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

Utah Supreme Court

Heber Grant Ivins; Elias Hansen; Attorneys for Protestants and Appellants;
Dean E. Conder; O. Devere Wooton; Attorneys for Proponents and Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of
WILLIAM D. BAXTER,
Deceased.

Case No.
10216

PROTESTANTS' AND APPELLANTS' REPLY BRIEF

APPEALED FROM A JUDGMENT ADMITTING WILL TO PROBATE BY THE FOURTH DISTRICT COURT OF UTAH COUNTY, UTAH

Honorable Maurice Harding, Judge

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

Dean E. Conder
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

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ISSUES RAISED IN TRIAL COURT

In their brief, respondents direct the attention of the court to some of the testimony given at the trial, but omit from such statement most of the testimony offered on behalf of the Protestants. We refer especially to the testimony of the Barretts and the deeds which were executed by Baxter and his wife to themselves as joint tenants. However, on this appeal appellants have not attacked the sufficiency of the testimony to support the finding of the trial court as to the competency of the

deceased to make a will but we do attack the judgment admitting the will to probate because it was not executed in the manner provided by law, and the trial court's ruling that the only issue raised by the pleadings was the question of the competency of Mr. Baxter to make a will and the admission of the testimony of Mr. Wooton concerning conversations had with Mr. Baxter after the alleged will was signed by Mr. Baxter.

POINT I

THE CASES AND AUTHORITIES CITED BY RESPONDENTS DO NOT SUPPORT OR TEND TO SUPPORT THEIR CLAIM THAT THE ALLEGED WILL WAS LAWFULLY EXECUTED.

A number of cases and authorities are cited in respondents' brief which hold that it is the duty of attesting witnesses to a will to ascertain and pass upon the matter of the sanity and testamentary capacity of the testator to make a will. We do not and have not questioned that such is the established law. An attesting witness to a will executed in Utah is chargeable with knowledge of the laws of Utah which requires that if he is alive, sane and a resident of the county where the will is offered for probate he will be called upon to testify as to the circumstances under which the alleged will was executed and as to the matter of the competency of the testator to make a will. However, that does not

mean that he may lawfully use, above his signature, the language here brought in question.

On page 10 of respondents' brief there is quoted from Page On Wills, Lifetime Edition, Vol. 1, Sec. 301, this language:

> "According to the weight of authority, the subscribing witnesses are required to attest to the capacity of the testator to make a will. This includes the capacity as to age, sanity and freedom from undue influence." etc.

A number of cases are cited in support of the text. None of those cases hold that the attestation there referred to shall or may be made a part of the attestation to a will as was done in the alleged will of Baxter. On the contrary, the cited cases hold that the testating witness should make such investigation so that they may be able to testify concerning such matters if and when called upon to testify when the alleged will is offered for probate. If the court should take the time to read the cases there cited, it will find that they support the law quoted on pages 10 and 11 of appellants' original brief from 94 CJS, pages 965 to 967.

On page 12 of respondents' brief, two cases are cited which hold that it is the duty of the attesting witnesses to ascertain if the testator is competent to execute a will. There is also cited the case of In re Chafey's Estate, 167 Wash. 185, 8 Pac. 2d 959 which contains this dicta:

> "If there were an attestation clause in conformity with statute and the will bore the genuine signature on the testator that would be prima facie evidence of the due execution of the will."

That case does not aid the respondent because the alleged will of Baxter was not executed in conformity with statute.

On pages 11 and 12 of respondents' brief a number of cases and other authorities are cited which do in effect say that attesting witnesses have a duty to satisfy themselves that the testator is of sound and disposing mind and memory and capable of executing a will. None of those cases hold that the witnesses to a will may add to and above their signatures to the authorized attestation the language here brought in question. What we have heretofore said touching the cases cited in support of the language quoted from Page on Wills, Lifetime Edition, Vol. 1, Sec. 351 is applicable to the law announced in the cases cited and discussed on pages 11 and 12 of respondents' brief.

On page 12 of respondents' brief, the cases of Snyder's Estate, In re Keen's Estate and In re Chafey's Estate there is dicta to the effect that the attestation of a witness to a will is prima facie evidence that the maker is competent to understand and execute it. The law announced in the dicta of those cases is in harmony with the uniform holding of the courts and authorities generally that to be valid a will must be executed in the manner provided by law. It is the established law in this

jurisdiction that before a witness may be heard to express his opinion that "at the time of the execution of this instrument (Baxter's alleged will) 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 under any menace or undue influence" he must be sworn as required by UCA 1943-104-49-27 to 30. (These provisions not changed by Utah Rules of Civil Procedure, See Rule 43(a). Moreover the attesting witnesses were not content to express their opinions, but contrary to law, stated that the alleged testator in fact executed a valid will. The fact that the attesting witnesses repeated their testimony as to the competency and freedom from duress of Mr. Baxter at the time of the hearing had on the petition of the will for probate does not cure the infirmities in the execution of the will. To approve a will containing the language here brought in question would require the court to admit in support thereof evidence which is not sworn to and which is incompetent because of an attempt of the witnesses to decide the competency of the testator, which is the very essence of the functions of the tribunal which must decide that matter.

POINT II

THE SUFFICIENCY OF PROTESTANTS' ANSWER TO RAISE THE ISSUE OF UNDUE INFLUENCE MUST BE DETERMINED BY THE UTAH RULES OF

CIVIL PROCEDURE AND NOT OTHERWISE.

On pages 19 to 20 of respondents' brief there is cited the law as announced by Bancroft on Probate Procedure and on Page on Wills such laws have been superseded by the Utah Rules on Civil Procedure, Rule 81(b) of the Utah Rules of Civil Procedure is also cited where it is said, "These rules shall not apply to proceedings in uncontested probate and guardian matters, but shall apply to all proceedings subsequent to the joinder of issues therein." The quoted provisions would seem to shed no light on the matter of whether or not the answer joins any issue other than that of the incompetency of Baxter.

POINT III

THE FACT THAT MRS. BAXTER WAS PRESENT WHEN THE CONVERSATION WAS HAD WITH ATTORNEY WOOTON AFTER THE ALLEGED WILL WAS EXECUTED DID NOT RESULT IN MAKING INEFFECTIVE THE PROVISIONS OF UCA 1953-24-8(2).

It is contended under Point 3, pages 20 to 24 of respondents' brief that 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. In this case the interests of the

estate were clearly adverse to the interests of Mrs. Baxter. The estate of Mr. Baxter after the marriage with Mrs. Baxter was reduced from in excess of $100,000.00 to about $3,500.00 owing on a contract. It is alleged by protestants in their answer that Mrs. Baxter acquired all of the property of Mr. Baxter, except the amount owing on the contract by the improper conduct of Mrs. Baxter. There is considerable evidence in support of the claim of the contestants.

The appellant protestants submit that none of the cases or authorities support respondents' claim that the alleged will was executed in the manner provided by law and that the court erred in limiting the issues to the question of the competency of Mr. Baxter and in admitting the rebuttal testimony of Attorney Wooton. They pray that the court below be directed to dismiss the petition for probate of the alleged will of William D. Baxter, deceased, and that if that may not be done, the order be made directing the court below to grant a new trial.

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 Appellants