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Miles Lorraine Miller and Irvine B. Miller v. Walker Bank & Trust Co., Executor of the Last Will and Testament of Nettie Knudsen Miller, Deceased, and Viola Miller Carlson : Appellants' Reply Brief

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IN THE SUPREME COURT
of the
STATE OF UTAH

MILES LORRAINE MILLER and IRVINE B. MILLER,
Plaintiffs and Respondents,

vs.

WALKER BANK & TRUST CO., Executor of the Last Will and Testament of NETTIE KNUDSEN MILLER, Deceased, and VIOLA MILLER CARLSON,
Defendants and Appellants.

Case No. 10272

FILED
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Supreme Court, Utah

APPELLANT'S REPLY BRIEF

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE A. H. ELLETT, JUDGE

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PRELIMINARY STATEMENT

Respondents have now settled on an implied trust theory—but they themselves confuse their own theory by saying (Respondents' Brief, pages 5 and 15) that Nettie Miller could not dispose of the property in question by will. There is absolutely no restriction of any kind on Nettie in Miles' will. In any event, if she was a trustee, she necessarily would have to have had power to dispose of the property by sprinkling it among the purported beneficiaries. This demonstrates clearly the confusion, ambiguities and conjectures which respond-

ents now wish to write into the will. We call attention to the simple language of Paragraph Second of the will (R. 45 and Appellants' Brief, (p. 3).

ARGUMENT

POINT I.

THE WILL MUST BE CONSTRUED FROM ITS TERMS, AND CLARITY AND CERTAINTY MUST PREVAIL OVER AMBIGUITIES, UNCERTAINTY AND PURE GUESS.

The law of wills and of probate is premised on the need for clarity, certainty and definiteness of terms. The only rights under the law of wills are those given by statute. *In re Mower,* 93 Utah 390, 73 P.2d 967; *Thompson on Wills,* Sec. 8, p. 18. The instrument as executed is the ultimate criterion—not conjectures as to what a testator, now long deceased, might have wanted or might have said, if we could now read his mind and rewrite his will. See 1 *Bowe-Parker*: *Page on Wills,* Sec. 5.11, p. 187.

Our Court in *In re Call's Estate,* 15 Utah 2d 1, 386 P. 2d 1065, weighed the applicable statutes and held in favor of the clear, certain and explicit. Respondents ask that the *Call* case be reversed.

Respondents have said (Respondents' Brief, p. 14) that "Not only testator's words, but his lack of words have a bearing upon what he had in mind when he signed the instrument." We submit that the words of the will are all that is in question. The will has no limitation upon Nettie as to any disposition by will or deed, and there

is no expression of her right to use the property for her own benefit, as suggested by respondents. Nettie received a devise of the entire residue, followed by words of *doubtful import*. By the *Call* case, the clear devise was paramount over any subsequent ambiguous and equivocal language which might conjure up thoughts or possible intentions of the testator, if we could now read his mind.

The *Call* case spelled out the importance of certainty and showed that in a choice between the application of a general statute, namely, 74-2-1, UCA 1953, going to the testator's general intent, and a specific statute, 74-1-36, UCA 1953, determining and favoring a fee simple devise, the latter, which makes for clarity and certainty, must prevail.

The same choice, applied to the Miles Miller will, under all existing law, can only be made in favor of an unqualified fee simple devise to Nettie.

The rule of the *Call* case is restated in *Thompson on Wills,* Sec. 224, p. 350, as follows:

> "An absolute devise or bequest of property in one clause of a will can not be qualified or cut down by a later part of the will unless such later part shows an equally clear intention to do so by the use of words definite in their meaning or by expressions which must be regarded as imperative.
>
> "When an estate or interest is given in one clause of a will by clear and specific terms, it can not be cut down or taken away by raising a doubt upon the extent and meaning of other clauses, but only by equally clear and decisive words as

those by which the estate or interest affected was created, or by clear and undoubted implication from the language used."

POINT II.

THE PROBATE COURT HAD JURISDICTION OVER THE ESTATE UPON APPOINTMENT OF THE EXECUTRIX AND COULD DETERMINE AND ADJUDICATE THE RES BY ITS SUBSEQUENT DECREES.

The respondents compound their own dilemma and confusion in their Second Point entitled "The Decree of Distribution is in accordance with the Terms of the Will and does not cut off the Interests of Respondents," by their following argument that the decree deprived respondents of rights because of failure of due process for the reason that no notice was given to respondents on the petition for distribution, and that the decree was a nullity.

The Decree of Distribution in the simplest language gave the entire residue of Miles' estate to Nettie. The will merged into the decree, and the decree became final when not appealed from.

Respondents are squarely confronted in their argument as to ineffectiveness of the decree because of lack of notice by a Utah statute and two landmark Utah cases that have weathered the test of 56 years before this Court.

75-1-7, UCA 1953 is entitled "*Jurisdiction properly acquired, irregularities do not invalidate subsequent orders and decrees,*" and it provides first as to parties

claiming adversely to the title of the decedent, and then as follows:

> ". . . and in a probate matter in which a competent court shall have appointed an executor, administrator or guardian upon due notice, no objection to any subsequent order or decree therein can be taken by any person claiming under the deceased or under the ward, on account of any such want of notice, defect or irregularity, in any other manner than on direct application to the same court, made at any time before distribution or on appeal."

Barrette v. Whitney, 36 Utah 574, 106 P. 522, 37 L.R.A. (N.S.) 368, tested this statute, and our Court held that probate proceedings are in rem; that the court acquires jurisdiction of the property of the estate and of all persons who have any interest in the property by proper notice given on the appointment of the executor; and that other notices provided for are not jurisdictional, and disregard therefor is a mere irregularity and may be assailed, in absence of fraud, only in direct proceedings. Failure to give notice of final distribution was held not to affect the validity of the decree of distribution, except on direct proceedings. See 21 *Am. Jur.,* Sec. 12, p. 377, where the proposition is stated as a universal rule that probate is a matter in rem, with jurisdiction had over the estate of decedent as the subject matter after notice properly given on appointment of the executor. *Bancroft Probate Practice* (2nd Ed.), Sec. 40, p. 107, states the rule as follows:

> "A proceeding for the probate of a will or for the grant of letters of administration, is thus

> in the nature of a proceeding in rem, with the court obtaining jurisdiction of the real and personal estate of the deceased upon the appointment of an executor or administrator . . . A judgment in probate is not against the persons as such, but against or upon the thing or subject matter itself, the status or condition of which is to be determined. When rendered, the judgment is a solemn declaration of the status of the thing, ipso facto rendering it what it is declared to be.
>
> "Where statutory notice has been given, all who are interested in the estate, and, in fact all the world, are bound by all orders or decrees duly entered."

Weyant v. Utah Savings & Trust Company, 54 Utah 181, 182 P. 189, 9 A.L.R. 1119, confirmed the *Barrette* case and laid to rest the question of jurisdictional notice in probate in Utah.

Respondents argue that title vested on death of the testator. This is true, subject to administration and to adjudication and delineation of that title by the court by its subsequent decree. *Bancroft Probate Practice* (2nd Ed.), Sec. 7, p. 17, states:

> "Probate of wills is essential to the establishment of a record title in the beneficiaries, both as to real and personal property."

In *Kennedy's Estate,* 87 Cal. App. 2d 795, 197 P.2d 844, the California Court held that title vests subject to administration and that the estate passes into the custody of the state to be by its agencies and instrumentalities

managed until creditors are paid and the rights of devisees and heirs are established. That court said:

> "While it reposes in such custody the court is authorized to determine the validity of wills and of creditors' claims, the rights of rival heirs, the necessity of sales and other incidents of winding up an estate."

See 21 *Am. Jur.*, Sec. 487, p. 653.

Our Court in *Nelson v. Howells,* 75 Utah 461, 286 P. 631, has held that the decree of distribution is the interpretation of the will.

Showing the practical application of the *Barrette* case and 75-1-7, UCA 1953, *Title Standard No.* 58 as adopted by the Utah State Bar requires abstracting of the proof of notice on the petition for letters testamentary and of the recording of the decree of distribution. No other proof of notice on petitions subsequent to that for appointment of the executor is required.

Jurisdiction was had over the notice properly given on appointment of Nettie Miller as executrix (R. 44). The probate court thereafter adjudicated and determined the title of the decedent by its decree of distribution.

CONCLUSION

The respondents are in fact and in effect asking reversal of two landmark decisions of this Court, a repeal of 75-1-7, UCA 1953, and a complete reversal of the in rem theory of probate.

We submit that the Probate Court had jurisdiction over the Miller estate. Its decree of distribution was the interpretation of the will, which merged into the decree. The decree was final and not subject to collateral attack.

The judgment of the District Court should be reversed.

Respectfully submitted,

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