1983

In the Matter of the Estate of Frank Chasel, Deceased : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of)

FRANK CHASEL, Deceased.)

No. 19265

APPELLANTS' BRIEF

Appeal from the Judgment of the Seventh
Judicial District Court for Duchesne County
Honorable Boyd Bunnell

GEORGE E. MANGAN, of
GEORGE E. MANGAN, APC
47 North Second East
Roosevelt, Utah 84066
801-722-2428
Attorney for Appellant

RAYMOND A. HINTZE
WALKER, HINTZE and WASHBURN
4685 Highland Drive, Suite 202
Salt Lake City, Utah 84117
801-278-4747
Attorney for Respondents
(Chasel, Iorg and Rogers)

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NATURE OF THE CASE

Decedent's only child applied for informal, intestate probate of decedent's estate, and was informally appointed as the personal representative. Decedent's half-brother and two half-sisters also applied for probate of an old will [Duchesne County Probate No. 1703], which probate decedent's son contested. In addition, decedent's son claimed there was a current will, that he could not locate, which made him the decedent's sole beneficiary. Litigation was threatened and to avoid the same, a family agreement was reached between decedent's half-brother, two half-sisters and his son, the personal representative. Final settlement and distribution, based on this agreement, was approved by the court on July 31, 1981.

Decedent's son was then made aware of at least three (3) subsequent wills to the one in Probate No. 1703, which were purportedly executed by the decedent, and based thereon, the personal representative attempted to set aside the informal probate and the family agrement, so as to probate the most current of the newly discovered wills.

DISPOSITION IN LOWER COURT

Decedent's half-brother and two half-sisters objected to the probate of the newly discovered wills, asserting that the Closing Order of July 31, 1981, was a formal order and that therefore the Statute of Limitations of three (3) months for admitting a new will to probate had run. Decedent's son claimed the informal probate had never been made formal, and that the Statute of Limitations of one year nad not run.

The lower court held that the personal representative had obtained a "formal" order as opposed to an "informal" order, approving the settlement of the estate which had converted the probate from an "informal" to a "formal" proceeding. Thus, the closing "order," without requesting a change from informal to formal, was construed by the court to be a request for a "formal" closing. Based on the lower court's construction, the time for amending the final order had run before the motion to probate the newly discovered will was made. The lower court also held that there were insufficient grounds to set aside the family agreement which was the basis of the final settlement and order.

RELIEF SOUGHT ON APPEAL

The personal representative seeks the reversal of the decision of the lower court, with a remand to the lower court directing it to find that the entire proceedings were informal, and to set aside the Informal Closing Order of July 31, 1981,

together with the stipulation of the family and to admit the latest newly discovered will to probate.

STATEMENT OF FACTS

Decedent died June 24, 1980. At the time of his death, decedent was unmarried and was survived by his only child, William Chasel. After a diligent search in which no will was readily found, decedent's son applied for informal appointment as personal representative, with the administration of the estate being intestate (See Record, p. 1). The informal appointment was approved (See Record, p. 5), and the personal representative proceeded to administer the estate.

In addition, decedent's half-brother and two half-sisters filed probate number 1703, which contained a purported Last Will and Testament of the decedent and a claim that the personal representative had been adopted by a third party. The personal representative filed affidavits stating that he never had been adopted by anyone (See Record, p. 12, 14 and 15). Decedent's son made a further search for a purported will the decedent had reportedly made shortly before his death, but the son could not locate the same. Because the new will could not be located, and believing he had no other route to follow so as to close the estate, a compromise family agreement was reached. The personal representative agreed to this settlement because of "pressure" and mistake of fact as to the lack of existence of a current, unrevoked will of the decedent (See Record p. 41).

The court entered an order approving the family agreement as per U.C.A., §75-3-1101. The court then approved the final distribution and settlement in this probate proceedings on July 31, 1981 (See pp. 35 & 39). Pursuant to said agrement, Probate No. 1703 was to be dismissed.

After six (6) months, but before one (1) year had passed, the personal representative located his father's Last Will and Testament at the law office of Fowler and Roe in Salt Lake City. Immediately the personal representative moved to set aside the informal probate and for the court to admit the newly discovered will to probate (See Record P. 50). The decedent's half-brother and half-sisters objected to this action and filed a motion for an order compelling the personal representative to comply with the closing order (See Record p. 51).

The court denied the personal representative's motions, holding that the order approving the family settlement had converted the proceeding from an informal probate to a formal probate, and therefore, under §75-3-412(3)(a), the time in which the court could entertain a petition to probate another will had passed.

From this ruling, the personal representative has appealed to this court.

ARGUMENT

I. THE ORDER OF THE COURT APPROVING THE FAMILY SETTLEMENT DID NOT CONVERT THE PROCEEDINGS FROM AN INFORMAL PROBATE TO A FORMAL PROBATE

A probate proceeding in Utah may take one of two forms, formal or informal. Informal probate is covered by §75-3-301 et. seq. Formal probate is covered by §75-3-401 et. seq. The Utah Supreme Court has never been required to consider or differentiate a formal probate from an informal probate. The comment following §75-3-302 equivocates an informal probate to the common law probate in "common form" and a formal probate to the common law probate in "solemn form." The comment states that informal probate is probate of a simple will which generates no controversy.

Probate in solemn form is typified by an adversial hearing with notice to all interested parties, and each interested party has the opportunity to appear. Probate in the common form is generally an ex parte hearing with only the will proponent or personal representative present. It is uncontested and quick. Matter of Estate of Ross, Or App. 548 P.2d 1001 (1976), 95 C.J.S. Wills §318, 80 AmJur 2d §1037.

U.C.A., §75-3-1101 provides the mechanics for the court to enter an order recognizing a family settlement. It is not included in Part 3 - Informal Probate or Part 4 - Formal Testacy Proceedings. It is simply a method to provide judicial review of

family settlements in order to insure that they are fair and reasonable and to provide a judicial order to aid in the enforcement of family settlements. Bean v. Carlos, 21 Utah 2d 309, 445 P.2d 144 (1968), Muncey v. Children's Home Finding & Aid Society, Idaho, 360 P.2d 586 (1962). In re Estate of Harper, 202 Kan., 150, 446 P.2d 738 (1968), 80 AmJur 2d §1100.

The very nature of a family settlement is informal, therefore, the need of a judicial order commemorating it. The reasons behind providing an actual court order would also suggest that a family settlement is an informal way of settling estates so as to avoid becoming involved in a formal judicial hearing. To say that a family settlement turns an informal probate into a formal probate contravenes logic. The only possible justification for this position is that §75-3-1101 states, "A compromise of any controversy . . . if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto . . ." All court proceedings are formal, including informal probate, in the sense that they are official, on-the-record proceedings. That is what is meant in §75-3-1101. For §75-3-1101's "formal proceedings" to be a formal probate, then under §75-3-401, et. seq., a full, adversial hearing would have to be held in which all parties to the family settlement are given the opportunity to appear and be heard, with the judge making the final decision as to what the final settlement should be.

In this case, the personal representative presented the

settlement, along with all the other papers required for probate. No notices were given, and the personal representative "waived" his right to notice. The judge may have reviewed the agreement to see if on its face it was fair, reasonble, accurate, etc. Then the court issued the "order" approving the distribution of Frank Chasel's estate, including the family settlement, as presented. All of this was done ex parte. Only the personal representative proffered any documents. There was no formal, adversial hearing. There was no controversy for the court to resolve. It was uncontested and quick. It was an informal probate of Frank Chasel's estate.

The only controversy was in Probate Number 1703. The record is clear, decedent's half-brother and two half-sisters never contested Probate Number 1698. They did file Notices of Waiver (see record pp. 10, 11). However, the family settlement eliminated any possible controversy. Had the interested parties wished a formal probate, they could have filed a petition requesting one in accordance with §75-3-402, or they could have filed the settlement in Probate Number 1703. No one did so, therefore, all parties acquiesced to the informal probate.

II. THE FAMILY SETTLEMENT SHOULD BE RESCINDED AND THE PROBATE SET ASIDE BECAUSE IT WAS BASED ON A MUTUAL MISTAKE OF FACT

The law favors compromise and settlement of disputes and generally, parties are not allowed to repudiate their settlement agreement. However, compromise settlements may be set aside on

the grounds of mutual mistake of fact, as with any contract.

In the present case, the family settlement was entered into on the basis of mistaken facts. Neither party knew of the whereabouts of the later discovered will or even if one actually existed. If the existence of that will had been known by the parties, then the will would have been offered for probate and the agreement would have never been entered into. The family settlement was based on an assumption of fact which, unbeknowns to both parties, was not true, i.e., the belief that there was no current will. That mistake was material and mutual. Therefore, the agreement should be set aside and the newly discovered wills admitted to probate.

No innocent purchasers without notice are involved, therefore, no innocent party will be prejudiced by the admission of the later wills to probate.

III. THE PROBATE SHOULD BE SET ASIDE BECAUSE THE FAMILY SETTLEMENT WAS PROCURRED BY PRESSURE AMOUNTING TO DURESS

An order of the probate court based on a family settlement is a judgment by consent. It can also be abrogated if the family settlement is obtained by fraud or duress. It is widely accepted principle of law, that it is not duress to threaten to do that which one has a legal right to do, i.e., threaten to litigate a claim asserted in good faith. Weathered v. Weathered, Kan. 224 P.901 (1924). Doernbecher v. Mutual Life Insurance Company of New York, Wash. 132 P.2d 751 (1943). Kam Chin Chun Ming v. Kam

Hee Ho, Hawaii, 371 P.2d 379 (1962). 17 AmJur §892.

In Weathered v. Weathered, op.cit., the court found fraud, duress and undue influence and ordered that the family settlement contract be set aside because persons who were pretending to act in the capacity of friends, protectors and advisors, but who were working in their own interest or in the interest of someone else, "advised" the plaintiff to sign the settlement.

The personal representative was young and impressionable. His uncle had alleged he was not his dad's son, had been adopted, and then put pressure on him to settle the estate, telling him he was "greedy" to want it all. Also his own lawyer told him that he had to settle. He was led to believe he had no other option, and that he would lose everything if he did not sign the settlement. Not knowing the location of the current will, the personal representative relied upon those representations and signed the settlement.

CONCLUSION

The informal probate procedure in §75-3-301 et seq. was meant to provide a procedure for avoidance of a formal, time consuming judicial hearing in the absence of controversy. The provision for judicial recognition of family settlements in §75-3-1101 is based on the same reasoning. Both are meant to provide a judicial procedure to recognize the settlement and distribution of a decedent's estate where there are no contests, no controversies, and no need for a full-blown adversial judicial

hearing. Therefore, logic would seem to demand the conclusion that a family settlement is an informal probate.

Because of the presence of the newly discovered will, the mutual mistake of fact which constituted the basis of the family settlement and the pressure exerted on the personal representative in order to gain his consent to the family settlement, the previous probate of Frank Chasel's estate should be set aside and the newly discovered will admitted to probate.

DATED this 7th day of October, 1983.

GEORGE E. MANGAN, APC
Attorney for Appellant

George E. Mangan

George E. Mangan
47 North Second East
Roosevelt, Utah 84066
801-722-2428

CERTIFICATE OF MAILING

I do hereby certify that on the 7th day of October, 1983, I mailed a true and correct copy of the foregoing APPELLANT'S BRIEF, postage prepaid, to Raymond A. Hintze, WALKER, HINTZE and WASHBURN, Attorney for Respondent (Chasel, Iorg and Rogers), 4685 Highland Drive, Suite 202, Salt Lake City, Utah 84117; by depositing the same in the United States Post Office at Roosevelt, Utah.

Gwen Graves
Secretary