

1963

In the Matter of the Estate of Chloe Ryan Call : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

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.

Hatch & Chidester; Attorneys for Appellant Don Lewis Ryan;

Recommended Citation

Brief of Appellant, *Ryan v. Nielson*, No. 9863 (Utah Supreme Court, 1963).
https://digitalcommons.law.byu.edu/uofu_sc1/4203

This Brief of Appellant 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 (pre-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

FILED
MAY - 2 1963

Clerk, Supreme Court, Utah

In the Matter of the Estate of)

CHLOE CALL RYAN)

Case No.

9863

Deceased. UNIVERSITY OF UTAH)

OCT 29 1963

BRIEF OF APPELLANT

LAW LIBRARY

HATCH & CHIDESTER

Attorneys for Appellant DON LEWIS RYAN
51 West Center Street
Heber, Utah

TABLE OF CONTENTS

	Page
Statement of Facts	1
Arguments:	
I. THE WILL IN QUESTION IS CAPABLE OF INTERPRETATION IN SUCH A MANNER THAT ALL ITS PROVISIONS CAN BE GIVEN MEANING WITHOUT CONFLICT	4
II. THE TRIAL COURT'S INTERPRETATION GIVES MEANING TO ONLY THE FIRST AND SECOND PARAGRAPHS OF SAID WILL	5
III. THERE WAS NO EVIDENCE SUBMITTED BY RESPONDENT THAT WOULD ALTER THE RULES OF INTERPRETATION AS SET FORTH IN THE UTAH CODE	8
IV. THE TRIAL COURT'S INTERPRETATION IS CONTRARY TO THE LAW OF INTERPRETATION OF WILLS	12
V. THE TRIAL COURT'S INTERPRETATION IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE WILL	18
Conclusion	19

AUTHORITIES CITED

Texts

33 Am Jur, Life Estates, Remainders, Etc.:	
§ 6	12
§§ 19 - 41	13, 14
§ 30	13
§ 41	13

TABLE OF CONTENTS (CONT.)

57 Am Jur, Wills § 1428	Page 17
7 ALR 838	14
10 ALR 756	14
36 ALR 1180	14
75 ALR 71	14
76 ALR 1154	14
17 ALR 2d 7	14
Am. Law Institute, Property Vol. 1, § 111 Statutes	14
Utah Code Annotated, 1953:	
Section 74-2-2	12
74-2-3	18
74-2-9	15
74-2-1-35	19

IN THE SUPREME COURT

OF THE

STATE OF UTAH

In the Matter of the Estate of)	
)	
CHLOE CALL RYAN,)	Case No.
)	
Deceased.)	9863

BRIEF OF APPELLANT

STATEMENT OF FACTS

The issue on appeal is the interpretation of the Will hereinafter set forth. There is no contest of the validity of said Will. It has been filed and approved for probate in the District Court.

The Trial Court found a fee simple grant in Orvis Call and Bessie Call Nielson. The Appellant contends that said Will grants life

estates to Orvis Call and Bessie Call Nielson with remainder to Don Lewis Ryan.

The terms of the Will are as follows:

I, Chloe R. Call, of Orem, Utah, of the age of 79 years, do hereby make, publish and declare this my Last Will and Testament in manner and form following:

First: I direct that all my just debts and funeral expenses be paid as soon after my decease as conveniently can be done.

Second: All the rest, residue and remainder of my estate, I give, devise and bequeath to my daughter Bessie Call Nielson, and to my son, Orvis W. Call, in equal undivided shares, share and share alike.

Third: I hereby direct that in the event my son, Orvis W. Call shall die before I die, or before my daughter, Bessie Call Nielson dies, that in such event the share herein devised to said Orvis W. Call shall go to my daughter, Bessie Call Nielson.

Fourth: I hereby direct that in the event my daughter, Bessie Call Nielson shall die before I die, or before my son Orvis W. Call dies, that in such event the share herein devised to said Bessie Call Nielson, shall go to my son, Orvis W. Call.

Fifth: I direct that upon the death of my daughter Bessie Call Nielson and upon the death of my son Orvis W. Call, that the shares

herein devised to them shall go to my nephew Don Lewis Ryan of Heber, Utah.

Sixth: In the event that the bequest herein made to Don Lewis Ryan shall fail, by reason of his death, or for any other reason, then I direct that the share herein devised to Don Lewis Ryan, shall go to William K. Ryan and Phyllis F. Ryan Hastings, in equal shares, share and share alike.

Seventh: I direct that in the event my two children, Bessie Call Nielson and Orvis W. Call agree, that the property of my estate may be sold by my executor, but that the proceeds from such sale shall be invested in American Telephone and Telegraph Company common stock and placed in the names of said two children in equal undivided shares share and share alike.

Eighth: I hereby nominate and appoint my daughter Bessie Call Nielson and my son Orvis W. Call the executors of this Will, and I direct that they shall not be required to furnish any bonds as such executors.

Ninth: I hereby revoke any and all Wills and Testamentary Dispositions by me at any time heretofore made.

/s/ Chloe R. Call

ARGUMENT ONE

THE WILL IN QUESTION IS CAPABLE OF INTERPRETATION IN SUCH A MANNER THAT ALL ITS PROVISIONS CAN BE GIVEN MEANING WITHOUT CONFLICT.

The clear import of the provisions of the Will are as follows:

The first provision provides for payment of debts.

The second, third, and fourth provisions confer an estate to the children of Testatrix

for so long as they live.

The fifth provision provides for the disposition of the property upon the death of the life tenants.

The sixth provision provides an alternative to the fifth.

The seventh provides for the disposal of the assets by the executors.

The eighth designates the executors.

There is nothing inconsistent in this construction. It construes all the terms and appears to be the only construction that gives effect to all the Will.

ARGUMENT TWO

THE TRIAL COURT'S INTERPRETATION GIVES MEANING TO ONLY THE FIRST AND SECOND PARAGRAPHS OF SAID WILL.

The sixth provision makes it clear that the property was not to go back to the estates

of the children of the Testatrix. "In the event that the bequest to Don Lewis Ryan shall fail by reason of his death or for any other reason, then I direct the share herein devised to Don Lewis Ryan shall go the William K. Ryan and Phyllis F. Ryan Hastings in equal shares, share and share alike." This makes it apparent that the Testator contemplated an attempt on the part of the children to defeat the interest of Don Lewis Ryan and inserted the restriction to prevent the return to their estates of the remainder for any reason.

The third and fourth provisions made it clear that there was not intended any estate to last longer than the life of her children. The Testatrix made it clear that these provisions were designed to go further than the mere prevention of a lapse because she provided for disposition upon the death of the child, re-

gardless of when the death occurs. These provisions cover death of the life tenant before and after death of the Testatrix.

The seventh provision provides for an exchange of the real property to stock. It insists upon the proceeds of said sale being invested in American Telephone & Telegraph Company common stock. This is not mere suggestion; the command is that the proceeds must be so invested.

Furthermore, the stock that is taken in exchange must be placed in both the names of the executors in undivided shares. It is obvious that the Testatrix is attempting to protect the estate from the known financial irresponsibility of Orvis Call. It is further apparent that the Testatrix is merely maintaining the equal control given the executors by the eighth provision of the Will. There is

certainly no grant of a power to evade the corpus.

ARGUMENT THREE

THERE WAS NO EVIDENCE SUBMITTED BY
RESPONDENT THAT WOULD ALTER THE RULES OF
INTERPRETATION AS SET FORTH IN THE UTAH CODE.

The evidence of surrounding circumstances
of the Testatrix tends to support the enter-
pretation set forth in this brief.

The facts show that the Testatrix was
aware that her children were not likely to
have children. Bessie Call Nielson was sixty-
five years of age and never had a child. Orvis
Call had been married twice to fertile women
and never had a child of his own or ever at-
tempted to adopt one. Thus the Testatrix
faced the issue of preferring Don Lewis Ryan
to the spouse of her children. (Transcript
13-16). There is no question but what she
has provided for her own children, the issue

remaining is whether or not she provided for the surviving spouse of her children.

The grant to Don Lewis Ryan could not be for the purpose of preventing a laspe because the Testatrix had knowledge that if there was a laspe, her estate would go by intestate succession to her heirs, and that her heirs and only heirs were her two children. Transcript 13-16) Therefore, it makes no difference whether or not there is a laspe unless she intended the property to go to Don Lewis Ryan in preference to the spouse of Orvis Call and Bessie Call Nielson.

The Testatrix had the advice and counsel of an attorney with long experience in the preparation of wills. Are we to assume that counsel failed to express her true intent when by construing all of the provisions of the will it makes a consistant grant? The Trail Court says Testatrix intended to use only

the second provision of the Will, and the balance being inconsistent is void or inoperative. It seems rather strange to imagine that an experienced counsel could not make an out-right grant to two persons if that were the instruction.

The Trial Court has seen fit to ignore the mandate of the statutes and arrive at a construction which fails to construe and give effect to the 4th, 5th, 6th, and 7th provisions of the Will--an interpretation that requires a construction of an inconsistency as follows:

(a) If both children was granted a fee simple, then upon the death of Orvis Call before Bessie Call Nielson, the share devised to him cannot go to Bessie Call Nielson as is required by the third provision of the Will.

(b) The same in reverse for the fourth provision.

(c) The shares devised Orvis Call and

Bessie Call Nielson cannot go to Don Lewis Ryan upon their death as is required by the fifth provision.

(d) The language in the sixth provision calling for alternative grantees of the devise to Don Lewis Ryan should his interest fail "for any other reason" is meaningless. Certainly a construction that grants a prior fee simple is "any other reason".

(e) The requirement in the seventh provision of the Will that the proceeds from the sale of the property of the estate "shall be invested" in American Telephone and Telegraph common stock and placed in "undivided" shares is inconsistent with the ordinary rights of a fee simple.

(f) To say that all other terms of the Will, except the first two, were designed to prevent a lapse is inconsistent with the facts.

because the Testatrix knew that in the event of a lapse the property would go by intestate succession to her only heirs, namely, Orvis Call and Bessie Call Nielson.

ARGUMENT FOUR

THE TRIAL COURT'S INTERPRETATION IS CONTRARY TO THE LAW OF INTERPRETATION OF WILLS.

Intention of the Testator must govern.

This intention must be: (1) Ascertained from the words of the Will, taking into view the circumstances under which they were made, exclusive of oral declaration. (74-2-2, Utah Code Annotated, 1953)

A construction of the Will that construes all its terms with no inconsistency if possible is required. (74-2-9, Utah Code Annotated, 1953)

". . . no particular form of words is necessary to create a life estate, and such estates may be created with the language of the operative instrument creating estates manifest and intention on the part of grantor or testator to pass to a grantee or devisee a right to possess, use, or enjoy the property during the period of his life." 33 Am Jur, Life Estates, Remainders,

Etc., § 6.

The grant to a person or persons that does not designate the estate and purports to transfer to a third person upon the death of the first taker the share devised to them, creates a life estate in the first taker. 33 Am Jur, Life Estates, Remainders, Etc. § 41, where coupled with a restricted power of disposal it is almost universally held to create a life estate.

"It is a clearly settled general rule that a qualified power of disposal does not create a fee simple estate where it is attached to general devise which does not specify the quality of the estate. In such cases there is usually gift over where the first devisee is general or definite in character, and it is universally held that the qualified or limited nature of the power of disposal gives the first taker only a life estate." 33 Am Jur, Life Estates, Remainders, Etc. § 30.

The authorities subscribing to this view are too numerous to cite in this brief. Hundreds of cases supporting the rule can be found in 33 Am Jur, Life Estates, Remainders,

Etc. § 19 thru 41; 36 ALR 1180; 76 ALR 1154;
7 ALR 838; 10 ALR 756; Am Law Institute
Property, Vol. 1, § 111; 17 ALR 2d 7; 75
ALR 71 and supplements thereto.

Is there any presumption or preference recognized that may have a bearing on this Will? The law recognizes preferences for the direct descendants of a decedent unless a normal construction is to the contrary. The Will in question, makes clear that the children have been provided for. The third and fourth provisions of the Will leave no doubt that the first to die between the children was to have only a life estate. There is no alternative construction that can change the clear wording of these two provisions. It thus becomes apparent that the Testatrix intended only life estates for the first of the children to die. Since both are subject to the same identical provision that is completely

Etc. § 19 thru 41; 36 ALR 1180; 76 ALR 1. 54; 7 ALR 838; 10 ALR 756; Am Law Institute Property, Vol. 1, § 111; 17 ALR 2d 7; 75 ALR 71 and supplements thereto.

Is there any presumption or preference recognized that may have a bearing on this Will? The law recognizes preferences for the direct descendants of a decedent unless a normal construction is to the contrary. The Will in question, makes clear that the children have been provided for. The third and fourth provisions of the Will leave no doubt that the first to die between the children was to have only a life estate. There is no alternative construction that can change the clear wording of these two provisions. It thus becomes apparent that the Testatrix intended only life estates for the first of the children to die. Since both are subject to the same identical provision that is completely

unambiguous and clear in its intent, it is apparent that the Testatrix intended the estate of the children to last only for their life.

If there could be any doubt, the fifth provision of the Will transfers the shares granted to the children to Don Lewis Ryan upon the death of the survivor of the two children. Can a preference be construed so strongly that all other provisions that are clear on their face, that may conflict therewith, become inconsistent and thereby void under the doctrine of repugnance? The clear mandate of Section 74-2-9, Utah Code Annotated 1953, leaves little doubt that such is not to be the case.

"The words of a Will are to receive an interpretation which will give to every expression some effect, rather than one which will render of the expressions inoperative."

The Trial Court has elected to ignore the clear language and intent of the third, fourth, fifth, sixth, and seventh provisions of said Will in favor of aforesaid preference in spite of the inconsistency created thereby and in spite of the legislative mandate set forth above.

What is the effect of language in a Will that clearly indicates that Testatrix was covering the issue of the lapse, i.e., ". . . in the event my son, Orvis W. Call shall die before I die, or before my daughter . . . ?" The Testatrix found no difficulty in expressing very clearly the time of the gift over from one child to the survivor, i.e., in the event one dies before her or the survivor. It seems rather peculiar that the trial court could find the Testatrix so inconsistent as has occurred by interpreting the fifth and sixth provisions of said Will as designed only to

prevent a lapse. That the Testatrix intended that Don Lewis Ryan take only in the event both children pre-deceased her she could have so provided as she did in the gifts set forth in the third and fourth provisions of the Will.

In addition there is positive evidence that the Testatrix intended to prevent a lapse of the remainder interest granted Don Lewis Ryan.

"The usual method of indicating an intention that a gift should not lapse is by an express substitution of another beneficiary in case of the death of the original donee ...
57 Am Jur, Will § 1428

The sixth provision of said Will specifies provides for the disposition in the event of death of Don Lewis Ryan. It provides an alternative donee. Certainly where the testatrix actually covered the issue of death of the donee and provides for an alternative it cannot be said she intended something contrary

to the clear meaning of her expressions. The testatrix has clearly shown her intent on the issue of lapse by specifically covering the death of all of the first three takers and providing an alternative so as to prevent lapse should one pre-decease her. There is nothing inconsistent with the vested remainder in Don Lewis Ryan which will become possessory as the Will says "upon the death" of the first takers.

ARGUMENT FIVE

THE TRIAL COURT'S INTERPRETATION IS IN-
CONSISTENT WITH THE PLAIN LANGUAGE OF THE WILL.

Section 74-2-3, Utah Code Annotated 1953 clearly establishes the guide lines in interpreting Wills in Utah.

"In interpreting a will subject to the laws of this State, the rules prescribed in this chapter are to be observed unless an intention to the contrary clearly appears."

There is no clear intention shown that is contrary to the interpretation required

under the chapters on interpretation of Wills in Code (74-2-1 thru 35). A construction under the 'rules prescribed' requires that all provisions be construed as a consistent whole if possible. The interpretation set forth in this brief does exactly that without any strained interpretation and by using the regular meaning of the provisions provided in the Will.

The Trial Court erred in admitting Deeds as evidence that were executed several years after the drawing of the Will, since the only issue before the court was the intention of the Testatrix.

CONCLUSION

It is respectfully submitted that the will contemplates life estates for the lives of the children of Testatrix with a remainder in Don Lewis Ryan that vested upon the death

of Testatrix. A fair interpretation of the provisions in the will, in accordance with their regular meaning under the circumstances, supports such a ruling.

The trial court has construed the preference afforded direct descendants to the point that most of the will is inoperative because of the conflicts created thereby. Clear grants are disregarded in favor of implications arising from strained interpretations of other parts of the will. This strained interpretation is used to create the doubt upon which the doctrine of preference is then applied.

It is respectfully submitted that the Trial Court erred in interpreting said will to grant fee simple estates to Orvis Call and Bessie Call Nielson.

Respectfully submitted,

HATCH & CHIDESTER
Attorneys for Appellant
Heber, Utah