1966

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

N THE SUPREME COURT
F THE STATE OF UTAH

THE MATTER OF THE
TATE OF MARY E. RATLIFF,
Deceased.

RL McLAIN et al. and
ST SECURITY BANK
UTAH, N.A.,
Plaintiffs and Respondents

vs.

ELLE R. CONRAD,
Defendant and Appellant

Case

RESPONDENT'S B

Appeal from Order of the Fou
Court for Uintah Co
Honorable Joseph E. Nels

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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

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

Respondents adopt the statement of Appellant set out as the disposition in the lower Court.

RELIEF SOUGHT ON APPEAL

Respondents seek to have the motion to dismiss the appeal of Appellant granted due to the fact that the requirements of Rule 73(a) of the Utah Rules of Civil Procedure were not compiled with by the Appellant.

In the alternative the Respondents seek to have the order admitting the Will to Probate on January 4, 1966 affirmed.

STATEMENT OF FACTS

Respondents accept the Statement of Facts as being true as set forth in their brief with the following additions:

Mary E. Ratliff, deceased, had her legal residence in Vernal, Utah, for Fifty years and on May 3, 1965, at Vernal, fell and broke her hip. She was flown to Denver for medical treatment where she passed away on June 20, 1965.

Respondents filed their Petition for Probate of the Will on November 19, 1965, in the Fourth Judicial District, Uintah County, State of Utah. The Appellant agreed to pay the designated amounts to the legatees of the Will if the Will were probated in Colorado. This was agreed to by the parties and the Petition for Probate was set for hearing on December 13, 1965. At that time the children of Mrs. Conrad, Appellant, filed the Will Contest and the Will was not admitted to probate in Colorado.

Respondents then noticed their Petition for Probate on January 4, 1966. The Court, based upon the evidence presented, admitted the certified copy of the Will to Probate in Utah, with instruction to obtain the original Will.

Shortly thereafter the Respondents filed a Petition to Dislodge the Will in Colorado and the same was set for hearing on March 16, 1966. At that hearing the Court

heard evidence on the *original Will* from Mr. Harold Sargent, one of the Witnesses to the Will, and from Mr. Morris Cook, the Clerk of the Court of Uintah County, State of Utah. Similar evidence was presented as was produced in Utah. The Appellant could not and did not show any evidence to indicate that Mary E. Ratliff was a resident of Colorado or that she intended to change her residence to Colorado.

When this Appeal was filed the Court in Colorado stayed the proceedings pending the ruling of this Court on the Appeal.

ARGUMENT

POINT I

APPELLANTS DID NOT COMPLY WITH RULE 73(a) IN FILING THEIR NOTICE OF APPEAL. MOTION TO DISMISS APPEAL SHOULD HAVE BEEN GRANTED.

Respondents Motion to Dismiss Appeal should have been granted by this Honorable Court due to the fact that the filing fee did not accompany the Notice of Appeal when filed with the County Clerk of Uintah County on April 1, 1966. By the admission of counsel for appellant the record discloses that the filing fee was not received until Friday, April 8, 1966. It was then and only then that the County Clerk could proceed to file the Notice of Appeal.

In *Jacobsen v. Jeffries,* 86 U. 587, 47 P. 2d 892 (1935) this Court held:

> "Leaving a paper with a filing officer, a fee for the filing of which is by the statute required to

be paid in advance, is not a filing. It is the duty of the officer to collect and pay into the proper treasury the fee provided by law before the paper is filed. Should such officer inadvertently or otherwise file a paper for which a fee is required to be paid, he is forthwith bound to account for such fee whether or not he collected the fee at the time the paper was left for filing."

"Under our law the filing of the record consists of two acts, one of which is payment of the fee, and the other of which is delivering the record to the clerk. Neither act standing alone is a filing, or a half filing, or of any avail as a filing." Gee v. Smith, 52 Utah, 602, 176 P. 620, 621.

The Jacobsen case, supra, was cited in *State v. Nelson,* Wash. , 107, P. 2d 1113, (1940). This case and many cited therein conclude that a filing fee is a payment in advance by statute and is a condition precedent to the filing of Notice of Appeal. No filing is effective without the payment of a fee when required by statute.

In other cases it is held that a paper is filed when it has been delivered to the proper officer and received to be kept in the official records, does not apply where the payment of a stated fee is made a prerequisite — in these cases the paper is not filed until the fee has been paid. Clearly that is the intent of the rule when it provides that the fee shall be paid when filing a document.

This Court in an opinion written by then Chief Justice Wade sets forth the rule under 73(1) U.R.C.P. which in effect is the same as 73(a) U.R.C.P. Bish's Sheet Metal Company, a Utah Corporation vs. Chris J. Luras d/b/a

Liberty Bell Bakery Company, 11 Utah 2d 357, 359 P. 2d 21, (1961) at page 358:

> "It is equally clear by the provisions of Rule 73(1), U.R.C.P. that the filing of the notice of the appeal and the payment of the fees therefor within the time allowed are the only requirements necessary for the court to have jurisdiction. All other steps, therefore, cannot affect the jurisdiction but any failure to follow the dictates of the rules makes the appellant subject to appropriate action by the court which may even include dismissal of the appeal."

As has been stated in the Bish's case, supra, the filing of the notice of the appeal and the payment of the fee within the time allowed are necessary jurisdiction requirements without which this court has no jurisdiction.

Hence it follows that in this case the filing fee required by Rule 73(a) U.R.C.P. was not complied with by the appellant and the court should have dismissed the appeal. The appeal was not taken as required by the statute.

POINT II

THE EVIDENCE SHOWING JURISDICTIONAL GROUNDS FOR PROBATE WAS SUFFICIENT TO SUPPORT THE ORDER ADMITTING THE WILL TO PROBATE.

Counsel for Appellant suggests that the evidence received at the hearing held on January 4, 1966, is insufficient to show jurisdictional grounds for admitting the Will to probate.

Clearly the record shows that all parties were given notice that the Petition to Admit the Will to Probate was

to be heard on January 4, 1966. Appellant was represented on that day by and through her counsel, Mr. Buell and Mr. Dillman. Appellants did not present one bit of evidence to show Mrs. Ratliff was not an actual and bona fide resident of Uintah County, State of Utah. Having failed to do so at that time and to refute the evidence of respondents, after notice should not now be subject to attack by the Appellants.

Subsequent to the January 4, 1966, hearing in the Utah Court, the Respondents filed a Motion to dislodge the Will held in Douglas County, Colorado on the basis that Mrs. Ratliff was a resident of Utah and further that the court of Utah had submitted the Will to probate and thereby became the court of original jurisdiction.

A hearing was held on March 16, 1966, in Castle Rock, County of Douglas, State of Colorado before Honorable Robert B. Lee, District Judge. The appellants submitted no admissible evidence to show that the decedent was a resident of Colorado.

The facts are that Mrs. Ratliff broke her hip in Vernal and was flown to Denver for medical treatment and died a month and a half later.

A residence once acquired remains until actually abandoned with the intent to reuonce the same, and to acquire a residence elsewhere, Mrs. Ratliff did not do either.

The evidence and record clearly shows the legal residence of Mrs. Ratliff to be in Utah. Appellant introduced no evidence to the contrary at the time the Will was admitted to Probate in Utah or at the Colorado hearing.

From the evidence introduced on January 4, 1966, it is clear that the decendent was a resident of Vernal, Uintah County, State of Utah. She had voted in Vernal for many years, the latest being in the 1964 election. She had her home in Vernal, bank accounts, the witnesses to the Will of October 6, 1961 and the Codicil dated May 1, 1962, were Vernal residents and memorial services were held for the decedent in Vernal. None of these facts were contradicted to by appellant at any time.

The lower court did not err in admitting the "Will" to probate and its order should be affirmed.

POINT III

A WILL MAY BE ADMITTED TO PROBATE UPON THE PRODUCTION AND PROOF OF A CERTIFIED COPY OF A WILL WHERE THE WILL IS UNAVAILABLE.

Counsel for Appellant state a certified copy of the original Will was improperly admitted to probate in Utah.

Where it was clearly explained to the court that the decedent was a resident of Utah and the fact that original jurisdiction should be in Utah the court did not err in admitting the "Will" to probate. The "Will" was not lost or destroyed but was actually in existence and lodged under the Colorado Statute in Douglas County. The Will has not been, and is not now, admitted to probate in Colorado. The Colorado Court has not refused to transmit the Will to the Utah Court. The matter is still pending.

At the Colorado hearing and prior to the attempted filing of this appeal the Colorado Court informed the appellant that unless she supplied it with cases sustain-

ing her position, or, could show the Utah Court's Order Admitting Will to Probate was void, an order transmitting Will to the Utah Court would be issued.

Respondents filed a Petition for Probate of Will in Utah, Fourth Judicial District, on November 19, 1965, and the same was set for hearing on November 30, 1965. At the request of Counsel for Appellant, the hearing was continued. It was again noticed and heard on January 4, 1966, when the Utah Court by appropriate order admitted the "Will" to Probate.

Counsel for Appellant states (Brief P. 5) that the Respondents could have challeneged the jurisdiction of the Court in Douglas County to admit the "Will" to probate on December 13, 1965. Respondents had no reason to as it was agreed that Colorado could handle the probate if the terms of the "Will" were carried out, but Appellant's son and daughter filed the Caveat which contested the Will.

In order to obtain the "Will" Respondent's counsel filed a Petition to dislodge the Will from the Colorado Court, immediately after the certified photo copy was admitted in Utah and argued the same on March 16, 1966. Judge Robert B. Lee made an order staying proceedings until the Utah Supreme Court rules on whether or not the Utah Courts order was void. Respondents will proceed to obtain the "Will" from Colorado if this court affirms the lower courts decision.

It is true that the Utah Statute does not specifically provide that a certified photo-copy of a Will may be

admitted, however, the general equity power of a Probate Court, should recognize how much better evidence a certified photo-copy of the original Will is than an unsigned office copy. Certainly this is far superior evidence and within the intent of the legislature which was to permit the introduction of the best evidence of the Will available.

The "Will" was properly identified by Mr. Harold Sargent (t. p. 4, 5, 6,7) and he was one of the attesting witnesses thereto and it was duly identified in every respect to be admitted to probate. The other attesting witness having died. (T. p. 5). The evidence then showed that the decendent was a resident of Vernal, Uintah County, State of Utah, at the time of her deat hand that appellant introduced no evidence to the contrary.

CONCLUSION

These facts when taken in light of the hearing held in Castle Rock, Colorado, on March 16, 1966, clearly indicate that the decendent was not a resident of Colorado or domiciled therein and the Court di dnot err in admitting the "Will" to probate.

The court was correct in admitting the "Will" to probate in Utah where the original "Will" was detained, but not admitted to probate, in a foreign court, so that respondents could not produce the same. The grounds for admitting the "Will" to probate are set forth in 75-3-3 U.C.A. (1953). The jurisdictional facts are set forth in the Petition of Respondents and the same were proved on January 4, 1966.

The lower courts admitting the Will to probate under these circumstances should be affirmed.

Respectfully submitted,

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