARE NOT ANNUITIES.**

Because of the express will language providing that the residual estate would vest in the Trustee and the trust would come into being only after probate was completed and the residual estate distributed to the Trustee, and because of the language of subparagraph SEVENTH (i) providing for payments to the Respondents “from the income of the trust estate and if insufficient, from the principal thereof”, which clearly show that the subparagraph SEVENTH (i) payments were to commence at the time of distribution to the Trustee, Respondents

can prevail here, if at all, only if said subparagraph SEVENTH (i) payments are annuities within the meaning of §74-3-12 U. C. A. 1953.\*

Neither of Respondents cites authority nor points to any will provisions which contradict Appellants' arguments at pages 25 to 37 of their brief to the effect that the said subparagraph SEVENTH (i) payments are *not* annuities. Respondent, Pierpont, attempts to dispose of the subject merely by deploring Appellants' reference to the definition of an annuity contained in §31-11-2 U. C. A. 1953, by citing *In re Sears' Estate*, 18 Utah 193, 55 Pac. 83, (in which case testator's will expressly provided that payments were to commence at his death); and by quoting fragmentary statements from Black's Law Dictionary and Corpus Juris Secundum which relate to the *effect* of an annuity, assuming that one exists, rather than to the elements essential to the existence of an annuity.

Respondent, Meyer's treatment of the annuity question at pages 31 to 40 of her brief is equally superficial. She does argue, in addition, that payments "in the nature of an annuity" are controlled by said §74-3-12, thus evidencing the same uncertainty as the trial court of whether these payments are, in fact, annuities. It is clear, however, that only payments which meet the annuity test are governed by the statute.

Although Appellants are aware of no principle of statutory construction which limits the annuity definition

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\*"In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death."

in §31-11-2 to insurance contracts, they will, in order to forestall argument and complaint by Respondents, ignore it and confine their analysis to the annuity definition in §74-3-1 U. C. A., 1953 and the generally accepted annuity definition developed in the cases set out at page 27 of Appellants' brief. In addition to the authorities and definitions set out there, Appellants call attention to the following definition of an annuity contained in *In re Luckel's Estate*, 151 Cal. 2d 481, 312 P. 2d 24, cited by Respondent, Pierpont, at pages 14 and 21 of her brief:

“An annuity is a periodical payment which is payable unconditionally, there being no contingency present.”

In this connection, we note that the California statutory annuity definition is identical to the one in §74-3-1 U. C. A. 1953.

The test, then, in determining if the subparagraph SEVENTH (i) payments are annuities is whether or not they are payable unconditionally and without contingency. The answer to this inquiry must be determined from the language of the will viewed from the time when the Testator executed the will and in light of the circumstances under which it was executed. Interpreted in this manner and as of that time, there is no doubt that these payments are *not* annuities. In the first place, the payments to Mrs. Pierpont are expressly conditioned upon the continuance of her unmarried status. In the second place, the payments to both Respondents are expressly subject to and conditioned by the provisions of subparagraph SEVENTH (k), under which the Trustee has the power to reduce or suspend the payments under

certain prescribed circumstances. Said subparagraph SEVENTH (k) also confers discretionary power upon the Trustee to make up or not to make up suspended or reduced payments when the reasons for the reduction or suspension have ceased to exist. It is respectfully submitted that under these circumstances these payments cannot reasonably be interpreted to be annuities.

Furthermore, even if they are annuities, the payments must date from the time of distribution, not from the date of the Testator's death, because the provisions of §74-3-12 are controlled by the Testator's intention as provided in §74-3-16. Here the Testator expressly provided that the trust estate would not vest in the Trustee and the trust provision would not become effective until final distribution of the estate. Under these circumstances, the subparagraph SEVENTH (i) payments provided to be made "from the income of the trust estate, and, if insufficient, from the principal thereof", logically could date only from the time the trust estate came into existence. Also, since there was no income from date of death until August 29, 1957 (except \$244.75) all payments between those dates must be regarded as suspended payments under subparagraph SEVENTH (k) and the question of whether or not such suspended payments are to made up lies within the discretion of the Trustee.

In connection with the last mentioned point, Respondents fail to distinguish between the effect of said subparagraph SEVENTH (k) as it relates to: (a) the issue of whether subparagraph SEVENTH (i) payments are annuities and (b) the issue of whether, assuming the

SEVENTH (i) payments are annuities, the Trustee nevertheless has the discretion to make up suspended payments for the period between the date of death and August 29, 1957. As to the first issue, said provision must be viewed as of the date of execution of the will. As to the second issue, it must be viewed as of the time when liquid assets are available after payments have been reduced or suspended. Of course, if said payments are held not to be annuities and that they did not commence until distribution of the residual estate to the Trustee, the second issue does not exist here. The failure of Respondents to distinguish between these essentially different concepts has resulted in a good deal of confusion in their briefs.

## CONCLUSION

In conclusion Appellants desire to emphasize that the fundamental issue in this case is: when did the Testator intend that the subparagraph SEVENTH (i) payments would commence? This issue can be determined only from Mr. Pierpont's will. An essential element in deciding this ultimate question is the time when the residual trust estate vested in the Trustee and the time when the trust provisions became effective. Here again the question can be answered only from an interpretation of the will. To support its contentions that the will clearly provides that title to the trust property was intended to vest only after probate was completed; that the trust provisions were not intended to become effective until that time and that the payments did not commence until then, Appellants have heretofore re-

ferred the Court and, again, respectfully refer the Court to the three following features of the will.

FIRST, the period during which the family allowance was to be paid under paragraph SIXTH was defined by the Testator 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." The pertinent provisions of paragraph SEVENTH which immediately follow this quotation are:

"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:"

It is apparent from the use of the words "give, devise and bequeath" in said paragraph SEVENTH that it is under this paragraph that the Trustee must derive its title to the residual estate. It is equally clear, in view of the express language of paragraph SIXTH, that said paragraph SEVENTH was not to become operative until after probate had been completed, so that the distribution of the residual estate to the Trustee and the vesting of title to the residual estate in the Trustee would occur simultaneously.

The accuracy of this interpretation is demonstrated by noting the illogical result that follows under paragraph SIXTH if the Lower Court's interpretation is adopted. The Lower Court held that the provisions of

paragraph SEVENTH became effective and that title to the residual estate vested in the Trustee at the Testator's death. Under this view, note that paragraph SIXTH provides no period during which the family allowance is to be paid, because the time of commencement (the Testator's death) is identical with the time of termination (time of distribution as provided by paragraph SEVENTH which the Lower Court held occurred at death).

SECOND, in every will provision in which the Testator granted any of his estate, *except* paragraph SEVENTH, the Testator used the language "I hereby give and bequeath . . ." In paragraph SEVENTH, however, the word "hereby" was significantly eliminated, indicating clearly that as to all the grants *except* as to the residual estate, title was to pass under the will at the time of Testator's death.

THIRD, the numerous other will provisions referred to and analyzed in Appellants' brief, show that Testator clearly intended that there would be successive and not simultaneous periods of probate and trust administration.

Since it is apparent that Testator intended that title to the trust estate would vest and the trust provisions would become effective at the time of distribution of the residual estate to the Trustee, the provisions in subparagraph SEVENTH (i) that the payments were to be made "from the income of the trust estate and, if insufficient, from the principal thereof" could not logically have reference to a time prior to the time the trust came into being.



This interpretation is corroborated by the fact that under paragraph SIXTH the Testator provided for a payment to the widow of a \$250.00 per month family allowance from the date of his death to the time of distribution, as provided in paragraph SEVENTH, and then provided under paragraph SEVENTH for the payment to her of \$250.00 per month during her lifetime or until she remarried, subject to the conditions of subparagraph SEVENTH (k). This discloses a clear testamentary intention that the widow receive only the sum of \$250.00 per month from the date of Testator's death subject to the applicable will provisions. The decision of the Trial Court upsets this testamentary intention and results in the payment to the widow of the sum of \$500.00 per month during probate and \$250.00 per month thereafter.

It is respectfully submitted that this interpretation is at variance with the will and that the judgment of the Lower Court should therefore be reversed.

Respectfully submitted,

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