

1993

In the Matter of the Estate of: Dale Everett Loupe, aka, Dale Edward Loupe, aka, Dale Everett Loupe Montes, Deceased. v. The Montes Family : Reply Brief

Utah Court of Appeals

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BRIEF

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930354

IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE
ESTATE OF:

Dale Everett Ioupe, aka,
Dale Edward Ioupe, aka,
Dale Everett Ioupe Montes,

Deceased.

The Montes Family, Appellant.

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No. 930354-CA

Priority 16 15

REPLY BRIEF OF APPELLANTS

AN APPEAL FROM AN AMENDED ORDER DETERMINING CONTEST
OF WILL, FORMAL PROBATE OF WILL AND APPOINTMENT
OF PERSONAL REPRESENTATIVE
EIGHTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
The Honorable John R. Anderson, Presiding

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FILED

JUN 17 1993

COURT OF APPEALS

IN THE MATTER OF THE
ESTATE OF:

The Montes Family, Appellant.

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 : No. 930354-CA
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 : Priority 16
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE1
STATEMENT OF THE FACTS1
ARGUMENT . . . . .	.1
POINT I	
THE MONTES FAMILY HAS BEEN DENIED A SUBSTANTIAL RIGHT BY THE TRIAL COURT'S REFUSAL OF APPLY A PRESUMPTION OF LACK OF TESTAMENTARY CAPACITY UNDER THE FACTS OF THIS CASE . . . . .	.1
POINT II	
MS. CARTER'S ARGUMENT UNDER I(c) OF HER BRIEF IS MISPLACED . . . . .	.4
POINT III	
THE MONTES FAMILY HAS MADE THE NECESSARY SHOWING TO CHALLENGE THE TRIAL COURT'S CONCLUSIONS . . . . .	.5
CONCLUSION . . . . .	.6

TABLE OF AUTHORITIES

CASES

<u>In Re Estate of Hastings</u> , 387 A.2d 865 (PA. 1978) . . . . .	.2
<u>In Re Estate of Supplee</u> , 247 So.2d 488 (Fla. App. 1971) . . . .	.4
<u>In Re Miller's Estate</u> , 116 P.2d 256 (Wash. 1941) . . . . .	.4
<u>In Re Estate of Morton</u> , 428 P.2d 275 (Wyo. 1967) . . . . .	.4
<u>Whittenberry v. Whittenberry</u> , 496 P.2d 240 (Ore. 1972) . . . . .	.4
<u>Ward v. Sears</u> , 78 N.W. 2d 545 (Iowa 1956)4

STATUTES

Rule 24 (a)(10) Utah Rules of Appellate Procedure6
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IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE
ESTATE OF:

Dale Everett Ioupe, aka, :
Dale Edward Ioupe, aka : No. 930354-CA
Dale Everett Ioupe Montes, :
Deceased. : Priority 16

The Montes Family, Appellants.

REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASE

This case is stated in the Montes brief at pages 2 and
3.

STATEMENT OF THE FACTS

The facts are set forth in the Montes Brief and all
supplemental facts are included in the argument below.

ARGUMENT

POINT I

THE MONTES FAMILY HAS BEEN DENIED A SUBSTANTIAL RIGHT
BY THE TRIAL COURT'S REFUSAL TO APPLY A PRESUMPTION OF
LACK OF TESTAMENTARY CAPACITY UNDER THE FACTS OF THIS
CASE.

Ms. Carter argues in her brief that although the trial
court refused to apply a presumption of testamentary
incapacity, the Montes family was not denied any substantial

right. (Appellee's Brief at 13). Ms. Carter argues that as the trial court found that the proponents had made a positive showing of capacity, any presumption of incapacity would have had no effect on the outcome of the case. Id.

In actuality, however, the Montes family has been greatly harmed by the trial court's refusal to grant a presumption of incapacity. Moreover, such a refusal has had a great effect on the outcome of the case. The trial court found that no presumption of incapacity arose under the facts of this case and that by a preponderance of the evidence adduced the decedent possessed the requisite mental capacity to make a will. (R. at 148)

Even assuming, however, that the trial court correctly concluded that there was a preponderance of the evidence in favor of a finding of capacity, a presumption of incapacity demands that the proponents of a will rebut the presumption by "clear and convincing" evidence that the testator possessed the requisite capacity. This rule was recognized in Re Estate of Hastings, 387 A.2d 865 (PA 1978). The Hastings court held that where an individual was adjudicated incompetent and a guardian of the estate appointed, and subsequently executed a will, that the burden shifted to the proponent of the will to show by clear and convincing evidence that at the time the

will was made the testator possessed the requisite testamentary capacity.

The same situation is present here. There was a conservatorship of the Veterans Administration in which the decedent was declared incompetent. (R. at 147) These proceedings were fully argued and adjudicated by the Seventh Judicial District Court in Duchesne County. (See Duchesne District Court Record contained in the file on appeal.) A guardianship was also ordered for the receipt of the decedent's Ute Tribal Royalties. (R. at 154). Interestingly, Ms. Carter, in her brief argues that there was never any guardianships arranged for the decedent, only conservatorships. This argument is contrary to the trial court's findings, the same findings that were prepared and submitted by Ms. Carter at trial. (R. at 154). Ms. Carter also argues in her brief that as only a conservatorship is present in this case, that a psychiatrist who declared the decedent to be incompetent only declared decedent incompetent to contract. (Appellee's brief at 17). However, a review of the psychiatrist's report reveals no support for such a proposition. (Exhibit 10, Appellant's brief at Addendum B.) To the contrary, the psychiatrist stated that at the time the decedent's judgment was poor and he was "not considered competent." Id. Again not only was there a conservatorship

in this case, but also a guardianship, a long history of mental illness, abuse of intoxicants, and other evidence such that these factors combined gave rise to a presumption of incapacity to make a will.

POINT II

MS. CARTER'S ARGUMENT UNDER I(C) OF HER BRIEF IS MISPLACED.

Ms. Carter argues in her brief that the presumption of sanity of the testator is a superseding presumption to any presumption of incapacity. (Appellee's brief at 22.) This argument is without merit. Courts throughout the country that recognize the rule that a testator is presumed to possess the requisite testamentary capacity, have also held that a guardian or an adjudication as to the intestator's insanity or incompetency raises a presumption of lack of testamentary capacity. See e.g., In Re Estate of Supplee, 249 So.2d 488 (Fla. App. 1971); In Re Miller's Estate, 116 P.2d 256 (Wash. 1941); In Re Estate of Morton, 428 P.2d 275 (Wyo. 1967); Whittenberry v. Whittenberry, 496 P.2d 240 (Ore. 1972); Ward v. Sears, 78 N.W. 2d 545 (Iowa 1956). Such a rule would place an unfair burden on the contestant of a will. Allowing such a presumption does not deprive the testator of any rights as Ms. Carter argues, rather it would simply help ensure fairness where the facts warrant such a presumption of incapacity.

POINT III

THE MONTES FAMILY HAS MADE THE NECESSARY SHOWING TO CHALLENGE THE TRIAL COURT'S CONCLUSIONS

At Page 26 of her brief, Ms. Carter claims that the Montes family has failed to marshal evidence in support of its contentions and it failed to cite to the record for its contentions. The Montes brief however argues specific instance and facts of this case that support its arguments as to both the appropriateness of a presumption of a lack of testamentary capacity and to a conclusion that the preponderance of evidence in this case requires a finding that the decedent did not possess the requisite testamentary capacity. (See Montes brief at 3-11).

It is indeed difficult to understand how counsel for Ms. Carter can argue that the Montes brief is lacking because of an alleged failure to "marshal" the evidence in support of its argument when Ms. Carter's brief cites only her own self-serving testimony in support of the trial court's finding that the decedent formulated a plan to dispose of his estate. (Carter brief at 28). Even more difficult to understand is the argument that the Montes brief failed to "marshall" evidence because of an alleged failure to cite to the record, when Ms. Carter's brief fails to contain a single cite to the record from pages 13 through 26 of her argument, in clear

violation of Rule 24 (a)(10) of the Utah Rules of Appellate Procedure, which requires that parts of the record relied on in the argument be properly cited to the record. The Montes brief has the proper citations, while Ms. Carter's brief does not.

CONCLUSION

The trial court erred in not allowing a presumption of lack of testamentary capacity in this case. Such a presumption was clearly warranted under the facts of this case. The conservatorship and the guardianship, which were separate proceedings, both found the testator to be incompetent. These findings were also supported by an independent psychiatrist's examination which expressly concluded the testator to be incompetent. There was no indication that the psychiatrist was referring only to incompetency to make a contract as Appellee alleges. These factors taken together with the confirmed long history of decedent's mental illness and substance abuse gave rise to a presumption of incapacity.

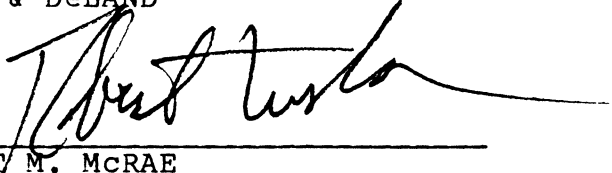
The substantial rights of the Montes family were denied because of the trial court's refusal to grant the requested presumption of incapacity. Had the presumption been granted, it would have been the proponent's burden to go forward and prove by clear and convincing evidence that the decedent possessed the requisite capacity on the date in

question. The Montes family also has sufficiently briefed the arguments so as to allow this Court to review the trial court's conclusions as to the preponderance of the evidence. Appellee's allegations as to the insufficiencies of the Montes brief are actually found in her own brief.

Finally, Appellee's argument that a presumption of testamentary capacity precludes a trial court from allowing a presumption of incapacity where there's previous findings of incompetency or insanity, is simply contrary to well established law.

RESPECTFULLY SUBMITTED this 15 day of June, 1993.

McRAE & DeLAND



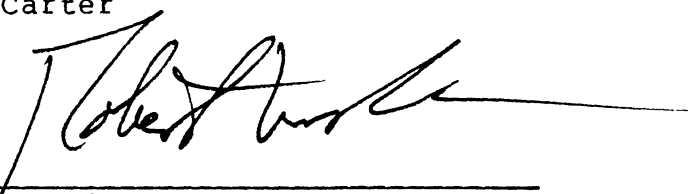
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CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a copy of the foregoing ~~REPLY BRIEF OF APPELLANT~~ to the following on this 15 day of June, 1993.

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