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IN THE SUPREME COURT

OF THE

STATE OF UTAH

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JUL 5 - 1963

Clerk, Supreme Court, Utah

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

REPLY BRIEF OF APPELLANT

HATCH & CHIDESTER

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REPLY TO PART I

Respondent attempts to treat the second paragraph of the Will as if it were the only provision therein. It is true that the grant contained in the second paragraph of the Will is in indefinite language stating neither fee nor life estate and stating no duration.

If the provision could stand alone without qualification by other provisions of the Will, there is no question but that the law by a presumption will create the maximum estate, (See Section 57-1-3, Utah Code Annotated, 1953, for conveyances, and Section 74-1-36, Utah Code annotated, 1953, for devise) but the law requires giving effect to all the provisions of a Will where possible and as a consequence one provision cannot be treated in contridiction to the

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balance of the Will where all provisions may receive a consistant effect.

It is contended that the Testatrix inserted the following 5 provisions in the Will to provide what happens "in the event the children do not get the fee." Such a contention is contrary to the repeated, unambiguous, and clear declarations of the Testatrix, and requires an interpretation that makes many provisions inconsistant. By giving normal meaning to the terms, all provisions can be given consistant effect.

It is acknowledged that the property, at the time of the execution of the Will, would produce a relatively small income. It was being used as a fruit orchard. But this is precisely

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the reason for the seventh provision in the will giving the executor the power to exhange the asset for A.T.&T. Stock.

The case of Schomp vs. Brown, 335p 2d 847 does not rule as contended by respondent. In addition, it is distinguishable because the first taker was granted a power to invade the corpus. The court refused to impose a trust for the remainderman because of the power to invade, but declared that the gift over estate holder had a cause of action in the event the first taker failed to fulfill the commitments imposed for the protection of the following estate.

The rule attributed by Respondent to Parker vs. Parker, 46 Mass 134 is agreed with provided duration is not given and provided it is not coupled

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with provisions that modify. This is the presumption mentioned above.

Chapman v. Check, 16 A. 407, 409, 81 Me. 109 cited by Respondant states the rule alledged by Appellant: That it is a general description of the property, not a statement of the size of the estate created.

It is argued that an estate vested upon the Testatrix's death, in Orvis Call and Bessie Call Nielson. This is agreed with, but our question concerns the size ot the estate that vested, not the time of vesting. The law favors early vesting (i.e. time of testatrix's death) where possible. 33 Am Jur, Life Estates, Remainders, Etc. ss 106. There is no reason why the estate granted Orvis Call, Bessie Call Nielson and Don Lewis Ryan could not vest upon the testatrix's death. Ob-

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viously this is the case here.

In re Collea's Estate, 233 p 2d 554 cited by respondant is distinguishable because there was a request of the first taker and not clear gift over.

The rule in Pruse v. Beasley, 335 p 2d 346 as set forth in Respondants brief is misleading because it omits a part of the rule as quoted in that case.

> "A devise of the residue of a testators property posses all of the property which he was entitled to devise or bequeath at the time of his death not otherwise effectually devised or bequeathed by his will."

Appellant concurs with this rule in its complete form.

Shippy v. Elliott, 327 p 2d 645 is distinguishable because the gift over was not mandatory but merely in terms

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of desire of testatrix. Also, the first taker had an unlimited power to invade the corpus.

The same can be said of Fields vs. Fields, 3 p 2d 771.

REPLY TO PART II

Respondant's argument assumes the very point in question. The question is whether or not a fee was created not whether or not there is an attempt to cut it down.

It is argued that a grant for life with a remainder following gives nothing to the first taker. It is believed that such a novel theory needs no reply.

It is contended that the Will does not give a basis to divide the estate. A deed granting an express life estate followed by an express remainder does not contain a basis of division.

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The answer is obvious. The law of estates defines the rights and duties of each estate. There is no contention that the estates are divided.

The citations of the repugnancy rule by respondant is not disputed. The issue in our case is different. The question before the court is the size of the estate. It is argued that the terms of the Will should be construed inconsistant with each other so that the repugnancy doctrine can apply. Such is contrary to law. Section 74-2-5, Utah Code Annotated, 1953.

REPLY TO PART III

Appellant's argument in the original brief deals with the issue of lapse raised by Respondant at Part III. Respondant, however, goes much in detail on the time of the vesting of estates

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contingent upon the death of the first taker. The vesting of the estate in Don Lewis Ryan is in absolutely no way contingent upon the death of the first taker. Only possession must await the termination of the life estate. The vesting of the estate in Don Lewis Ryan was contingent only upon his surviving the testatrix. There can be no dispute under the law on the time of the vesting of this estate. It is not at issue.

The cases cited by Respondent deals with the time of vesting of estates contingent upon death.

In re Gormley's Estate, 338 p 2d 457 is distinguishable because the grant to the first taker was in "complete and perfect ownership" and also time of vesting was at issue.

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REPLY TO PART IV

The seventh provision is in mandatory language. It authorizes the sale of the property for the express purpose of substituting alternative property. The language is not mere permission or words of request, it is a command. There is no need for a power to exchange the asset if the estate is in fee simple - such is one of the inherent rights of a fee simple. However, such power is not inherent with a life estate and must be specifically given to be free of protest by the remainderman.

It is contended that the power of exchange is an absolute power of disposition. This seems novel in view of the compulsory purchase of stock from said sale. It is a power broad

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enough to exchange the asset for stock only. It is difficult to imagine a more restricted power of disposition. Such power is logically consistant only with a life estate.

It is true that if we could construe only parts of a will and completely disregard all other parts that any grant to a person or persons without further qualification regardless of the share of each grantee would create a fee simple by operation of the recognized presumption. But the seventh provision, like the second provision of the will, does not stand alone.

One of the distinguishing factors of a life estate is that the duration of such estate is always for the period of a life as lives.

In the will in question, the

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duration of the estate of the first takers is given clearly in the third, fourth, and fifth provisions, all of which show the termination time of such estate to be at their death.

The seventh provision does not give a different duration than exists for the second paragraph. There is no increase of right granted in the seventh paragraph over that given in the second paragraph.

The seventh paragraph does not alter the "shares devised" except in the form of the corpus. By the second provision of the Will, Orvis Call and Bessie Call Nielson was to take this property share and share alike. The seventh provision only establishes the same ownerships in the substituted asset that existed in the asset

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granted by the second paragraph.

It is urged that the presumption that elevates indefinite gifts standing alone to fee simple should operate here in spite of the fact that it would change the express given duration of the shares devised to Orvis Call and Bessie Call Nielson. This Will is perfectly capable of a construction that interprets each part thereof in relation to each other so as to form a consistant whole as required by Section 74-2-5, UCA, 1953. This is possible without adding words to the will as urged by Respondant (Respondant's brief p 15) and without any repugnance because of inconsistancy. This requires an interpretation, however, that the first takers receive life estates.

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REPLY TO PART V

Council makes a point that the granting provisions of the Will does not say life estate. It also does not say fee simple. It is simply a grant in indefinite terms indicating neither life estate nor fee which is coupled with a restricted power of exchange with a gift over upon the death of the first takers. (See 33 Am Jur, Life Estates, Remainders, Etc. § 30; 36 ALR 1080; 76 ALR 1154; 7 ALR 838; 10 ALR 756; 17 ALR 2d 7; 75 ALR 71; Am Law Institute, Property, Vol 1, § 111.

The balance of the contentions of Part V merely assume the question in point namely, what was the size of the estate. Respondant argues rules of law that take effect only after it is determined that t estate is in fee or that the power of exchange is an absolute power of disposi ion

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REPLY TO PART VI

The contention that the interpretation of the trial court is consistant with the whole will seems best refuted by respondant's arguments on repugnancy (respondant's brief pp 9-13). Even respondant acknowledges that the trial court's ruling requires the repugnancy doctrine because of inconsistancy as well as the addition of words to the terms set forth in the will.

The balance of the contentions of respondants brief concerning an alledged attempt by Don Lewis Ryan to take the estates of the first taker and a supposed burden being placed thereon just is not in conformity with the allegations of appellant. He claims an estate in remainder and no more.

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CONCLUSION

Respondant's brief fails to supply any support that would vary the required interpretation as dictated by normal rules of construction. Not one case has been cited that was not distinguishable and further that supports the contentions of Respondant.

Respectfully submitted,

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