

1964

In the Matter of the Estate of William D. Baxter : Petitioner's and Brief of Respondent

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,
Deceased.

} Case
No. 10216

Petitioner's and Respondent's Brief

Appeal From a Judgment Admitting Will to a Probate
of the Fourth District Court of Utah County, Utah.

HONORABLE MAURICE HARDING, *Judge*

O. DEVERE WOOTTON
Suite 12, Geneva Building
American Fork, Utah

DEAN E. CONDER
NIELSEN, CONDER AND HANSEN
510 Newhouse Building
Salt Lake City, Utah

Attorneys for Respondents

HEBER GRANT IVINS
75 North Center Street
American Fork, Utah

CLARENCE M. BECK and ELIAS HANSEN
Felt Building
Salt Lake City, Utah

Attorneys for Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ES-
TATE OF WILLIAM D. BAXTER,
Deceased.

} Case
No. 10216

Petitioner's and Respondent's Brief

STATEMENT OF THE CASE

This case involves the question of whether or not the Testator, William D. Baxter, had mental capacity to make a Will at the time of its execution.

DISPOSITION IN LOWER COURT

The Trial Court found that William D. Baxter was competent and admitted the Will to probate.

RELIEF SOUGHT ON APPEAL

The Appellants seek a reversal of the Trial Court's Judgment and the Respondent herein seeks the affirmation of the Trial Court's Judgment.

STATEMENT OF FACTS

In general, the Respondent agrees with the facts as outlined in the Appellant's Brief but since certain facts should be clarified more fully from the Respondent's standpoint an additional statement will be made by the Respondent herein.

William D. Baxter and Flora Baxter, his wife, had resided in American Fork, Utah, for a number of years. During the time of their residency in American Fork, they had accumulated a reasonable estate. Flora Baxter, the first wife of William D. Baxter, died on May 30, 1957.

After the death of Flora Baxter, William D. Baxter corresponded with Ruth Burn, a widow who lived in England, and after some correspondence, he proposed to her and invited her to come over to the United States to marry him. She came to the United States and married William D. Baxter on April 15, 1958. (Tr. 31)

William D. Baxter and Flora Baxter had two sons as the issue of their marriage, Gilbert John Baxter and William F. Baxter, who died in the spring of 1960. William F. Baxter, the son, left surviving him three children who are the grandchildren and the Protestants to the admission of the Will in this particular case. The surviving son, Gilbert J. Baxter, and the second wife, the surviving widow, Ruth Baxter, are seeking to sustain the admission of the Will. (R 13)

"Bill" Baxter was a man in his eighties in 1960 and prior to 1959 had enjoyed reasonably good health for a man of his age as testified to by his personal physician. (Tr. 8) In 1959, he was hospitalized with what his doctor termed an irregularity of the heart which subsequently threw an "embolus" and which caused a weakness of the right side of his body. The doctor testified, "This was not the paralysis, this was a weakness." (Tr. 8)

During his lifetime, William D. Baxter had accumulated some income-producing properties and he had conveyed some of these properties to his granddaughters but reserved the right to have the income from the rental of these properties, by a verbal agreement, during his lifetime. (Tr. 40-41) Subsequently and after his illness, the granddaughters insisted and took over the income from these properties. (Tr. 85) Thereafter, William D. Baxter made a Will which is the subject matter of this lawsuit, which Will is dated the 26th day of April, 1960, in which he devised certain parcels of property to William F. Baxter (who was still alive at that time) and Gilbert Baxter and the remainder of his property to his wife, Ruth Baxter. This Will was witnessed by Guy A. Richards, his attending physician, Donald S. Ryder, his clergyman, and O. DeVere Wootton, his attorney. (R. 9) Before the signatures of the attesting witnesses appears the following:

"This instrument was on the day and date hereof signed, published and declared by the said testator, William D. Baxter, to be his Last Will

and Testament in the presence of us who at his request have subscribed our names hereto as 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.”

William D. Baxter, on the 29th day of June, 1963, died in American Fork, Utah, and the Petition for his Admission of the Will to Probate was filed with the Clerk of the Court on August 28, 1963. (R. 3)

On October 2, 1963, Lois Thomas, one of the granddaughters, filed a Protest to the Petition to the Admission of the Will to Probate. In the Protest filed by the granddaughter, she alleges that on or about the 26th day of April, 1960, that William D. Baxter was incompetent to execute the Will and that “at all times hereafter was not of sound mind but was of unsound mind, incompetent and incapable because of unsoundness of mind and incompetency; that said unsoundness of mind and incompetency are so by reason of an excessive brain hemorrhage or stroke sustained by the said William D. Baxter on or about the 17th of June, 1959, from which he never recovered and the effect of which was to render him of unsound mind and lack of capacity to execute a Last Will and Testament from that date until his death.” (R. 10)

Gilbert Baxter and Ruth Baxter both answered the Protest of Lois Thomas and a Notice of Trial was

filed on the 13th day of November, 1963, setting the matter down for a trial without jury for March 11, 1964, at 10:00 o'clock a.m. On March 27, 1964, the matter was rescheduled for trial for April 30, 1964. (R. 24) On the 21st day of April, 1964, new objections to the Admission of the Will were filed by the grandchildren. The new objections to the Admission of the Will to Probate outlined as the grounds for the objections: (1) That the Will was not witnessed at the end thereof; (2) that the witnesses were limited to signing their names and could not use the additional language showing the testamentary capacity; and (3) "That on the 26th day of April, 1960, the time of the execution of the alleged Will of William D. Baxter, he was not competent to make a Last Will and Testament because of the unsoundness of his mind and lack of capacity to understand the effect of his signing the alleged will." (R. 23) In the Objections to the Admission of the Will, it is further alleged in Paragraph 5 that William D. Baxter had suffered a severe heart attack and a brain hemorrhage which "rendered him of unsound mind and memory." In Paragraph 6, it is alleged that "because of the unsoundness of his mind and lack of capacity to understand the effect of his signing the alleged Will" that he was not competent to make the Last Will and Testament. Paragraph 7 alleges that Ruth Baxter was married to William D. Baxter in April of 1958. Paragraph 8 alleges that Mr. Baxter had a sum in excess of One Hundred Thousand Dollars (\$100,000.00) deposited in various bank accounts. Paragraph 9 alleges that Mrs. Baxter, shortly after their marriage, "... began an at-

tempt to secure all of the money in which William D. Baxter had any interest . . . that the said Ruth Baxter, by menace and undue influence, secured the transfer to her of all of the money and certain other property in which the said William D. Baxter had any interest." Paragraph 10 alleges that because of the property being wrongfully transferred to Ruth Baxter the estate had the right to recover the money, and then they pray that the Will be declared invalid. (R. 21-24)

The case was then set for trial on April 30, 1964, before the Honorable Maurice Harding, at which trial witnesses and evidence were produced and the Court found the issues in favor of the Petitioner and admitted the Will to Probate.

During the course of the trial, the Respondents (Petitioners in the Trial Court) called as one of their witnesses Dr. Guy A. Richards, a physician and surgeon and also Superintendent of the Utah State Training School, who resided in American Fork. (Tr. 5) Dr. Richards testified that he had had special training in the field of retarded children and mental disturbances and was well qualified in this area. (Tr. 6) That he was one of the witnesses to the Will of William D. Baxter and it was his opinion that William D. Baxter was of sound and disposing mind at the time he executed the Will. (Tr. 7) Dr. Richards said that he had seen William D. Baxter on an average of about once a month from 1955 until the time of his death. (Tr. 7) Dr. Richards referred to the heart disturbance that Mr. Baxter had had in 1959 and that he, Dr. Richards, had attended to Mr. Baxter during that

time. He was asked whether or not this had any effect on the mental capacity of Mr. Baxter, and the Doctor testified, "I think not." (Tr. 9)

Mr. O. DeVere Wootton was called as a witness. He was the attorney who prepared the Will and represented Mr. Baxter during his lifetime. He was well acquainted with Mr. Baxter during his lifetime. Don Ryder, the other witness to the Will, was Mr. Baxter's clergyman. Mr. Wootton testified that the Will was executed in the regular fashion as required by statute, (Tr. 18) and that he also observed the condition of Mr. Baxter at the time of the execution of the Will and said in his opinion, Mr. Baxter was alert and said that he was in excellent mental condition at the time of the execution of the Will. (Tr. 19-20)

Edith Grace Hamaker, one of the Protestants to the Will, was called as a witness by the Appellants herein, and she testified regarding three particular incidences of her grandfather. One of which was that she called him to tell him that he had the new granddaughter and that her grandfather, on the telephone, didn't seem very excited about it and just more or less grunted. She testified that following his illness Mr. Baxter, ". . . well, after his illness, he just didn't seem like the same man, and he said some things that didn't make sense." (Tr. 36) Nevertheless, following his illness, she had dealt with the grandfather regarding the rents on some properties and proceeded to take over the rental units that had been owned by the grandfather. (Tr. 41-42)

On cross-examination, she was asked, "Well, don't you base a lot of your opinion upon the fact that you say he stooped when he walked, and he held his head in his hands, and that sort of thing?"

Answer: "Yes."

Question: "And this is what causes you to really think he was not competent, isn't it?"

Answer: "Besides the things he said that didn't make sense."

Question: "Now these things that he said that didn't make sense was with reference to when you told him about your grandchild on the same day that the Will was executed?"

Answer: "Yes."

Question: "And the only thing that happened there was that you only got a grunt from him over the phone, is that correct?"

Answer: "Yes. It was an awful weak voice, too."
(Tr. 44)

Mr. George Hackford was called as a witness for the Protestants in the Trial Court and was asked his opinion about Mr. Baxter and he said, "In my opinion 'Bill' wasn't as sharp as he was previously." (Referring to his condition following his illness in 1959.) (Tr. 54) And except for the fact that he thought Mr. Baxter did not recognize him as to who he was on one occasion, he had nothing further to indicate anything about Mr. Baxter's condition.

The next witness called by the Protestants was Mr. Wayne Hamaker who is the husband of Edith Grace Hamaker, one of the Protestants. He testified that on

one occasion he did not think that Mr. Baxter recognized who he was (R 63), that Mr. Baxter certainly wasn't himself after his illness (Tr. 64), and that his main opinion about whether or not Mr. Baxter had all of his mental faculties was the fact that his mind would wander back to the Eureka area, which was the area of his childhood. (Tr. 71)

On cross-examination, in response to the question of mental competency, he said, "I feel that any time a man's mind wanders to a point of going back to his childhood he certainly isn't competent to make a declaration as important as a Will."

"Question: "And that was what you based your conclusion upon when you say he was incompetent?"

Answer: "That's right." (Tr. 72-73)

Lois Marie Baxter Thomas, one of the granddaughters and Protestants to the Will, was also called as a witness by the Protestants, and the only thing she could say about her grandfather is that following his illness "he just didn't act like he used to before." (Tr. 77)

Other witnesses were called by the Protestants who testified, in substance, to the same things. Mr. O. DeVere Wootton was recalled as a rebuttal witness to testify about Mr. Baxter's condition and his ability to recall his property and to remember the persons who were the natural objects of his bounty.

ARGUMENT

POINT I.

THE TRIAL COURT MADE NO ERROR IN ADMITTING THE WILL TO PROBATE SINCE THE WILL WAS WITNESSED IN THE MANNER AS PROVIDED BY LAW.

The Protestants, Appellants herein, have objected to the Admission of the Will on the grounds that it was not properly witnessed since the witnessing had the language preceding the signatures of the witnesses to the effect that at the time of the execution of the Will the Testator was of sound and disposing mind. Protestants argue, therefore, that this is taking from the Court the prerogative of its determination of whether or not the Testator had legal capacity to execute the Will and that it is not at the end of the Will as required by law. Certainly, there is nothing wrong with the witnesses proclaiming the fact in the attestation to the Will that they are satisfied of the mental competency of the Testator.

Page on Wills, Lifetime Edition., Vol. 1, Sec. 351, in discussing the formalities of execution states as follows:

“According to the great weight of authority, the subscribing witnesses are required to attest the capacity of the testator to make a will. This includes capacity as to age, sanity, and freedom from undue influence. This point is often misunderstood by the witnesses who think that they are attesting only the legal formalities of the execution. Such witnesses may, however, assume the sanity of a testator if they know no facts which would tend to show that he was insane.”

This Court, in the case of *In re Swan's Estate*, 51 Utah 410, 170 Pac. 452, at page 456, had the following to say regarding the duty of the subscribing witnesses:

“In considering the evidence and its sufficiency it must not be overlooked that the functions and duties of subscribing witnesses to a will in this state, and perhaps in most of the states, are not alone to witness the signature of the testator and formal execution of the will, *but they must, at the same time, pass upon the question of his sanity and testamentary capacity.*” (Emphasis added)

This same rule of law was followed in the Kansas case of *Fuller v. Williams*, 125 Kan. 154, 264 Pac. 77, in which case the Court stated as follows:

“But witnessing a will is a matter of great importance and solemnity. *Rice v. Monroe*, 108 Kan. 526, 527, 196 P. 756. One who attests and subscribes a will as a witness should do so with the understanding that he is competent to testify on the probate of the will that the testator had mental capacity to make a will and was not under restraint or undue influence. *Lawrie v. Lawrie*, 39 Kan. 480, 18 P. 499; *Hospital Co. v. Hale*, 69 Kan. 616, 619, 77 P. 537; *McConnell v. Keir*, 76 Kan. 527, 531, 92 P. 540. The attesting witnesses to a will must not only witness the signing or publishing of it by the testator, but it is also their duty to satisfy themselves that the testator is of sound and disposing mind and memory and capable of executing a will. *Smith et al. v. Young et al.*, 134 Miss. 738, 99 So. 370, 35 A. L. R., 69; *In re Swan's Estates*, 51 Utah 410, 170 P. 452. ‘A witness to a will must * * * satisfy himself * * * of his (the testator's testamentary capacity.’ 40 Cyc. 1110; *Dunkeson v. Williams* (Mo. Sup.) 242 S. W. 653;

Shouler on Wills (6th Ed.) Sec. 229, 524; Page on Wills (2d Ed.) Sec. 332. And see cases collected in annotation 35 A. L. R. 79. This duty necessarily requires that the attesting witnesses to a will should know and understand that the instrument they are signing as witnesses is a will, and they should do so prepared to testify to the testamentary capacity of the testator and that he is free from restraint and undue influence."

"Even 'the attestation of a signature to a will, or other document, is a direct assertion by the witness that the maker is competent to understand and execute it.' Snyder's Estate, 279 Pa. 63, 123 A. 663." (In re Keen's Estate, 299 Pa. 430, 149 A. 737.)

Although the Appellants argue in this case that the addition of the language where the witnesses state that the Testator was of sound and disposing mind invalidates the Will, a case in Washington (*In re Chafey's Estate*, 167 Wash. 185, 8 P. 2d 959) is a case in which the witness to the will did nothing but sign their names and put their address after their name without any further or additional statement, and the Court of Washington held that this will was void and of no effect because "It was the duty of the attesting witnesses, under the statute, to observe and see that the will was executed by the Testator, and that he had capacity to execute the will." And then the Court went on to say:

"It will be noted that, while the instrument offered for probate contains the signatures of the decedent and two other persons, there is no semblance of an attestation clause as the statute requires. Nowhere in the instrument is the word 'attest' or the word 'witness' or any word of any

similar import. The writing does not contain any form of attestation clause which would constitute *prima facie* evidence that the instrument was signed by Fisher and Brooks as witnesses in the presence of the testator by his direction or request. If there were an attestation clause in conformity to the statute, and the will bore the genuine signature of the testator (the signature is conceded to be that of Mr. Chafey), that would be *prima facie* evidence of the due execution of the will. The fact that the subscribing witnesses were dead, insane, or were beyond the jurisdiction of the court would not defeat the validity of the will, if in fact it was duly executed. In such case the court may admit proof of the handwriting of such witness, and admit the instrument to probate as though it had been proved by such subscribing witness in his or her proper person."

Obviously, therefore, the attesting witnesses to the Will have a greater function than simply putting their signatures upon the page. The Appellants, in their argument, would have you believe that all the witness had to do was simply sign his name upon the sheet and, as the Washington Court has indicated, this would invalidate the Will. The witness has a function of attesting to the Will which means more than simply placing his signature upon the sheet, and to include in the attestation clause the language that the witnesses were satisfied that the Testator was of sound and disposing mind only carried out the function which the witnesses are obligated to bear when they sign as attesting witness to a Will.

A serious question is raised as to the admissibility of testimony of subscribing witnesses who attempt to

testify that the Testator was incompetent. This matter is discussed in 57 *Am. Jur. "Wills,"* Sec. 145, at page 133, as follows:

"It is generally held that when an attesting witness attempts to impeach a will by testifying that the testator did not have testamentary capacity, his evidence will be received with suspicion and the utmost caution, *especially where the attestation clause declares the competency of the testator.* Such testimony is deemed to reflect on the credibility of the witness. The theory is that the fact that a person voluntarily identifies himself with the execution of a will and a witness is an indication that, in his opinion, the person executing the instrument is competent so to do. According to some authority, no weight should be given to the testimony of an attesting witness that denies the mental competency of the testator. But the suspicion which attaches to the testimony of a subscribing witness impeaching the will on the ground of mental incompetency of the testator is removed by evidence that the witness was called upon to act suddenly and did not have time to deliberate, or that he acted for the purpose of pacifying and indulging an incompetent testator. In any event, the weight to be given the opinion of a subscribing witness that the testator was unsound mentally depends upon the intelligence of the witness and the opportunity accorded him for observation." (Emphasis added)

The Appellants make an argument in their Brief that the witnesses did not sign at the end of the Will as provided by law and that the Testator didn't sign at the end of the Will as provided by law since this additional information was put in the attestation clause.

Page on Wills, Lifetime Edition, Vol. 1, Sec. 290, makes reference to the place of the signature in reference to the attestation clause and says as follows:

“Questions as to signing at the end are presented where testator signs above the testimonium clause, or below the attestation clause, or in blanks in one of these clauses. *In most jurisdictions the attestation clause is not regarded as a part of the will*, but rather as a certificate to the will; and, accordingly, the signature of the testator may either precede or follow such clause and yet be at the end of the will. In the ordinary form of a will, testator's signature precedes the attestation clause. A signature of this sort is a signature at the end of the will.” (Emphasis added)

The matter of the place of the signatures of the witnesses is discussed in 57 *Am. Jur.* “*Wills*,” Sec. 348, p. 257, as follows:

“The better opinion is that the signature of the witnesses are properly placed, within the meaning of a statute which states that the witnesses shall sign at the end, if they are practically and substantially at the end of the instrument. If the signatures of witnesses are placed in such a position with relation to the concluding words of the will as to warrant a reasonable inference that they were placed where they appeared solely for the purpose of attesting the execution of the will, they comply with the statutory requirement that they shall be at the end of the will. Moreover, as hereinbefore appears in the discussion regarding the place for the testator's signature, some courts hold that the ‘end of the will,’ within the meaning of a statute which prescribes signing at the end, is the logical, rather than the physical or spatial, end of the will.

“Clearly, an attestation clause intervening between the testator’s signature and the signatures of the witnesses does not invalidate the latter. Moreover, there is a signing by the witnesses at the end of the will, although the attestation clause is carried entirely across the face of the instrument, and separates the testator’s signature from the signatures of the witnesses. (Emphasis added)

See also Annotation. “Wills: Place of signature of attesting witnesses,” 10 *A. L. R.* 429.

The very cases cited by the Appellants regarding where the signature of the witnesses attesting to the Will should be support the proposition that the Will in this particular case is properly executed. Admittedly the statute of the State of Utah requires that the witnesses must sign his name as a witness at the “end of the will.” Appellants argue that because of the attestation clause being included in this Will that the Will has not been properly executed by the witnesses at the end of the Will.

The case of *In re Moro’s Estate*, 183 Cal. 29, 190 Pac. 168, is a case in which the attestation clause was on a separate sheet from the sheet on which the Testator had signed at the end of the sheet as his Will and then the attestation clause was on a separate sheet with the signatures of the witnesses on a separate sheet, both of which sheets were stapled together. The California Court held that the Will was properly executed at the end thereof by the Testator and that it was properly executed by the witnesses at the end of the attestation clause and the same was at the end of the Will. This case was cited and followed in an Oklahoma case, *In re Dunlap’s*

Will, 87 Okl. 95, 209 Pac. 651, in which the same question was raised as to whether or not there had been compliance with the statute where the witnesses had signed after the attestation clause and on a separate sheet of paper, and the Oklahoma Court stated as follows:

“We conclude that the mere fact that the attestation clause and signature of the witnesses are on a sheet or page following that on which the testator affixed his signature is immaterial. This conclusion is supported by *In re Moro's Estate*, 183 Cal. 29, 190 Pac. 168, 10 A. L. R. 422, wherein the court, in construing section 1276, Civil Code of California, which is identical with section 8348, Rev. Laws 1910, held:

“ ‘The fact that the attestation clause was on a separate sheet from the concluding provisions of the will and the signature of testator, though there was a sufficient blank space on that sheet, does not invalidate the will, where the sheets were fastened together in proper order so that the attestation clause was upon the sheet immediately following that containing the end of the will.’ ”

POINT II.

THE TRIAL COURT DID NOT COMMIT ERROR IN HOLDING THAT NO ISSUE WAS RAISED BY THE PLEADINGS AS TO UNDUE INFLUENCE IN THE EXECUTION OF THE WILL.

At the outset, it should be noted that Point II raised by the Appellant only raises the issue of whether or not there was undue influence in securing the transfer to Mrs. Baxter of certain assets by Mr. Baxter during his lifetime. During the course of the trial, the Protestants

attempted to introduce some evidence to the effect that there may have been a question about whether or not Mrs. Baxter exercised undue influence upon Mr. Baxter in getting him to execute the Will. This evidence was rejected by the Court.

As set out in the Statement of Facts in this Brief, the objections to the introduction of the Will were all predicated upon the grounds that Mr. Baxter did not have mental capacity in which to make the Will at the time of the execution of the Will. The procedure for contesting a Will is set out in the Utah Code in U. C. A. 75-3-7, and provides as follows:

“If any one appears to contest the will, he *must file written grounds of opposition to the probate thereof*, and serve a copy on the petitioner and on the proposed executor, if he is not the petitioner, and shall mail notices of such contest to the heirs. Any one or more of such persons may demur thereto upon any of the grounds of demurrer provided in the Code of Civil Procedure. If the demurrer is sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may, within such time as the court may allow, jointly or separately answer the contestant’s grounds, traversing or otherwise obviating or avoiding the objections.”
(Emphasis added)

At no place in the objections to the introduction of the Will do the Protestants claim that Ruth Baxter exercised undue influence on William Baxter in the execution of the Will. Admittedly, the *Utah Rules of Civil Pro-*

cedure provide for liberality of pleading; however, even in the *Utah Rules of Civil Procedure* certain matters must be pleaded with particularity. (See Rule 8 B and C and also Rule 9) However, this matter is set forth specifically in the Probate Code as to the procedure in filing a contest of the introduction of a Will. The matter of a contest on the probate of a Will is in the nature of a special proceeding and the forms of pleading, to the extent that they are specifically provided by statute, should be followed. (See *Bancroft's Probate Practice*, 2d Ed., Vol. 1, Sec. 182, p. 444.)

Undue influence must be pleaded specifically, and it is not sufficient to make a general allegation. *Bancroft's Probate Practice*, 2d Ed., Vol. 1, Sec. 187, 8456, in reference to the matter of alleging undue influence, states as follows:

“Where the ground of contest is undue influence it is not sufficient for the pleader merely to allege the legal conclusion of undue influence, but facts must be pleaded from which the court may determine as a matter of law whether the facts so pleaded constitute the claimed undue influence.”

Page on Wills, Lifetime Edition, Vol. 2, Sec. 631, stated as follows:

“Fraud, mistake, and undue influence cannot be alleged in general terms; but the facts which amount to such fraud, mistake, or undue influence must be set forth specifically.”

The Utah Rules of Civil Procedure, Rule 81 B, specifically provides :

“These rules shall not apply to proceedings in uncontested probate and guardianship matters, *but shall apply to all proceedings subsequent to the joinder of issue therein*, including the enforcement of any judgment or order entered.” (Emphasis added)

POINT III

THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF O. DEVERE WOOTTON, THE ATTORNEY FOR MR. BAXTER, AS TO CONVERSATIONS HE HAD WITH WILLIAM BAXTER AFTER THE ALLEGED WILL WAS EXECUTED.

During the course of the trial, the proponents of the Will put on the witnesses to testify as to the prima facie case required to admit the Will to probate. Following this the Protestants then called their witnesses in attempting to show that the Testator lacked testamentary capacity to execute the Will. They tried to show this by saying that Mr. Baxter, in his illness in 1959, sustained a brain injury which prevented him from having testamentary capacity thereafter. It therefore became quite material to the lawsuit as to the condition of Mr. Baxter following his illness in 1959 and particularly at the execution of the Will in 1960. Some of the witnesses testified that his condition following his illness in 1959 remained the same up until the time of his death. Mr. Wootton, the attorney, was called to rebut the statements

made by these witnesses and to show that Mr. Baxter was aware of his property, knew who the beneficiaries of his estate were to be, and was clear of mind as to the disposition he was making of his property in connection with this Will. (*In re Swan's Estate*, 4 Utah 2d 277, 293 Pac. 2d 683.) This conversation with Mr. Wootton took place on June 1, 1960, a little more than one month after the execution of the Will and shortly after the death of his son in May of 1960. This conversation related to the way that Mr. Baxter was aware of the assets he had, the beneficiaries of his estate, and could recall to mind the property and the disposition he was making of his property.

The only question raised by the Protestants (Appellants) in their Brief is whether or not Mr. Wootton can testify regarding conversations following the execution of the Will. The question of whether or not an attorney may testify regarding the execution of the Will has been laid to rest by many cases, and the Utah Court has definitely followed the procedure that there is no privilege in communications regarding the execution of the Will. (See *In re Young's Estate*, 33 Utah 382, 94 Pac. 731) We submit, however, this privilege of communication is a privilege solely to the Testator and the Testator, having passed on, the privilege is no longer available and especially is this true in Will contest cases. The privilege in Will contest cases did not apply at Common Law, and our statute is no broader than the Common Law; therefore, insofar as a Will contest case is concerned, the matter of privilege does not exist. This Court held in *In re Young*, supra, as follows:

“The privilege was not extended to will contests at common law, and, as our statute is no broader than the common law upon the subject, we have no right, even if we were inclined to do so, to extend the privilege to will contests.”

This discussion with the Testator and his attorney took place, as indicated, approximately a month and a half after the execution of the Will, and he came into the attorney's office to discuss with him his Will that he had made. (Tr. 178-179) Furthermore, at this time he brought with him Mrs. Baxter who was present during the conversation, and whether she stayed in the room all during the conversation or not is not recalled by the attorney. (Tr. 178) We recognize the rule that the attorney in a Will contest case would not be at liberty to disclose confidential information given him by the client that is unrelated entirely to the Will, but we submit in this particular case that the client came in to discuss his Will further and to discuss his property and consider what action should be taken regarding the Will, even though it was after the preparation of the Will, and that this conversation is all tied into the matter of the Will and in a Will contest should not be considered as privileged communications. Furthermore, since Mrs. Baxter was present during this discussion or at least part of it, the matter is not privileged. We refer to the case of *Anderson v. Thomas*, 108 Utah 252, 159 Pac. 2d 1942, which follows the authority of the case cited above, *In re Young's Estate*, and recognizes that in a Will contest case there is no privilege. However, in that case, it was a matter of a contest whether or not undue influence had been exercised in the execu-

tion of a Deed and the Court determined that there was no privilege because the related communications were given in the presence of third parties and, further, they related to the execution of the Deed to which the attorney was a witness, and furthermore that the communications were in the course of employment which the client did not desire to have them particularly confidential communications.

Furthermore, in this case the attorney for the Protestants cross-examined the witness at length regarding these transactions and statements about the Testator and his affairs with his granddaughters. He, therefore, waived any objection. (Tr. 188-192)

Certainly the Protestants have no more right to claim the privilege than does the Petitioner-Respondent herein have the right to waive the privilege. In the matter herein, all of the parties are claiming under the same person, and that person is deceased. The matter of privilege should be only a conditional privilege as referred to by Professor Wigmore in 8 *Wigmore on Evidence*, Sec. 2314, wherein he says it should be only a "temporary confidentiality" not intended to require secrecy after the death of the Testator.

In this case, any attempt by part of the heirs to exclude testimony bearing on the Testator's condition would only be for the purpose of benefiting their interest and denying the full truth to be heard by the Court. Other courts have recognized that when the dispute is between the parties claiming under the Testator the

privilege should not apply since this prevents the Court from possibly getting the full truth.

See *Olsson v. Pierson*, 237 Iowa 1342, 25 N.W. 2d 357; *Winters v. Winters*, 102 Iowa 53, 71 N.W. 184; see also 97 C. J. S., "Witnesses," Sec. 288.

The Iowa Court, in the case of *Winters v. Winters*, supra, stated the law as follows:

"At common law confidential communications to a physician were not privileged, and they are only so made by statute. Those to an attorney, however, were privileged, and it was held that the attorney might not divulge without the consent of the client while living, but that, after his death, in a contest between a stranger and an heir, devisee, or personal representative, the latter might waive the privilege and examine the attorney concerning the confidential communications, though the stranger was not permitted to do so; and, *in a controversy between heirs at law, devisees, and personal representatives, the claim that the communication was privileged could not be urged, because, in such a case, the proceedings were not adverse to the estate, and the interest of the deceased as well as of the estate was that the truth be ascertained.* Hageman, Privil. Com. Sec. 84; *Russell v. Jackson*, 9 Hare, 387; *In re Layman's Will*, 40 Minn. 371, 42 N.W. 288, *Scott v. Harris*, 113 Ill. 451; *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N.E. 726; *Blackburn v. Crawfords*, 3 Wall. 175." (Emphasis added)

CONCLUSION

We respectfully submit that in this case the evidence fully bears out the Trial Court's position, and since this is a case at law, this Court should affirm the decision of the Trial Court.

Respectfully submitted,

O. DEVERE WOOTTON

Suite 12, Geneva Building
American Fork, Utah

DEAN E. CONDER

NIELSEN, CONDER AND HANSEN

510 Newhouse Building
Salt Lake City, Utah

Attorneys for Respondents