1966

In The Matter of the Estate of Mary E. Ratliff v. Earl Mclain et al. and First Security Bank of Utah, N.A. : Brief of Appellant

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

IN THE MATTER OF THE ESTATE OF MARY E. RATLIFF,
Deceased

EARL McLAIN et al. and FIRST SECURITY BANK OF UTAH, N.A.,
Plaintiffs and Respondents

vs.

MAYBELLE R. CONRAD,
Defendant and Appellant.

Case No. 10604

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This was a probate proceeding instituted on the petition of Earl McLain and certain other legatees named in the purported last will and testament of Mary E. Ratliff, Deceased. The appellant objected to the admission to probate of instruments which were not the originals of the said purported will and a codicil thereto.

DISPOSITION IN LOWER COURT

The court below admitted the purported will and codicil to probate upon the production and proof of a certified

copy thereof. The court denied appellant's motion for new trial.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the lower court's Order Admitting Will to Probate and remand of the proceedings to to said court with instructions that the original instruments must be deposited with the court before any further hearing is conducted toward admission of will to probate.

STATEMENT OF FACTS

Mary E. Ratliff died on June 20, 1965, in Arapahoe County, Colorado [R-1, Petition for Probate of Will (Corrected)]. The original of an instrument purporting to be decedent's last will and testament dated October 6, 1961, and the original first codicil thereto dated May 1, 1962, were lodged with the Clerk of the District Court in and for Douglas County, Colorado, on July 13, 1965 [R-12, Clerk's Certificate].

A Petition for Probate of Will, to which was attached a photo copy of the purported will, was filed with the Clerk of the Fourth Judicial District Court in and for Uintah County, Utah, on November 19, 1965, by several of the legatees under said purported will [R-1]. A Petition for Probate of Will was filed with the Douglas County, Colorado, Court on November 26, 1965 by appellant, a legatee and sole heir of decedent [R-15, Answer to Demand for Original Will]. The Uintah County proceeding was held in abeyance pending admission of the Will to probate in Colorado. However, a will contest developed in the Colorado proceeding whereupon the Uintah County hearing was set for January 4, 1966 [R-15].

At the hearing on January 4, 1966, in the court below, a copy of the instruments lodged with the Clerk of the District Court in Douglas County, Colorado, certified by the Clerk, were introduced [R-24, 25, T-5, 6]. Ralph Sargent, the sole surviving attesting witness, testified from these copies [R-24, T-5] and they were admitted in evidence [R-31, T-12]. Upon the testimony of Ralph Sargent concerning the circumstances surrounding the execution of the purported will and codicil [R-23, 24, T-4, 5], the testimony of Amelia Manker as to the decedent's presence in Vernal, Utah, during the spring of 1965 and references to a house in which decedent lived and a car which she drove [R-27, 28, T-8, 9] and the testimony of Morris Cook as to decedent's voting in the 1964 election [R-29, 30, T-10, 11], the "will" was admitted to probate [R-31, 33, T-12, 14]. Appellant repeatedly objected to the proceeding and moved to stay proceedings pending production of the original purported will and codicil, but these objections were overruled.

ARGUMENT

I.

A WILL CANNOT BE ADMITTED TO PROBATE UPON THE PRODUCTION AND PROOF OF A CERTIFIED COPY WHEN THE ORIGINAL DOCUMENT IS KNOWN TO BE IN EXISTENCE AND LODGED IN ANOTHER COURT OF PROBATE.

Prior to the marvels of modern photo copy equipment this case could never have arisen because a certified copy would have borne no necessary resemblance to the original of the certified document. Thus, it would have been im-

possible to establish the legal status of a purported will upon production and execution of a certified copy.

We submit that the advent of the photo copy machine has not caused such a deterioration in the worth of an original will that it will no longer be required for probate purposes. Further, the fact that the original will is held by some responsible party and that he has certified a certain photo copy to be a copy of the original will should not suffice in lieu of the original itself.

The Probate Code consistently uses the word "will" *not* "certified copy of will" except in special circumstances noted hereinafter. For example, 75-1-2 provides that *wills* must be proved; 75-3 is replete with the word *will*. (Emphasis supplied.)

On the other hand, the legislature has in several cases clearly authorized the use of copies of wills in probate proceedings. 75-3-23 relating to probate of foreign wills specifically states that copies of wills, duly authenticated, are adequate. 75-3-25, 26 and 27 relating to proof of lost or destroyed wills also clearly contemplate the use of copies upon proof that the will was in existence and has been lost or destroyed. Neither of these situations are applicable in the instant case.

In this connection the case of *In re Frandsen's Will*, 50 U. 156, 167 P. 362 (1917) is noteworthy. This case involved proof of a lost or destroyed will which had at one time been recorded in the county clerk's office. The will was shown to have been in existence when the testator became mentally incompetent and, therefore, the court held that the will must have been in effect at her death. The court did not permit proof of the will, however, by

introduction of the county clerk's record. The court said in passing that anyone having compared the record with the original could have testified to the correctness of the copy and the copy could then have been used as an examined copy of the original. We note, then, that even in the case of a lost or destroyed will a copy is not independent evidence of a will except under the rule of examined copy.

Cases supporting the proposition that probate proceedings must be stayed until production of the original will include *In re Barney's Will*, 94 N.J. Eq. 392, 120 A. 513 (1923), and *In re De Buck's Estate*, 125 N.J. Eq. 80, 4 A.2d 309 (1939). An earlier New Jersey case, *In re Morrissey's Will*, 91 N.J. Eq. 289, 107 A. 70 (1919), held that production of the original will is jurisdictional. See *Page On Wills*, §26.37 (1961).

Those seeking probate in Uintah County might contend that they had no alternative but to proceed without the original will. This would not be the case. The will and codicil having been lodged with the District Court in Douglas County, Colorado, any of the petitioners, particularly the Executor named in the will, could have petitioned for probate in that court at any time. Colorado Revised Statutes 1963, 153-5-22. In the alternative, petitioners could have challenged the jurisdiction of the Court in Douglas County to probate the will, and if successful, could have had the will transferred to the Court in Uintah County, Utah. Colorado Revised Statutes 1963, 153-5-23; Colorado Rules of Civil Procedure, Rule 450. Instead, Petitioners simply demanded that counsel for appellant forward the original will [R-13]. Counsel was, of course, unable to comply with this demand, the will and codicil

having been formally lodged with the Court in Douglas County, Colorado.

Legal authority requiring production of the original will for probate, where not proved to have been lost or destroyed, is supported by sound reason. Among a number of potentially serious problems to be noted in connection with the creation of any precedent permitting the probate of certified copies of wills where the original is in existence and is lodged with another court of probate are the following:

1. The traditional inviolability of the will is jeopardized. This challenges the very essence of wills and probate.

2. The problem of proof is at once apparent and the safeguards embodied in our law since the Statute of Wills are needlessly weakened.

3. Several probates can be initiated and conducted at the same time with conflicting results. Comity may or may not prevent collision courses from developing.

In summary, the court below erred in admitting to probate as the will of Mary E. Ratliff a document which was a certified copy of an instrument lodged with another court of probate. The Order Admitting Will to Probate should, therefore, be reversed and the court directed to stay proceedings on any Petition for Probate until the original document for which probate is desired is produced.

II.

EVIDENCE OF JURISDICTIONAL GROUNDS FOR PROBATE WAS INSUFFICIENT TO SUPPORT THE ORDER OF THE COURT ADMITTING THE WILL TO PROBATE.

In addition to the error urged in the first argument, it is submitted that petitioners introduced insufficient evidence at the hearing on January 4, 1966, to support the allegations of jurisdiction made in the Petition for Probate. These jurisdictional grounds were residence in Uintah County and property located in Uintah County at the time of decedent's death [R-1].

The only evidence as to decedent's residence was testimony of Amelia Manker that the decedent had been in Vernal for three or four months during the spring of 1965 [R-27, T-8], and the testimony of Morris Cook that she had voted in 1964 [R-30, T-11]. Nothing appears as to decedent's domicile or intentions at the time of her death.

Evidence of decedent's property in Vernal was limited to Amelia Manker's passing reference to the decedent's house [R-27, T-8] and a car driven by decedent and which was variously located in front of the laundry-mat and at her garage. No evidence was introduced as to the nature of decedent's ownership interest, if any, in these assets.

By virtue of petitioners' failure to support these jurisdictional allegations, therefore, it is submitted that the court below erred in admitting the "will" to probate and the Order Admitting Will to Probate should be reversed.

III.

APPELLANT COMPLIED SUBSTANTIALLY WITH RULE 73(a) IN PERFECTING THIS APPEAL AND THE COURT MAY EXERCISE ITS DISCRETION IN DETERMINING WHETHER UNDER ALL THE CIRCUMSTANCES THE APPEAL SHOULD BE ALLOWED.

Respondents have moved to dismiss this appeal upon the grounds that this Court lacks jurisdiction. The manner in which the appeal was filed is alleged as the basis for this motion to dismiss.

Rule 73(a), Utah Rules of Civil Procedure, provides:

> "A party may appeal from a judgment by filing with the district court a notice of appeal, together with sufficient copies thereof for mailing to the Supreme Court and all other parties to the judgment, and depositing therewith the fee required for docketing the appeal in the Supreme Court."

The rule allows one month from the entry of judgment within which an appeal may be taken.

In this case motion for new trial was denied March 1, 1966, and appellant had until April 1, 1966, to take her appeal. A Notice of Appeal was in fact received by the Clerk of the District Court and by counsel for respondents on Friday, April 1, 1966, through the United States mails, from counsel for appellant in Roosevelt, Utah. Monday, April 4, 1966, the Clerk received in the same manner additional copies of the Notice of Appeal for attorneys for respondents. Friday, April 8, 1966, the Clerk received the filing fee of $3.50 and only then filed the Notice of Appeal.

It is to be noted that counsel for appellant was in Roosevelt, Utah, whereas the District Court was in Vernal. Counsel did not have the convenience of proximity with the filing office nor the benefit of communication from the filing office as to the absence of copies and fee which were required. Had use of the mails not been necessary, and had personal contact been made between the filing office and counsel, both of which under other circumstances are likely, the situation as to copies of the Notice of Appeal and the filing fee would not have occurred.

No decision of this Court has been uncovered interpreting the present rule as jurisdictional insofar as copies of the Notice and filing fee are concerned. The essence of the rule is notice to the trial court that an appeal will be taken. Appellant more than fulfilled this condition by mailing to the Clerk of the District Court and to opposing counsel a Notice of Appeal which was received within the prescribed one month period. Rule 73(a) does not contemplate that any further action need be accomplished within the one month period by virtue of the fact that the Notice may be filed the last day of such period.

Appellant concedes that this Court has broad discretion in determining what disposition is to be made of an appeal involving timeliness of procedural steps. It is submitted that the significance of this case, together with the circumstances surrounding the taking of the appeal, warrant the use of the Court's discretion in favor of a decision on the merits. The respondents' motion to dismiss should, therefore, be denied and the case heard and determined on its merits.

CONCLUSION

The Order Admitting Will to Probate entered by the Court below is contrary to the law and evidence of this case. To allow this order to stand would create precedent for a new method of probate not recognized by any statute or court in the United States. Such a departure is solely a matter of legislative concern not judicial decision. For these reasons the Order Admitting Will to Probate should be reversed and the case remanded.

Respectfully submitted,

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