Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1967

In the Matter of the Estate of Dallas Bedford Lewis, Also Known as D. B. Lewis, Deceased. Lucille Parker, Jack Heldt and Robert Gaston v. Ernest L. Lewis : Respondent's Brief

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.A. Lee Peterson; Attorney for Respondent

Recommended Citation
Brief of Respondent, *Lewis v. Lewis*, No. 10719 (1967).
https://digitalcommons.law.byu.edu/uofu_sc2/3876

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the
SUPREME COURT
Of The STATE Of UTAH

IN THE MATTER OF THE ESTATE OF DALLAS BEDFORD LEWIS, ALSO KNOWN AS D. B. LEWIS, DECEASED.

LUCILLE PARKER, JACK HEIDT and ROBERT GASTON,
Appellants,
vs.
ERNEST L. LEWIS,
Respondent.

Case No. 10719

RESPONDENT'S BRIEF

Appeal From The Judgment Of The Fifth District Court for Millard County, Honorable C. Nelson Day, Judge

THORPE WADDINGHAM
DUDLEY CRAFTS
Delta, Utah

VAN COTT, BAGLEY, CORNWALL & McCARTHY
141 East First South
Salt Lake City, Utah
Attorneys for Appellants

A. LEE PETERSEN
Box 335
Fillmore, Utah
Attorney for Respondent

FILED
FEB 2 8 1967
Clerk, Supreme Court, Utah

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

CASES CITED

STATUTES CITED

TREATISES CITED

In The SUPREME COURT Of The STATE Of UTAH

IN THE MATTER OF THE ESTATE OF DALLAS BEDFORD LEWIS, ALSO KNOWN AS D. B. LEWIS, DECEASED.

LUCILLE PARKER, JACK HEIDT and ROBERT GASTON,
Appellants,

vs.

ERNEST L. LEWIS,
Respondent.

Case No. 10719

RESPONDENT'S BRIEF

INTRODUCTORY

Appellants herein have appealed the Order of the District Court of Millard County appointing respondent as Administrator with Will Annexed in ancillary adminstration proceedings of the estate of Dallas Bedford Lewis. Respondent hereby defends his appointment and seeks to have the Order of the lower Court affirmed.

THE RECORD

For convenience and simplicity, the same classifications and designations as used in Appellants' Brief will be used here in referring to the record on appeal: (a) The pleadings file, pages numbered 1 through 11, and 98 through 111, with Exhibits 1, 3 and 4 attached, here designated as "R."; (b) The so-called Original File, which is the copy of the will and probate thereof authenticated by the California Court, pages numbered 12 through 97, here designated as "Of."; and (c) The Reporter's Transcript, pages numbered 1 through 130, here designated as "Tr."

STATEMENT OF FACTS

In most respects, the Statement of Facts contained in Appellants' Brief is fairly accurate; however, respondent's view of the facts differs from appellants' in some respects. Respondent disagrees with the statement on page 3 of Appellants' Brief that the will named the appellants to perform certain duties and enjoy certain powers in connection with the administration of the decedent's estate, but contends that the will names the appellants as trustees whose duties and powers are to commence after the administration, strictly speaking, of decedent's estate has been completed. (Of. 33)

To the second paragraph on page 5 of Appellants' Brief should be added the information that the testator and his attorney, during the life-time of the testator, both knew and approved of Ernest L. Lewis receiving a payment of $24,000.00 from the Neales in connection with the exercise of the option mentioned. It should also be noted that the transaction was arranged at the instigation of the testator and was complete except for formalities before his death. (Tr. 107-8, 111-12)

In the following paragraph, the statement is made several times that the Food Company funds have been used in connection with the Sulphurdale properties. This statement is inaccurate. D. B. Lewis invested his personal funds into the Sulphurdale venture. The personal funds may have been his income from the Food Company but were nevertheless his personal funds. The executors in California, after they were appointed, determined to lend monies from the Food Company to pay expenses in connection with the venture, such monies to be repaid by the D. B. Lewis Estate. (Tr. 32) It is also to be noted that the expense allowance of Ernest L. Lewis from Lewis Food Company is made in connection with services rendered as Utah sales manager for the Food Company itself. (Tr. 53)

The Appellants' Brief states on page 6 that the "only"

means of paying the cost of maintaining the joint venture property is with monies from the Food Company. This is an unwarranted conclusion. There are many potential sources of funds to pay such costs, but the Food Company is probably the most convenient source; hence it has been selected. (Tr. 121)

In the final paragraph on page 6 of Appellants' Brief it is stated that the petitioner (Ernest L. Lewis) did not present with his petition a copy of the will and the probate thereof duly authenticated as "required" by the provisions of Section 75-3-23, U.C.A. 1953. This statement is based on the false premise that the provisions of the code make such a requirement. Perusal of the Code Section referred to reveals that the language is permissive, not mandatory.

Significant facts omitted from Appellants' Statement are that Ernest L. Lewis was induced by D. B. Lewis to leave a profitable automobile business in Texas and come to Utah to take charge of the Sulphurdale property and had managed the testator's property in Utah since it was first acquired, a period of about five years. (Tr. 78, 123) and that he was in California at the time the testator died and for several weeks thereafter. He made numerous attempts to talk with the persons who were appointed as executors by the California Court about the property in Utah, but they were unavailable to him. They did not seek information from him about the property or as to what legal counsel his brother had been using in Utah. (Tr. 29, 31, 86, 108) The appellants showed very little interest in the Utah property until after Ernest L. Lewis informed them that he had filed a petition for ancillary administration in Utah. (Tr. 13) And even on the date hearing was held in Utah, July 6, 1966, little or nothing had been done about probate proceedings in the States of Idaho and Oregon where the testator also had property interests. (Tr. 13)

ARGUMENT

POINT I.

THE LOWER COURT PROPERLY RULED THAT APPELLANTS WERE NOT NAMED AS EXECUTORS IN THE WILL OF DECEDENT.

(a) The Order of The California Court Appointing Appellants as Executors Applies Only to the Portion of the Estate in California.

Appellants cite considerable authority tending to show that the order of a Court admitting a will to probate is binding on all persons having Notice of the proceeding and also must be given full faith and credit by other states. Utah has a statute to this effect. Respondent is in full agreement with the authorities cited.

However, to attempt to use this line of argument and the authorities cited to show that the appointment of executors of an estate in California is binding upon a Utah Court for ancillary administration of the estate in Utah is to display a surprising lack of understanding of the fundamental nature of administration proceedings. Administration proceedings are in rem, not in personam. *Barrette v. Whitney*, 36 Utah 574, 106 Pac. 522; *Bancroft, Probate Practice*, 2nd Ed., Vol. 1, Sec. 40. As proceedings in rem, they have effect on things, the things being the properties of an estate. And it is elementary that the Courts of any state have no jurisdiction over properties beyond their boundaries. *Bancroft, Probate Practice*, 2nd Ed., Vol. 4, Sec. 1227. For this reason, ancillary administration proceedings become necessary when a decedent owned property located in more than one state. But the ancillary administration proceeding is not a part of the domiciliary administration. *Bancroft, Probate Practice*, 2nd Ed., Vol. 4, Sec. 1222 states:

> Ancillary administration is accordingly not to be regarded as subsidiary, but rather as an independent administration, limited in effect to property physically within the jurisdiction, and directed primarily to the protection of local creditors of the decedent.
>
> Ordinarily there is not even privity between ancillary and domestic representatives.

This principle is elaborated in 21 American Jurisprudence 848 et seq.:

> Although it has been said that an ancillary administrator is in some respects the deputy or agent of the domiciliary representative, it must be borne in mind that he receives his authority, not from the executor, but under a different law, that he administers the estate which comes to his hands under a different law from, and perhaps conflicting with the law of the domicile, and that he is not answerable for his conduct to the domiciliary representative. . . (A)lthough a domiciliary and ancillary representative are in privity with the decedent, there is no privity between themselves. . . It is an elementary principle that letters testimentary or of administration have no legal force or effect beyond the territorial limits of the state in which they are granted. . . (S)ince an ancillary administrator derives his authority from the laws of the state of his appointment, he is concerned with and has authority to collect the debts, receive the assets situated in the state where the administration is granted.

If the law were not as stated above, the sovereignty of the several states would be seriously infringed. Orders made by Courts of one state could have effects on property located in other states. But the law is that administration of an estate in California is subject to the California Courts and administration of an estate in Utah is exclusively within the jurisdiction of the Utah Courts. The only limitation on the complete sovereignty of the Courts of the

various states in probate proceedings is that a will which has been found to be valid in the state where it was executed must be recognized as valid in other states. This principle has been specifically enacted into law in this state in Section 75-3-24, U.C.A. 1953:

> 75-3-24. Hearing and Proof. - If on the hearing it appears on the face of the record that the will has been proved, allowed and admitted to probate in any other state or territory of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate and shall have the same force and effect as a will first admitted to probate in this state, and letters testimentary or of administration shall issue thereon.

Beyond recognizing the probate of a will in another state or in a foreign country, the statute cited in no way indicates that any recognition is to be given to any further orders of the foreign Court with respect to the administration of the estate.

Respondent does not here collaterally attack the Order of the California Court. He is concerned only with the administration proceeding in Utah. This is a separate proceeding under jurisdiction of the Courts of a different sovereign state. The order of the lower Court in this state did not in effect strike down the order of the California Court. It had no effect on it. The executors appointed in California are still executors in California. But the lower Court in Utah properly determined that the administration of the portion of the estate located in Utah was within its jurisdiction and has proceeded accordingly.

(b) Utah Courts Must Determine Who Is Entitled to Administer an Estate in Utah.

Appellants cite several sections of the Utah Code to

show that the property of this estate should be deemed as personal property and therefore is controlled by the law of the domicile. Respondent does not disagree. But appellants' argument is not material to this case. In the first place, the matter now before the Court is not a determination about the disposition of property, real or personal, but a determination as to the selection of a personal representative of the estate. The law pertaining to a determination of this sort is succinctly stated in 33 Corpus Juris Secundum 923, Sec. 31:

> The law of the place where the estate is to be administered, and not the law of the domocile of the decedent, governs in who is entitled to administer.

Even if the argument of appellants were material, the law of the domiciliary state is presumed to be the same as the law of this state unless proven otherwise. *In re Campbell's Estate,* 53 Utah 487, 173 Pac. 688. And no proof has been made that the law in California differs in any respect from the law in Utah. Moreover, this Court has already been confronted with the type of argument now propounded by appellants, in the case of *In Re Campbell's Estate, supra,* and its ruling ought to settle the issue:

> The contention that the Courts of this state are precluded from construing the will because the Courts of California, where the domiciliary administration is had, may place a construction thereon different than given it by the Courts of this state, is wholly without merit. No authorities are cited, nor do we think any can be found, that support counsel's contention in that regard.
>
> The general rule, as declared by practically all of the authorities on the subject, is that the law of the testator's domicile governs the construction of his will disposing of personalty, and that Courts exercising ancillary powers should be governed by this rule in construing wills, unless a construction

> of the law of the testator's domicile contravenes the law of the state where the will is offered for probate . . . Furthermore, we have a statute declaratory of this general rule which is as follows:
>
> (The Court cites the Section which is now Utah Code Annotated 1953, 74-3-21.)
>
> It will be noticed that this section in plain and unmistakable terms provides that the "interpretation" of wills shall be governed, when relating to personal property, by the law of testator's domicile, and not, as counsel's argument seems to imply, by the interpretation given wills by the Courts of a sister state where the domiciliary administration is had.
>
> While the interpretation of a will under these circumstances by the Courts of some other state should, and would, be given much weight by the Courts of this state, such interpretation nevertheless would not be binding.

After making the above statement of law, this Court proceeded to determine a matter involving personal property of an estate in which there was an ancillary administration in Utah and a domiciliary administration in California in direct contravention of a ruling already made by a California Court - - giving considertion to the *law* of California, but refusing to be bound by the decision of the California Court. Surely appellants' contention that the Utah Court in this case is bound by the Order of the California Court in the proceeding held there is not to be taken seriously.

(c) The Will Names No Executors.

Though it is preferable both for the protection of the citizens of a state where ancillary administration is had and for the benefit of the estate that a resident of the state of ancillary administration be appointed to administer the

estate, appellants correctly contend that where persons are named in a will as executors, their non-residence does not disqualify them for appointment in the State of Utah. On the other hand, if they are not named in the will as executors, their appointment is expressly prohibited by Section 75-4-4, U.C.A. 1953:

> No person is competent or entitled to serve as administrator or administratrix who is either: . . . (2) Not a bona fide resident of the state . . ..

The foregoing section of the Utah Code should be applied in the light of: First, what will best serve and protect the citizens of Utah? and, second, what is best for the estate? It is the Utah Court's duty to determine whether or not the will named executors, and if there is a doubt, the doubt should be resolved in favor of having a personal representative on the spot in Utah, available to demands of creditors and persons having an interest in or claim upon the property which is situated in this state. This doctrine is set forth in 33 Corpus Juris Secundum 906, Sec. 22, as follows:

> (I)t may be stated generally that the appointment of executors by construction or implication from the terms of the will should not be favored, but in doubtful cases administration with will annexed should be resorted to.

The will of this decedent names no executors. It names certain persons as "trustees", but it is not proper to infer from the will that the testator intended these persons to be executors. It was held in *Estate of Clary*, 98 Cal. 2d 524, 220 Pac. 2d 754 that:

> Unless the Court can conclude from the words of the testator that the latter intended for his devisee to take charge of the estate, collect his assets, pay his debts, and perform the usual functions of an

executor, it is error to appoint such devisee.

A good deal of stretching and reading between the lines is necessary to conclude from this decedent's will that the appellants herein were intended to perform the functions of executors. Rather, the testator was obviously doing some relatively long range planning. Ineptly, but nevertheless quite certainly, the testator manifests his desire that his property be distributed to trustees of numerous trusts, charging the trustees to use the properties and monies placed in their custody to carry out various terms and wishes which were dictated into the will. Appellants have in their Brief quoted a paragraph from page 14 of the will in which trustees are named. It is appropriate that the succeeding two paragraphs of the will also be quoted and called to the attention of the Court:

> Throughout this will I have instructed that Security First National Bank be used as Co-Trustee; however, my Trustees shall have the right to change banks to any other responsible bank as Co-Trustee should they for any reason feel that the Security First National Bank is not satisfa tory due to too high fees or any other reasons, with or without cause. The head of the Trustees shall be Lucille Casso-Parker and the Trusteeship shall operate on a majority rule until such time as John Raymond Lewis, as specified heretofore, becomes of age and shall become chairman of the Trustees, and when he reaches age thirty the Trusteeship shall be disbanded and he shall become the sole authority with the above instructions in effect.
>
> During the existence of this Trusteeship, the Trustees involved shall be paid a reasonable compensation for their efforts and time devoted to the execution and carrying out to the best of their ability the wishes that have been dictated into this will. (Of. 33)

It is to be noted that Lucille Parker is apparently to

be replaced as a trustee by John Raymond Lewis, who is presently a young boy of about twelve years of age, when he becomes of age and that the trusteeship is to endure until he reaches the age of thirty years. The testator does not appear to be talking about the winding up of his affairs and the settlement and distribution of his estate, but rather about the carrying on of his business and using the earnings to carry out certain wishes which he expressed in the will. It is not likely that the testator intended his estate to remain in administration for a period of eighteen years.

Appellants cite several sections of the Utah Code pertaining to interpretation of wills. An additional section which is even more pertinent to this matter is Section 74-2-5, U.C.A. 1953:

> 74-2-5. All Parts To Be Harmonized, If Possible. All the parts of a will are to be construed in relation to each other, and, if possible, so as to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.

The paragraphs from the will quoted above are the last paragraphs in the will in which the words trustee and trusteeship are used. It is very clear in these paragraphs that the testator was speaking of a trusteeship and not of the administration of his estate. If earlier references to trustees in the will are inconsistent with the references in these paragraphs, the references in these paragraphs should prevail.

Since, to say the least, there is great doubt that the testator intended to appoint the appellants herein as the executors of his Last Will and Testament, the finding and conclusion of the lower Court that no executors were named in the will is proper.

POINT II.

THE LOWER COURT HAD THE RIGHT TO USE ITS DISCRETION IN THE APPOINTMENT OF THE REPRESENTATIVE OF THE ESTATE IN UTAH.

(a) Appellants Failed to File Their Petition for Letters Testamentary Within the Time Limit Allowed by Utah Law.

Even if the appellants had been named as executors in the will, a Utah Court is not obligated to appoint them to administer the portion of this estate located in Utah. Section 75-3-4, U.C.A. 1953, provides:

> If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator and that he is named as executor, fails to petion for the probate of the will and for letters testimentary, he may be held to have renounced his rights to letters, and the Court may appoint any other competent person administrator, unless good cause for the delay is shown.

This Section of the Code has been applied in the case of *In re Love's Estate,* 75 Utah 342, 353, 285 Pac 299:

> It may be conceded that, where the petition by the party named as executor is filed in time, the Court has no discretion but to appoint the party named executor unless he is disqualified by statute, but this Court has already committed itself to the doctrine that failure to make timely application for letters testimentary leaves it in the discretion of the Court whether he appoints the person having the preferential right or some other competent person.

Appellants contend that the holding of *In re Love's Estate, supra,* is not pertinent in the case of an ancillary administration. But it is submitted that appellants contention is incorrect. *Bancroft, Probate Practice,* 2nd Ed., Vol. 4, Sec. 1228, states:

> But statutes declaring that one named as executor renounces his preference right to letters if he fails to apply therefor within a specified number of days after he has knowledge of the death of the testator and that he is named as executor, apply in ancillary as well as domiciliary administration.

The Supreme Court of Wyoming in holding that a section of the Wyoming law similar to the section of Utah law cited applies to a foreign as well as a domestic will and that preference is lost by delay, commented that the object of the statute is to secure prompt settlement of estates. That Court held that after expiration of the thirty day period, who is to be appointed to administer the estate becomes a matter for the *sound discretion* of the Court. *Rice v. Tilton,* 80 Pac. 828. The purpose of the thirty day limitation is, of course, for the protection of the estate and the persons having claims against or rights under the estate. These persons ought not to be required to submit to lack of diligence on the part of the persons named in the will.

(b) Appellants Failed to Show Good Cause For Their Delay in Filing Probate Proceedings in Utah.

Whether or not good cause for the delay in filing probate proceedings in Utah was shown is substantially a matter of fact to be determined by the lower Court -- the lower Court having the advantage of seeing the witnesses and hearing them testify and observing their demeanor, all of which must be considered along with the statements which become part of the record. The finding of the lower Court is as follows:

> 13. This Court finds that they did not show good cause, or in fact any cause for such delay, other than that they didn't feel that it was important as compared with other matters, and that they were not concerned until after they were informed

> of the petition by Ernest L. Lewis. There was no showing that they were in any way prevented from petitioning this Court, and in fact there was testimony that Mr. Ernest L. Lewis informed one or more of them of the urgency for action in Utah, and that they ignored such statements and appeared to avoid contact with Mr. Lewis. (R. 102)

The appellants contention that the Utah petition could not be filed until the will was admitted to probate in California is erroneous. There is no requirement of Utah law that a will must be proved in the domiciliary state before it can be submitted for probate in Utah. Nor is there any requirement that the probate proceedings in the domiciliary state and a copy of the will must be submitted at the time a petition is filed in Utah. As has been previously noted, the language of the Utah statutes is permissive, and not mandatory. Conceding, though, that there may be justification for waiting until the will has been admitted in the domiciliary state before filing probate proceedings in another state, the facts remain that the appellants did not in any way commence to make preparations for filing in Utah or even to inquire about Utah law or Utah counsel until after Ernest L. Lewis informed them he had filed his petition. At that time they immediately became very interested in the property in Utah, but still did nothing about the property in the States of Idaho and Oregon, and probate in these states was still in abeyance on July 6, 1966, the date on which the hearing on this matter was held in Utah. (Tr. 13) It is a proper inference that the appellants were spurred to action in Utah solely by the action of the respondent. Prior to that time, they had not consulted with him about the property or about what legal counsel his brother had used in Utah and appeared to be avoiding him, though he made attempts to be available to them and to inform them of matters pertaining to the Utah property. (Tr. 86, 103)

(c) The Utah Court Properly Exercised Its Sound Discretion in Appointing a Personal Representative of the Estate in Utah.

Respondent is in full accord with the contentions of appellants that the affairs of Lewis Food Company and the estate in California are of extreme importance and require diligent care. They must not be neglected. These affairs are a heavy responsibility for the appellants. Lucille Parker, a mother of four young children, has had to assume the great responsibility of the presidency of Lewis Food Company. (Tr. 49) Jack Heidt, a vice president of a bank, is having to bear burdens in connection with this estate in addition to his full time regular employment. (Tr. 24) And Robert Gaston, an attorney who is subject to the demands of a substantial law practice, also has to assume the additional demands of the D. B. Lewis estate. (Tr. 75)

With the burdens and responsibilities placed upon them in California, the appellants are undoubtedly more than busy. In addition to this, to take on the responsibility of a substantial property in Utah is beyond their competence. They were unable even to initiate inquiry about the requirements of Utah law before an important statutory deadline had expired. At least one of the appellants was still unaware that anyone was in charge of the Utah property as late as July 6, 1966. (Tr. 29)

Appellants make attempts to cast doubts upon the ability of Ernest L. Lewis to administer the property by asserting that at his instigation the Food Company immediately following the death of decedent was induced to pay out $415,000.00 in purchase of the Neales' interest in the Utah property. This was not done at the instigation of Ernest L. Lewis, but at the instigation of D. B. Lewis prior to his death. Ernest L. Lewis and Mr. Murchison, D. B. Lewis' attorney, were merely concerned about carrying out the wish of the decedent to settle a lawsuit in which the decedent was being sued for $35,000,000.00. (Tr. 107 -

10) Until that lawsuit was settled, the whole estate, including Lewis Food Company, was in jeopardy. For this reason, D. B. Lewis had five days prior to his death, summoned his brother, Ernest L. Lewis, to California to arrange for purchase of the Neales' interest in Sulphurdale and thereby settle the lawsuit. The option was obtained by Ernest L. Lewis on a Friday and D. B. Lewis died the following Monday night. Ernest L. Lewis spent a large part of that Monday with his brother and his brother's attorney going over the papers, making copies of them, and arranging for the transaction. (Tr. 108)

A further innuendo against Ernest L. Lewis in Appellants' Brief is the mention that nothing was left to him directly under the will - - that a trust was created for Ernest L. Lewis, his wife and his son but no responsibility whatever was placed in the hands of Ernest in connection with the administration of the estate. In this connection, it is significant that the testator died at the relatively young age of sixty-two years and that though Ernest L. Lewis is a few years younger, he was experiencing a period of serious illness during the time when the testator was writing his will. (Tr. 122) Furthermore, everyone is aware of the inheritance tax advantages in skipping generations in disposing of properties in wills. For these reasons, not lack of confidence in Ernest L. Lewis, the decedent made his provision for Ernest L. Lewis and his other brothers and sisters in the form of trusts for their decendents. The facts that the decedent placed Ernest L. Lewis in charge of his property in Utah during his lifetime and entrusted him to negotiate settlement of a $35,000,000.00 lawsuit show that he did repose confidence in him. (Tr. 107-10) The lower Court was fully justified in finding that Ernest L. Lewis was competent in every way and uniquely qualified to administer the property of the estate in Utah.

Appellants urge that a unified administration of an estate of this size and complexity is preferable. But this

fails to take into consideration the most important reason why an ancillary proceeding is required. The primary purpose of an ancillary proceeding is to protect the citizens and all persons who may have an interest in or claim against the property in the state where the ancillary administration is had. It is obvious that this purpose can best be accomplished by having a personal representative present and residing in the state of ancillary administration. Moreover, the size and complexity of this estate make it desirable that a local administrator be appointed in addition to the domiciliary representatives. Appellants are "spread too thin" to take the necessary interest in and care of the Utah property. The lower Court was convinced of this when it found:

> All three of them displayed no particular interest or concern in or for the Utah properties of this decedent, and none of them had much if any knowledge of the properties. It appeared to this Court that their only interest in the Utah properties arose after Ernest L. Lewis filed his petition herein, and was to the effect that he should be precluded from being so appointed. (R. 102)

Upon determining that the appointment of a personal representative of the estate was a matter within its discretion, the lower Court no doubt weighed the various factors just mentioned. Furthermore, the contestants had all appeared in Court and testified and their appearance and demeanor may have influenced the weight of their testimony. The efforts of Ernest L. Lewis in preserving the estate by seeing that a $35,000,000.00 lawsuit was settled according to his brother's wishes, in taking action to sell property which the will directed to be sold, (Tr. 87) and in taking steps to see that someone was appointed to administer the estate in Utah and to have authority to convey the property if a sale should materialize, together with his knowledge of and proximity to the property (Tr. 78)

were no doubt compared with the efforts and knowledge and availability of the appellants. Though he lives and works only a few miles from the headquarters of Lewis Food Company, Jack Heidt did not get around to making a visit there from the date of D. B. Lewis' death (April 25, 1966) until June 6, 1966 (Tr. 24) and he displayed no knowledge or understanding whatever about Sulphurdale. (Tr. 27) Robert Gaston had managed to visit the Lewis Food Company headquarters twice in the two and a half month period from the date of the testator's death till the hearing in Utah. (Tr. 75) It appears from the record that the general management of Lewis Food Company has been left almost entirely in the hands of a young housewife who had previously been working only a part of one day a week. (Tr. 48) The lower Court did not err in exercising its sound discretion to appoint Ernest L. Lewis to administer the estate in Utah.

CONCLUSION

The order and findings of the lower Court are justified by the facts and law. Its Order denying the petition of appellants and allowing the petition of respondent and appointing respondent as administrator with will annexed for the conduct of ancillary administration proceedings in this jurisdiction should be affirmed.

Respectfully submitted,

A. LEE PETERSEN

Attorney for Respondent

TABLE OF CONTENTS

AUTHORITIES CITED