

1964

In the Matter of the Estate of William D. Baxter : Protestants' and Brief of Appellants

Utah Supreme Court

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Heber Grant Ivins; Elias Hansen; Attorneys for Protestants and Appellants;

Dean E. Conder; O. Devere Wooton; Attorneys for Proponents and Respondents;

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ES-
TATE OF WILLIAM D. BAXTER, } No. 10216
Deceased. }

PROTESTANTS' AND APPELLANTS' BRIEF

APPEAL FROM A JUDGMENT ADMITTING WILL
TO A PROBATE OF THE FOURTH DISTRICT
COURT OF UTAH COUNTY, UTAH.

HONORABLE MAURICE HARDING, JUDGE

UNIVERSITY OF UTAH

APR 23 1965

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Newhouse Building
Salt Lake City, Utah
and
O. DEVERE WOOTON
Suite 12, Geneva Building
American Fork, Utah
*Attorneys for Proponents and
Respondents to Admission of
Will to Probate*

HEBER GRANT IVINS
75 North Center Street
American Fork, Utah
CLARENCE M. BECK

and
ELIAS HANSEN
Felt Building
Salt Lake City, Utah
*Attorneys for Protestants and
Appellants to Admission of
Will to Probate*

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ES-
TATE OF WILLIAM D. BAXTER, } No. 10216
Deceased. }

PROTESTANTS' AND APPELLANTS' BRIEF

DISPOSITION IN THE LOWER COURT

This is an appeal from the Judgment of the District Court of Utah County, Utah, wherein on July 21, 1964, Maurice Harding, one of the Judges of said court entered a decree admitting to probate the alleged Last Will and Testament of William D. Baxter, deceased.

THE RELIEF SOUGHT ON APPEAL

The protestants and appellants on this appeal seek a reversal of the decree admitting the alleged Will of William D. Baxter to probate.

STATEMENT OF FACTS

Ruth Baxter, the widow of William D. Baxter, filed her petition to have admitted to probate an alleged Last Will and Testament of William D. Baxter, deceased. (R 5) The alleged Will is dated April 26, 1960, and is signed by William D. Baxter and three witnesses. Above the signature of the witnesses appears this language:

This instrument was, on the day and date hereof signed, published and declared by said testator, William D. Baxter, to be his Last Will and Testament, in the presence of us, and at his request have subscribed our names thereto as the witnesses, in his presence and in the presence of each other. At the time of the execution of this instrument, the said testator was of sound and disposing mind and had a clear understanding of the nature of the instrument being signed and was not acting under any menace or undue influence.”

It is in substance alleged in the petition for the probate of the alleged Will of William D. Baxter that he died at American Fork, Utah, on June 29, 1963, and at the time of his death, he was a resident of American Fork, Utah; that he left an estate in Utah County, Utah, consisting of a contract of approximately \$3,500.00; that he left a Last Will and Testament, a copy of which is attached to the Petition; that his heirs consisted of the Petitioner, Ruth Baxter, his widow, a son, two granddaughters and a grandson; that one of his sons predeceased him; and that the property mentioned in the

will as being deeded to his son was conveyed to him prior to the death of the testator. (R 3-4)

One of the granddaughters, Lois Marie Thomas, filed a protest to the admission of the will to probate. (R 10-11) Gilbert Baxter, the son, and Ruth Baxter, the widow of the deceased, answered the objection of Lois Thomas to the admission of the alleged will to probate. (R 13-14) On April 20, 1964, a motion was filed in the cause by the grandchildren objecting to the admission of the alleged will to probate on the ground that the same was not executed in the manner provided by law in that above the signatures of the witnesses appeared this language:

“At the time of the execution of this instrument, the said testator was of sound and disposing mind and had a clear understanding of the nature of the instrument being signed and was not acting under any menace or undue influence.”
(R 19-20)

By leave of the court on April 20, 1964, the grandchildren of the deceased filed amended objections to the admission of the alleged will to probate. (R 24) In the objection so filed by the grandchildren of the decedent, William D. Baxter, it is in substance alleged that the protestants are the grandchildren of William D. Baxter, deceased; that they are the children of William F. Baxter, who predeceased his father, William D. Baxter; that the alleged Last Will of William D. Baxter, deceased, shows on its face that it is not a valid will in that it was not executed in the manner provided by the provisions

of UCA, 1953-74-1-5 (4), which provides that there must be two attesting witnesses, each of whom must sign his name as a witness at the end of the Will at the testator's request, in his presence and in the presence of the other; that at the end of the alleged Will immediately above the signature of the attested witnesses is this language:

“At the time of the execution of this instrument, said testator was of sound and disposing mind and had a clear understanding of the nature of the instrument being signed and was not acting under any menace or undue influence.”

The provisions of UCA 1953-75-3-9, 75-3-10 and 75-3-11 are quoted in said objections to the admission of will to probate. It is further alleged that by the provisions of the law above mentioned the attesting witnesses are limited to signing their names and attesting that they did so at the request of the testator, that by adding the language as to the competency and freedom from menace and undue influence of Baxter at the time he signed the alleged will, the attesting witnesses were attempting to perform the functions of the tribunal that may be called upon to determine such facts. It is also alleged that one of the witnesses was the physician of the deceased during his illness and as such was precluded from testifying because of the provisions of UCA 1953, 78-24-8. That on or about June 17th, 1959, said William D. Baxter sustained a severe heart attack and extensive brain hemorrhage or stroke, from the effects of which he never recovered and which rendered him of unsound mind and memory; that on April 26, 1960, when he executed the

allege dwill, he was incompetent; that Ruth Baxter, the widow of Jack Burn, and William D. Baxter were married in the month of April, 1958; that at the time of said marriage, William D. Baxter was the owner of property in excess of \$150,000, of which in excess of \$100,000 was in cash on deposit in banks in numerous savings accounts, some of which money stood in the name of William D. Baxter and his granddaughter, Edith Grace Hamaker and some in the name of his granddaughter, Lois Marie Thomas; that soon after the marriage of Ruth Baxter and William D. Baxter, the said Ruth Baxter began an attempt to secure all of the money which William D. Baxter had any interest in and after William D. Baxter sustained the brain damage, she increased her efforts to secure possession of all the money owned by William D. Baxter or in which he had an interest; that when the granddaughters or friends of William D. Baxter sought to visit him, his wife, Ruth, either resisted or dissuaded them from making such visits or if they did visit him, the said Ruth Baxter would either answer or otherwise interfere with any attempt of the friends or relatives to engage in any conversation with Baxter; "that the said Ruth Baxter, by menace and undue influence, secured the transfer to her of all the money and certain other property in which the said William D. Baxter had any interest; that the estate of William D. Baxter, in addition to the property mentioned in the petition of Ruth Baxter for probate of the alleged will of William D. Baxter has also the right to recover money and other

property which has been unlawfully acquired by the said Ruth Baxter.”

The protestants prayed judgment that the alleged will dated April 26, 1960, be declared invalid; that the petition for the probate thereof be denied and that these protestants be awarded their costs herein. The court denied the motion to dismiss the petition for probate of the will and pursuant to the pleadings above mentioned, a trial was had before the court sitting without a jury upon the issues raised by the pleadings. There is a sharp conflict in the evidence as to the competency of Mr. Baxter at or above the time the alleged will was executed. Eight witnesses were called and testified on behalf of the proponents of the will. They were permitted to testify and did testify that on or near April 26, 1960 when the alleged will was executed, William D. Baxter was competent. Among the witnesses testifying were Dr. Guy A. Richards who attended Baxter from the time he suffered the stroke until he died and Attorney O. DeVere Wooton, who acted as attorney for Mr. Baxter and who drew the alleged will. It was made to appear that Donald S. Ryder, the other signer of the will, was in California and therefore not called to testify. (R 9) Ten witnesses were called by the contestants to the admission of the will to probate who testified that at or near April 26, 1960, when the alleged will was executed, they were of the opinion that William D. Baxter was not competent to execute a will. During the course of the trial, the court below held that the protestants did not raise any undue influence that

was practiced upon William D. Baxter and that the only issue raised by the pleadings was the claim of competency of William D. Baxter. By such a ruling and other rulings made by the trial court, the evidence offered was limited to its application as to the competency of Mr. Baxter at the time he executed the will. (R 23) There was, however, uncontroverted evidence received without objection showing that when the friends and relatives of Mr. Baxter called to see him, Mrs. Baxter undertook to interfere with conversations sought to be had with Mr. Baxter. (R 72-78-104-105) The evidence also shows that Mrs. Baxter secured a conveyance to her and Mr. Baxter as joint tenants two tracts of land; that she sold some stock in an irrigation company (R 103-127); that Mrs. Baxter secured the transfer to her and Mr. Baxter as joint tenants numerous bank accounts in the total amount of \$100,000.00. (R 195-199) Prior to the time these transfers were made, a number of the accounts stood in the names of Mr. Baxter and his granddaughters as joint tenants. Such transfers were made without informing the contestants that the accounts were to be taken from the granddaughters. At the conclusion of the evidence offered by the proponents of the will, counsel for the contestants stated that they would have some rebuttal evidence but after a conversation had between the court and counsel, the court stated that he would take the matter under advisement. On April 29, 1964 a motion for a rehearing was filed upon numerous grounds that no ruling had been made on the motion to deny the admission of the will to probate. (R 35) A brief was filed

in support of the motion. (R 38-43) On July 21, 1964, Findings of Fact and Conclusions of Law and a Decree was signed and filed. (R 44-46) On August 19, 1964, an appeal was filed with the Clerk of the Court and on August 27, 1964, a Designation of Record on Appeal was filed.

ARGUMENT

It is the contention of the appellants that the alleged will is invalid because it was not executed in the manner provided by law and that if this court should conclude otherwise that said trial court committed prejudicial error in holding that there was no issue before the trial court as to Mrs. Ruth Baxter using undue influence upon her husband, William D. Baxter.

POINT I

THE TRIAL COURT ERRED IN ADMITTING TO PROBATE THE ALLEGED LAST WILL AND TESTAMENT OF WILLIAM D. BAXTER, DECEASED, BECAUSE SUCH ALLEGED WILL WAS NOT WITNESSED IN THE MANNER PROVIDED BY LAW.

U.C.A. 1953, 74-1-5 provides:

“Every will other than a nuncupative will must be in writing and every will other than an olographic or nuncupative must be executed and attested as follows:

(1) It must be subscribed at the end thereof by the testator himself;

(2) The subscription must be made in the presence of the attesting witnesses.

(3) The testator must at the time of subscribing the same declare to the attesting witnesses that the instrument is his will; and

(4) There must be two attesting witnesses each of whom must sign his name as a witness at the end of the will at the testator's request, in his presence, and in the presence of the other."

In the instrument here involved there appears after the attesting paragraph and above the signature of the attesting witnesses this language:

"At the time of the execution of this instrument the said testator was of sound and disposing mind and had a clear understanding of the nature of the instrument being signed and was not acting under any menace or undue influence." (R5)

The protestants and appellants contend that the alleged will was not executed in the manner provided by law, in that, (a) the witnesses did not sign the same as provided by law, and (b) that the witnesses attempted to perform the function of the court or jury by deciding the very question that are the functions of the court or jury that must decide the validity of an alleged will which is being contested.

In our somewhat extended search of the authorities the exact question here raised seems to be a matter of first impression in this and other jurisdictions involving the construction of a statute similar to that of Utah. We have been unable to find an adjudicated case or other

authority (except the decision of the trial court in this case) which has sustained an alleged will which had been executed in the manner that the alleged will here brought in question was executed. We have also been unable to find a book of forms which recommended execution of a will in the manner in which the instrument here questioned was executed.

The authorities as we read them are uniform in holding that to be valid a will must be executed in the manner provided by law; that the language directing the manner which a will must be executed is mandatory. It is the will of the legislature as expressed in its language that must be given effect, and not the intention of the testator. Such is the holding of this court in the case of *In re Alexander's Estate*, 104 Utah 286, 139 Pac. (2d) 402. In that case the instrument sought to be admitted to probate had been signed when the witnesses first saw it, but the deceased acknowledged to the witnesses that he had already signed the same. This court by a majority held that the probate of the instrument should be denied. That is the rule generally in construing statutory law providing for the manner in which a will shall be executed. 94 C.J.S. page 965, et seq., Sec. 167. It is there said:

“A will is either valid or invalid as an entirety as far as execution is concerned. All the requirements stand as of equal importance and must be observed, however insignificant they may be in themselves, or however meaningless they may be when considered in relation to the circumstances of the particular case. Courts are entirely lacking

in power to dispense with any of the requirements of the statute or to supply defects in the execution of the will. A failure to comply with any one of the requirements is fatal to the validity of the will and no defect in its execution can be added or supplied by parol proof as discussed in *Sec. 391.*”

See also *94 C.J.S. page 967, Sec. 167(e)*. Numerous cases are cited in footnotes to the text in support thereof. We shall presently direct the attention of the court to a few of the cases which are applicable to the facts in this case.

Before doing so we call the attention of the court to the statute above quoted which requires that a will must be subscribed at the end thereof by the testator himself, and that each of the attesting witnesses must sign his name as a witness at the end of the will.

As to the meaning of the words “end of the will” as applied to the testator, some of the cases seem to take the view that the end of the will is the point farthest removed from its beginning. The more recent opinions seem to take the view that the end of the will means at the point where the testator finishes the disposition of his property regardless of where on the instrument such provision is completed. If it is uncertain where on the instrument the will ends the probate of the will is denied, because not executed in the manner provided by law.

The same doctrine is applied to the meaning of the words “end of the will” as applied to the place where the attesting witnesses must sign. However, under stat-

utes such as the Utah statutes the courts hold that the end of the will means at the end of the attestation because as to the witnesses the attesting clause is a part of the will. The following are among the authorities which support the foregoing statements as to what is meant by the words "end of the will" as applied alike to the testator and the witnesses.

In re Estate of Seaman, 146 Cal. 455, 80 Pa. 700, adopted from New York;

In re Moro's Estate, 183 Cal. 20, 190 Pac. 168;

In re Mack's Estate, 124 N.Y.S. (2d) 891, where numerous cases are cited;

In re Field's Will, 204 N.Y. 448, 91 N.E. 881;

In re Dunlap's Will, 87 Cal. 95, 209 Pac. 651;

In re Coyner Estate, 37 Atl(2d) 509;

In re Andrews' Will, 60 N.Y.C. 441.

In a number of the foregoing cases a blank space existed between the end of the will where the testator signed and where the attesting witnesses signed. In most of such cases it is held that the fact that such a blank space existed did not render the will invalid. There is a dissenting opinion in the case of *In re Moro's Estate*, supra, which is to the contrary, where a large blank space exists between the end of the will and the attesting clause signed by the witnesses.

The adjudicated cases are agreed that in a statute such as the Utah statute the provision requiring the testator and witnesses to sign at the end of the will must

be complied with by both the testator and the witnesses. Such ruling is in accord with the doctrine that in construing a statute where a particular word is used two or more times in a statute, the same meaning must be given to the word each time it is so used. *Corey v. Knight*, 150 Cal. App. (2d) 671, 680, 319 Pac. (2d) 673; *Lawton v. Sweitzer*, 354 Ill. 620, 188 N.E. 811.

The authorities also teach that when the legislative act creates a right and provides the manner in which it shall be exercised, the right must be exercised in the manner provided in the act, and not otherwise. *National Union Fire Ins. Co. v. D. & R.G. Ry.*, 44 Utah 26, 34, 13 Pac. 653; *Fletcher v. Paige*, 124 Mont. 114, 220 Pac.(2d) 484; *Lafayette Transfer & Storage Co. v. Michigan Public Utilities Commission*, 287 Mich. 489; 283 NW 659.

It is provided in *U.C.A. 1953, 68-3-11*, that words and phrases shall be construed according to the context, and approved usage of the language, etc. Unless technical terms are used words employed in a statute must be given their usual and ordinary meaning. *Cache Auto Co. v. Central Garage*, 63 Utah 10, 221 Pac. 862. Other cases of the same effect are collected in a footnote to the above Act.

Applying the law announced in the above cited cases, and the provisions of the Utah law above quoted, the language at the end of the will means at the point where the will terminates. Obviously the instrument here brought in question was signed by the testator at the

end thereof. It is equally obvious that the witnesses did not sign the same at the end thereof. But on the contrary, signed the instrument at the end of a statement unauthorized by our law and incompetent as admissible evidence to establish the facts sought to be established. The witnesses did not sign at the point directed by *U.C.A. 1953, 74-1-5(4)*, but at the end of the statement "At the time of the execution of this instrument the said testator was of sound and disposing mind and had a clear understanding of the nature of the instrument being signed and was not acting under any menace or undue influence."

There are a number of other principles of law which, when applied to the alleged will of William D. Baxter, renders it void.

By the language just quoted the witnesses seek to decide the very matter which is the function of the court or jury. It will be seen that the witnesses were not content to express their opinion as to the competency and absence of undue influence of Mr. Baxter at the time the instrument was signed, but sought to relieve whoever may be called upon to hear and determine those matters by putting the same at rest by their statement. There is a fundamental distinction between a witness expressing an opinion as to a fact and in stating as a fact the ultimate fact, which in case of a contest must be determined by the tribunal whose duty it is to decide issues raised by pleadings. In a will contest it is of controlling importance whether or not the testator was competent and not acting under duress at the time he signed the alleged

instrument, and the attesting witnesses may not lawfully decide such question but are merely permitted to express their opinion as to his competency or absence of undue influence. Among the Utah cases so holding are *Utah Copper Co. v. Industrial Commission*, 69 Utah 452, 3 Pac. 397; *Roberts v. Salt Lake B & O Ry. Co.*, 53 Utah 30, 176 Pac. 855. That is the holding of the cases generally. 32 C.J.S., page 74, Sec. 446, and cases cited in footnotes to the text.

So also the opinion of a witness as to the competency and absence of undue influence of an alleged testator is his opinion at the time the will is presented for probate, and not his opinion at the time the instrument was signed. *Lyon v. Chicago City R. Co.*, 250 Ill. 75, 101 N.E. 211.

The following provisions of U.C.A. 1953 tend to lend light on the effect of adding to the attestation of the will the statement of the witnesses as to the competency and absence of undue influence of Mr. Baxter at the time he signed the alleged will.

U.C.A. 1953, 78-25-12 provides:

“A last will and testament except a nuncupative will is invalid unless it is in writing and executed with such formalities as are required by law. When therefor such will is to be shown the instrument itself must be produced or secondary evidence of the contents given.”

U.C.A. 1953, 75-3-8:

“If the will is contested all subscribing witnesses who are present in the county and who are

of sound mind must be produced and examined, and the death, absence or insanity of any of them must be satisfactory shown."

U.C.A. 1953, 75-1-6:

"The provisions of the Code of Civil Procedure shall be applicable to and constitute the rules of practice in probate and guardianship proceedings."

U.C.A. 1953, 75-3-9:

"The testimony of each witness shall be reduced to writing and signed by him and the same shall be evidence in any subsequent contest concerning the validity of the will or a sufficiency of the proof thereof, if the witness is dead or has permanently removed from the state."

U.C.A. 1953, 75-3-10:

"If the court is satisfied upon the proof taken or from the facts found by the jury, that the will was duly executed and that the testator at the time of its execution was of sound and disposing mind and not acting under duress, menace, fraud or undue influence, a certificate of the proof of the facts found and attested by the Seal of the court must be attached to the will."

U.C.A. 1953, 75-3-11, requires the Clerk to file the Will, and Certificate of Proof, and the Testimony.

The execution of the alleged will of William D. Baxter was not in conformity with the provisions of *U.C.A. 1953, 74-1-5(4)*, in that, the witnesses did not sign at the end thereof, and therefore is invalid as provided in

U.C.A. 1953, 78-25-12. Not only did the subscribing witnesses fail to sign at the end of the will as by law required, but signed at the end of the competency statement by which they invade the function of the court or jury which may be called upon to try a contest as to the validity of the alleged will. To hold that the instrument here involved is a valid will is at war with the provision of *U.C.A. 1953, 78-25-12.*

To approve the witnesses signing the alleged will at the end of the statement as to the competency, absence of duress and undue influence instead of at the end of the will as provided by law offends against the well established maxim of "Expression Unius Est Exclusio Alterius."

By no stretch of the meaning of the language of *Utah Code Annotated* 74-1-5(4), or the rules of statutory construction may it be said that such language permits the attesting witnesses to add before their signatures that "At the time of the execution of this instrument the said testator was of sound and disposing mind and had a clear understanding of the nature of the instrument being signed and was not acting under any menace or undue influence." The maxim *expressio unius est exclusio alterius* is a well established rule of construction of this, and the courts generally. *Utah Rapid Transit v. Ogden City, et al.*, 89 Utah 546, 58 Pac. (2d) 1; *Tribune Reporter Printing Co. v. Homer*, 51 Utah 153, 157, 169 Pac. 170; 82 C.J.S. page 666, Sec. 333, et seq., where numerous cases from other jurisdictions are cited in footnotes.

The maxim is especially applicable in the construction of a statute. It is well established that when a statute provides that something be done and directs the manner in which it shall be done, it may not be done otherwise. *Utah Rapid Transit Co. v. Ogden, supra*, and cases there cited, and 82 C.J.S. page 666, Sec. 333(a), and cases cited in footnotes to the text.

Moreover, to permit a will to be admitted to probate containing such statements as those by which the witnesses attempted to decide touching the competency and freedom from menace or undue influence of Baxter is calculated to involve the court in endless difficulties. In a proceeding had for the admission of a will to probate the entire will must be received in evidence. It is in effect so provided in *U.C.A. 1953, 75-3-9; 75-3-10 and 74-3-11*. If the case is tried before a jury how may the court lawfully refuse to admit the entire instrument including the objectional language? How may the court escape the dilemma in which such language has placed it? If the trial is being had before a jury how may the court consistently admit the incompetent statement and then instruct the jury not to consider the same, and expect the jury to understand and follow such an instruction? If the case is tried before the court sitting without a jury involving a will containing such incompetent statements, and the court concludes that such incompetent statements are proper in a will, how may the court conclude that such statements did not enter into his conclusion that the will was properly executed?

Not only is the language immediately preceding the signatures of the attesting witnesses incompetent as evidence and is not authorized by law, but if given effect would offend against the provisions of *Section 7 of Article One of the Constitution of Utah* that no person shall be deprived of life, liberty or property without due process of law." This court has had a number of occasions to pass upon circumstances in which that constitutional provision is applicable. See *U.C.A. Vol. 1, page 14*. Among such cases is *Christianson v. Harris*, 109 Utah 1, 116 Pac.(2d) 314, where it is held that due process of law requires parties to litigation shall have an opportunity to examine and cross examine witnesses. Other state and federal cases so holding are collected in *16A C.J.S. page 824, note 54.18*. If the validity of a will offered for probate may be shown by such spurious statements as those here brought in question when one or more of the attesting witnesses is absent from the county where the will is offered for probate or is dead or insane, obviously the contesting heirs are deprived of their constitutional right of examination and cross-examination.

The attention of the court is again called to the provisions of *U.C.A. 1953, 75-3-8 and 75-3-9*, which require that in the event of a contest all subscribing witnesses to a will who are present in the county must be called, and if any of such witnesses are not present in the county or who are dead or insane, such fact must be shown, and that the testimony of the witnesses must be reduced to writing and signed by him, and when so signed shall be

evidence of the validity of the will in any subsequent contest.

It is common knowledge that as a general rule persons who are the heirs of a testator are not present when a will is being executed, and if statements such as those here being attacked are to be admitted in evidence, it may well be that the heirs of a deceased person will be deprived of their interest in the decedent's estate by *evidence of controlling importance without an opportunity to cross examine* the attesting witnesses. Indeed that is what occurred as to one of the attesting witnesses in this case who was not present in the county where the alleged will was offered for probate. Under the doctrine contended for by the proponents of a will, if none of the attesting witnesses are present in the county, or are dead or insane at the time a will is offered for probate, the competency and freedom from undue influence could doubtless be established by such statements as those contained in the alleged will of Baxter. If that is permissible, obviously the heirs of a decedent who would inherit his property are deprived of their rights without due process of law.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN HOLDING THAT NO ISSUE WAS RAISED BY THE PLEADING AS TO RUTH BAXTER, THE WIDOW, USING UNDUE INFLUENCE TO SECURE THE TRANSFER TO HER AND MR. BAXTER AS JOINT TENANTS OF TWO TRACTS

OF REAL ESTATE AND NUMEROUS BANK ACCOUNTS WHICH HAD THERETOFORE STOOD IN THE NAME OF MR. BAXTER AND HIS GRAND-DAUGHTERS.

Rule 8 (c) of the Utah Rules of Civil Procedure provides that there are a number of matters that may be set forth in an affirmative answer to the complaint, among which are duress and illegality. Subdivision 8 (e) provides that each averment of a pleading shall be simple, concise and direct, 8 (1) provides that no technical forms of pleadings or motions are required. Section 1 (f) provides that all pleadings shall be so construed as to do substantial justice. There is nothing in the Rules requiring a more definite statement when the claim is that the instrument involved is illegal. If the proponents of the will claim that the answer of the contestants was vague or ambiguous, the remedy is by a motion for a more definite statement under Rule 12 (e). However, it is doubtful if the proponents of the will would have been entitled to a more definite statement. Duress and undue influence is generally practiced in secret, and protestants, therefore, must rely in great part upon circumstantial evidence to support the claim that the will is invalid because its execution was secured by unlawful means. If, as is alleged in the objection to the admission of the will to probate, William D. Baxter had property in excess of \$150,000.00, of which \$100,000.00 was in the form of cash on deposit in banks, some of which stood in the name of William D. Baxter and his granddaughters, it would seem to follow that the establishment of such fact as to

securing the conveyance of the property actually conveyed, but also that which is provided to be conveyed by the terms of the will. Not only are such allegations sufficient to raise an issue of undue influence in execution of the will but also raises an issue under Rule 13 of Utah Rules of Civil Procedure. Moreover, elements touching the alleged menace and undue influence was properly admissible as bearing upon the appointment of Ruth Baxter as executrix of the will as provided in UCA 1953, 75-3-15, by which the integrity of a person who seeks to be appointed executrix is a proper subject of inquiry. If it should be established that Ruth Baxter was guilty of the actions charged in the objections, the will should not have been admitted to probate and even if it should, it was error to appoint Ruth Baxter as such executrix if she was guilty of the acts alleged in the objections.

The trial court refused to allow the protestants to introduce any evidence of undue influence or duress, claiming it was not pleaded. The mere filing of objections (see 75-3-7 UCA 1953) puts this fact in issue for the court must affirmatively find "the testator at the time of its execution was of sound and disposing mind and not acting under duress, menace, fraud or undue influence (see 75-3-10 UCA) and signed such certificate of proof."

POINT III

THE TRIAL COURT ERRED IN OVERRULING
THE OBJECTIONS ON THE ADMISSION OF THE

REBUTTAL TESTIMONY OF O. DeVERE WOOTON,
WHEN MR. WOOTON WAS RECALLED TO TES-
TIFY AS TO CONVERSATIONS HAD WITH THE
DECEASED, WILLIAM D. BAXTER, AFTER THE
ALLEGED WILL WAS EXECUTED. (Tr. 170-179)

We are mindful that it is the settled law that an attorney who prepares a will may testify as to conversations had with the testator concerning facts connected with the execution of a will. It is so held by this court in the case of *In Re Young Estate*, 33 Utah 384, 94 Pac. 731. However, in the main, the testimony given in rebuttal by Attorney Wooton is directed to conversations had with Mr. Baxter after the alleged will was executed and is directed to statements made by Mr. Baxter as to his reasons for not wanting his grandchildren, especially his granddaughters, to receive any of his property. If a testator desires to change his will, he may do so by either making a new will or by executing a codicil. It may not be done by conversations had with his attorney. Moreover, if the testimony given in rebuttal was to show that the deceased intended to exclude his grandchildren from participating in his estate as provided in UCA 1953, 74-1-32, such testimony was not properly admissible in this proceeding. But if admissible at all, it would be upon the final distribution of the property mentioned in the will, *In Re Frandsen's Will*, 50 Utah 156, 166; 167 Pac. 362.

WHEREFORE, the appellants pray judgment that the decree appealed from be reversed; that the alleged will of William D. Baxter be declared invalid and if that

may not be done that the court below be directed to grant
a new trial to correct the errors claimed by appellants.

Respectfully submitted,

HEBER GRANT IVINS
75 North Center Street
American Fork, Utah

CLARENCE M. BECK

and

ELIAS HANSEN
Felt Building
Salt Lake City, Utah

*Attorneys for Protestants and
Appellants to Admission of
Will to Probate*