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In The Matter of the Estate of Jack Eddy, Aka Jack P. Eddy, Aka Jack Pollard Eddy : Brief of Respondent Sharon Hall

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

In the Matter of the Estate

of

JACK EDDY, aka JACK P. EDDY, aka

JACK POLLARD EDDY, Deceased.

BRIEF OF RESPONDENT SHARON

Appeal from Judgment of the Third Judicial
in and for Salt Lake County
Honorable Stewart M. Hanson, Di

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

In the Matter of the Estate of JACK EDDY, aka JACK P. EDDY, aka JACK POLLARD EDDY, Deceased.	Case No. 12165

BRIEF OF RESPONDENT SHARON HALL

NATURE OF THE CASE

This is a probate proceeding in which the deceased's former wife and the former wife's daughter by a prior marriage each claim the right to distribution of the deceased's estate pursuant to the terms of the will. Decedent's brother, his sole heir at law, claims the estate by intestacy.

DISPOSITION IN THE LOWER COURT

The lower court, Judge Stewart M. Hanson, entered a Judgment, based upon stipulated facts, in which the estate was awarded to Sharon Hall, daughter by a prior marriage of the deceased's former wife.

RELIEF SOUGHT ON APPEAL

Respondent Sharon Hall seeks an affirmation of the lower court judgment.

STATEMENT OF FACTS

The Statement of Facts set forth in appellants' briefs are essentially accurate and respondent hereby adopts these statements and by this reference makes them a part hereof as though set forth herein at length.

ARGUMENT

POINT I.

THE LOWER COURT CORRECTLY HELD THAT APPELLANT, ROBERTA EDDY, WAIVED AND RELINQUISHED HER RIGHT TO TAKE UNDER THE WILL OF JACK EDDY BY REASON OF HER STIPULATION IN THE DIVORCE DECREE.

It has long been the established law in California that a spouse may relinquish inheritance rights in the prospective estate of the other spouse by agreement between the parties, e.g., by a property settlement agreement entered into in connection with a divorce.

Thus, in *Estate of Patterson*, 46 Cal. App. 415 (189 Pac. 483), husband *orally* agreed to relinquish his inheritable interest in wife's estate in consideration of the transfer to him by wife of certain land standing in their joint names. Subsequently, wife died intestate and husband filed a petition asking for letters of administration. The trial court denied his petition finding that:

> "He was not entitled to administer said estate for the reason that he was not entitled to succeed to the personal estate of decedent since petitioner had dur-

> ing the lifetime of decedent entered into a valid contract with her *whereunder he had relinquished, released and waived all rights, including his inheritable rights and interest in and to the property and estate of deceased.*" (Emphasis supplied.)

The appellate court in affirming quickly disposed of the issue which is here presented and then turned its attention to the more troublesome question of whether such an agreement must be in writing to be valid and enforceable. The decision insofar as it is pertinent to the instant proceeding is crystal clear:

> "It follows, of course, from said code provisions (California Civil Code Sections 158, 159 & 160) that a husband and wife may enter into an agreement whereby one or the other, or both, may relinquish his or her inheritable interest in the estate of the other. This proposition, however, it not disputed here, nor could it be, since the disposal of one's inheritable interest in the estate of another is no less an act involving a contract or an engagement respecting property than where such act involved the transfer of property in tangible form or property having a present tangible existence."

In the case of *In re Davis,* 106 Cal. 453 (39 Pac. 756), cited in Patterson, husband and wife entered into "articles of separation" whereby they agreed to divide their property and "relinquish all claim of every nature upon the property of each other then owned or thereafter to be acquired." The parties then separated and continued to live apart until the death of husband, whereupon the widow applied (through a nominee) for letters of administration. The trial court denied the nominee's petition and the appeal followed. The

appellate court affirmed, holding that:

> "The right of the widow to letters depended on whether she was entitled to inherit any of her husband's property. We think it clear from the evidence that she was not . . . The agreement of separation entered into between decedent and his wife was a contract which they were competent to make with one another and one, in fact, expressly authorized by statute (California Civil Code Sections 158 & 159). It rested upon good and sufficient consideration, and was fully carried out. The obvious purpose was not only to definitely sever the property rights of the parties, but mutually to relinquish and release all inheritable interest of each other in the property and estate of the other."

Similarly, in the *Estate of Edelman,* 148 Cal. 233 (82 Pac. 962), husband and wife entered into a separation agreement whereunder each party "waived all right and claim of inheritance to succeed to any part of the property of the other." Upon the subsequent death of wife her will was offered for probate and husband appeared as a contestant alleging that the will was executed by wife under undue influence. Upon the trial of the matter the court found that the separation agreement was valid and binding and operated to deprive husband of any interest in wife's estate as well as any standing to contest the will. On appeal the order dismissing husband's contest was upheld:

> ". . . Proof on the part of the proponent of the will of a separation agreement between the husband and wife, whereby they each waived and released all right and claim of inheritance or to succeed to any

> property of the other and which had been lived up to by both parties during the lifetime of the wife, is sufficient to show a want of interest in the husband to maintain the contest . . ."

There appears to be no Utah case in point and the question herein presented may be one of first impression insofar as Utah is concerned. However, the great weight of authority is in accord with the position taken by the California cases cited hereinabove. This is clearly established in 26*A Corpus Juris Secundum,* Section 58b, pg. 636:

> "In the absence of statutory provisions to the contrary, a husband or wife may waive, release or be estopped to assert rights of inheritance in the estate of the other by certain acts or conduct on his or her part during the marriage. Thus, although a rule to the contrary prevails in some jurisdictions, *as a general rule* a husband or wife may waive his or her inheritable rights in the estate of the other by an express postnuptial agreement." (Emphasis supplied.)

The general rule has been enunciated and followed in California, as we have seen, and in Kentucky, Maryland, Mississippi, Missouri, Illinois, New York, Indiana, Kansas, Pennsylvania, Ohio and many other jurisdictions.

Appellant Roberta Eddy has failed to cite a single case or authority which supports her position in this regard.

In Re Crane's Estate, 6 Cal. 2d 218 (56 P. 2d 476), is *not* inconsistent with the well-established rule in California and the great weight of authority elsewhere. In *Crane* the property settlement failed to set forth *any renunciation of*

the right to inherit from each other's estate. Instead, the contract provided that:

> "the parties had settled, adjusted and forever determined . . . their respective rights to any inheritance . . . in the estate of either."

In the absence of any *express* renunciation, the court held that there was no waiver of the widow's right to a bequest under the terms of the will, stating:

> "But, as if by intention, there is a total failure to set forth in the contract any renunciation of the right to accept and receive future gifts to one from the other whether by way of gift inter vivos, by devise, or by bequest. As applied to such gift, we find in the agreement no basis for an estoppel against appellant with respect to the legacy claimed in the will."

To the same effect is *Estate of Hadsell,* 120 Cal. App. 2d 270 (260 P. 2d 1021) (1953) in which the court, citing *Crane,* held:

> "Unless a property settlement agreement specifically renounces the right, such agreement does not estop a surviving husband or wife to take under the will of the other."

In our case, the stipulation set forth in the Eddy divorce decree does indeed contain a specific renunciation of the right to inherit:

> "It is adjudged that pursuant to stipulation, both plaintiff and defendant waive any and all right to inherit the estate of the other at the time of his or her death, or to take property from the other by devise or bequest . . ."

Bennett v. *Forrest,* 150 Pac. 2d 416 (Cal. 1944), also cited by appellant Roberta Eddy is not at all in point. In *Bennett,* the probate court had found that the property settlement agreement (wherein husband and wife had waived and relinquished all right to inherit) *was not in effect at the time of decedent's death* because the spouses had reconciled after entering into the agreement. Therefore, the only question before the appellate court was whether the probate court's finding with regard to this issue was res adjudicata.

Thus, we see that under the great weight of authority in this country appellant Roberta Eddy has waived and relinquished her rights under the will of Jack Eddy and, further, that she has failed to give expression to any contrary view.

POINT II.

THE DIVORCE AND PROPERTY SETTLEMENT DID NOT RESULT IN A REVOCATION OF THE WILL UNDER THE LAWS OF THE STATE OF UTAH.

Petitioner, James Eddy, cites the recent (1966) case of *Luff* v. *Luff,* 359 Fed. 2nd 235, as authority which this Court should follow on the issue of revocation by implication of law. A careful examination of *Luff* v. *Luff,* and the applicable statutory law of the District of Columbia, will reveal that *Luff* cannot be followed by the courts in the State of Utah.

The language of the applicable District of Columbia

statute enumerating the usual means of revoking a will is, essentially, similar to Section 74-1-19, Utah Code Annotated. Both statutes provided that revocation can be accomplished by a later will or codicil, or by burning, cancelling, tearing or obliterating. But at this point the similarity between the two jurisdictions ends.

Utah law *further provides* two particular circumstances where the will is *conclusively deemed revoked.* The first, where, after making a will, the testator marries and has issue of such marriage and the wife or issue survive him (Section 74-1-24 Utah Code Annotated 1953). The second, where, after making a will, the testator marries and the wife survives him (Section 74-1-25 Utah Code Annotated 1953). However, the District of Columbia has no statutes setting forth the particular circumstances under which revocation by implication will be recognized. Thus, in *Luff* the District of Columbia court was free to apply the common law doctrine of implied revocation to any situation which it felt fell within the rationale of the doctrine. This freedom was clearly expressed by the majority opinion, as follows:

> "And where implied revocation has been recognized, *and the circumstances of its application left to the courts to decide, as here,* we turn to decisional and statutory law in other jurisdictions for guidance as to whether a divorce with property settlement is such change of condition or circumstances as brings the doctrine into play." (Emphasis supplied.)

It is at once apparent that the "circumstances of the application of the doctrine of implied revocation" have *not* been left to the Utah Courts to decide since the legislature

has *limited* the application of the doctrine to the change of circumstances described in Sections 74-1-24 and 74-1-25 of the Utah Code. This is in accordance with the rule discussed in 18 A. L. R. 2d 697, which treats with the subject "*Divorce or annulment as affecting will previously executed by husband or wife.*" The general rule, as set forth in the Annotation at Pg. 703, is as follows:

> "Where the statute prescribes certain methods for revocation of wills and contains no exception permitting implied revocation, the divorce may be held not to revoke the prior will, even though the statute provides that *other* subsequent events such as marriage or birth of child shall revoke a prior will, the court taking the position that the *statutory methods of revocation are exclusive.*" (Emphasis supplied.)

Counsel for James Eddy is in error when he states at Pg. 12 of his brief that:

> "All parties apparently agree that under common law divorce would result in revocation implied by law."

Respondent, for one, disagrees with this conclusion for the very simple reason that divorce was virtually unheard of at common law. The *real* question here is whether the common law doctrine of implied revocation should be applicable to divorce. Page on Wills, Section 21.101 discusses this very point:

> "Divorce was so rare before modern legislation that it may well be treated as a new case, fairly involving the question of the application of the existing principles of common law and ecclesiastical law to a situation which could rarely, if ever, be presented

> under the old law for specific adjudication . . . The unwillingness of the courts to treat this as a revocation is due in a large part to the fact that testator frequently intends his will to remain in effect in spite of the divorce . . . The courts are thus driven to a rule which represents the probable intention of the average testator. *It seems very doubtful whether the probable intention of the average testator that a prior will should not remain in force under such circumstances is so clear as to justify the courts in adding this as a new class of revocation by operation of law.*" (Emphasis supplied.)

POINT III.

JAMES EDDY HAS BEEN DISINHERITED UNDER THE EXPRESS PROVISIONS OF THE WILL.

Paragraph Fifth of the will has two aspects, both leading to the same result.

In the first sentence of Paragraph Fifth the testator states that he has

> "*intentionally and with full knowledge omitted to provide for my heirs who may be living at the time of my death . . .*" (Emphasis supplied.)

The second sentence consists of a typical "in terrorem" clause which applies to

> "any person, whether a beneficiary under this will or not mentioned herein, who shall contest this will or object to any of the provisions thereof."

James Eddy has, of necessity, limited his argument to the applicability of the "in terrorem" clause to his posture

in this case. He contends that what he is doing does not really amount to a "contest" of the will and, therefore, the in terrorem clause does not apply to him. Ergo, he has not been disinherited.

James Eddy's argument in this regard is quite transparent. Assuming, arguendo, that his contention is valid and that he has not been disqualified from taking under the will by the operation of the in terrorem clause, the fact remains that he has been disinherited by virtue of the first sentence of Paragraph Fifth quoted above.

Parenthetically, if we accept the definition of a "contest" as "any legal proceeding which is designed to thwart the testator's wishes as stated in his will" as per *In Re Holtermann's Estate,* 206 Cal. App. 2d 460, 23 Cal. Rptr. 685 (cited by appellant James Eddy at Pg. 22 of his brief), then James Eddy has, indeed, contested the will. For, if he has his way, the estate will go by intestacy to himself as the heir of Jack Eddy — and the testator's wishes as stated in his last will and testament will have been thwarted with a vengeance.

POINT IV.

THE LOWER COURT CORRECTLY HELD THAT IT WAS THE TESTATOR'S INTENTION, AS ASCERTAINED FROM THE FOUR CORNERS OF THE WILL, THAT RESPONDENT SHARON HALL SHOULD TAKE UNDER HIS WILL AND BE ENTITLED TO DISTRIBUTION OF HIS ESTATE IN THE EVENT

OF ANY CONTINGENCY THAT RENDERED THE PRINCIPAL BENEFICIARY INCAPABLE OF OR DISQUALIFIED FROM SUCH DISTRIBUTION.

The cases cited by appellants correctly state the law as it applies to certain particular factual situations, but they have limited applicability to the facts of the instant case.

Thus, *In Re Beales Estate,* 117 Utah 189, 214 Pac. 2d 525, *In Re Kincaid's Estate,* 3344 Pac. 2d 85, *Glover* v. *Reynolds,* 135 N. J. Eq. 113, 37 A. 2d 90, *Estate of Sowash,* 62 Cal. App. 512, 217 Pac. 123, and *In Re Searl's Estate,* 20 Wash. 2d 230, 186 Pac. 2d 913, all have this much in common with the instant case: They all deal with the effect of the failure of a condition precedent on the vesting of the succeeding estate. However, in none of these cases was there a *renunciation* by the principal beneficiary. Thus, the question which is central to this appeal — whether the testator *intended* the alternative beneficiary to take *in any and every event* which terminated the precedent estate — was not dealt with since it did not arise.

In our case, the renunciation by the former wife, Roberta Eddy, requires an examination into the doctrine of acceleration as well as an analysis of the testator's intent in this regard.

The great bulk of renunciation cases deals with the acceleration of remainders after the prior life estate has terminated for one reason or another before the death of the life tenant. The most familiar case of acceleration is where

the wife has been given a life estate by the will of her husband and she renounces the will and elects to take her dower or statutory allowance instead. In such case the remainder is accelerated to take effect as if the wife had predeceased her husband. This result obtains as a consequence of the *rule of construction* which arises from the inferred intent of the testator. However, where the instrument manifests a contrary intent the rule yields to the intention of the testator as shown by the instrument. See 164 A. L. R. 1433, at pg. 1434.

There is a paucity of cases which treat with the effect of renunciation of *estates in fee.* As a consequence of this dearth, there is no rule of construction by which the testator's intent may be inferred where the estate renounced is in fee. But, rule of construction or no, if the intention of the testator can be ascertained from the "four corners" of the will, this intention must be given effect. Thus, in *Broaddus* v. *Park College,* 180 S. W. 2d 268, cited by appellant James Eddy at Pg. 17 of his brief, the court states:

> "The cardinal rule for construction of wills is to ascertain the testator's intention from the language of his will, — not one part alone but from the 'four corners' thereof, — and so to construe it, if possible, as to give effect to all its provisions."
>
> "When the intent of its maker is discovered, the will is solved, unless that intent runs counter to an inflexible rule of law or public policy."

In *Broaddus,* the testator gave a bequest of $5,000.00 to his wife on condition she survive him, otherwise to his two nieces. The wife did, in fact, survive testator but she

renounced the bequest. The *sole* question before the court was posed as follows:

> "So the question to be resolved is, did the testator *intend* that respondents should receive the $5,000.00 in event the wife renounced the will?" (Emphasis supplied.)

The court, after a careful review of the language of the will and surrounding facts and circumstances, came to the conclusion that the testator did not so intend. It should be clearly noted at this point that the language of the annotation, 157 A. L. R. 1104 (in which *Broaddus* is cited) which appears on Pg. 17 of appellant James Eddy's brief:

> "Renunciation on the part of the original beneficiary was not equivalent to his death . . . and so the alternative beneficiary was not entitled to take as substituted legatee or devisee"

is totally misleading if the reader accepts it as a general rule of construction that "renunciation is not equivalent to death." As we have observed, supra, there is no rule of construction in this area and one must look to the will itself in order to ascertain whether the testator intended the alternative beneficiary to take in the event of renunciation as well as in the case of death.

Thus, the *same annotation,* 157 A. L. R. 1104, discusses the case of *Fletcher* v. *Cotton,* 81 N. H. 243, 123 A. 889, where the court held that the testator *did* intend that the alternative beneficiary should take following a renunciation by the principal beneficiary.

In *Fletcher,* the testator, John Cotton, bequeathed his

homestead and household furniture to his wife and "in case my wife should not survive me or should die intestate then to my daughter." (Although he referred to her as his "daughter" she was not, in fact, related to testator nor was she legally adopted.) The wife survived testator but renounced her rights under the will and elected to take her statutory one-half interest in the estate in fee instead of her right of dower and her homestead right.

Thereafter, wife died *testate* bequeathing her one-half interest in the real property to the "daughter." The "daughter" also claimed the *other* half of the homestead under the will of testator John Cotton. The defendants contended that since testator's wife survived him and died testate, the condition precedent had not been satisfied and, therefore, the "daughter" could not take under the will and the other undivided half interest should fall into the residuum of the estate. The court disagreed with this contention and held for the plaintiff "daughter." The pertinent language of the decision follows:

> "The intention of the testator, however, is to be determined not alone by the literal meaning of the language employed, but is to be gathered from the words used read in the light of the surrounding circumstances, such as the subject matter of his gift and the relations of the testator to the persons who are the objects of his bounty . . . The testator had no children. The plaintiff from her early childhood until her marriage four years before the death of the testator, had been a member of his family, and had been reared and treated by testator and his wife as their child. While the plaintiff was neither related nor legally adopted, she held in the minds

> and affection of the foster parents the position usually occupied by a daughter . . . The wording of the will disposes a genuine solicitude on the part of the testator that the homestead, together with all the effects associated with the home, should remain in the immediate family. This appears to have been his primary purpose. The homestead, etc. were to be the widow's if she survived him. If not, then they were to be the daughter's. If the widow did survive him, still they were to be the daughter's, unless the widow should otherwise direct by will . . . He thought that he had sufficiently expressed this idea when he made the devise to the daughter 'in case my wife should not survive me or should die intestate.' *Had he anticipated the widow might, by exercising her election under the statute, place an undivided interest in the home beyond her testamentary control, he doubtless would have expressed his thought with greater precision.* His purpose, however, is not in serious doubt. The intestacy of his widow as to the homestead place was what was in his mind when he said, 'or should die intestate.' Upon the filing of her waiver the widow ceased to have any testamentary power over that undivided half of the homestead . . . and as to such undivided half, she then became intestate within the meaning of testator's will as truly as if she had then died without a will. Accordingly, upon the filing of the widow's waiver, such undivided half passed to the plaintiff under the will of John Cotton." (Emphasis supplied.)

Thus, we see in *Fletcher* v. *Cotton,* the court has construed the will to give effect to the testator's intentions and the renunciation by the wife of her interest under the will was properly allowed to accelerate the daughter's interest even though the express conditions precedent to her taking

had not been met. This is precisely the situation with which we are faced in the present case.

Now, at long last, we come to the facts of the instant case. Respondent readily concedes that if the will merely provided for a gift over to Sharon Hall if Roberta Eddy predeceased testator, Roberta's renunciation would result in intestacy since in such case there would be no way to ascertain the testator's intentions in the event of renunciation. These provisions in the will, standing alone, would present a situation closely analogous to the factual situation presented by *In Re Lampshire,* 57 Misc. 2nd 332, 292 N. Y. S. 2d 578, cited by appellant James Eddy at Pg. 18 of his brief. The court in *Lampshire* correctly observed, based upon the facts of that case, that it

> "should not make a new will based on speculation as to what the testator might have intended."

However, Paragraph Fifth of our will adds an important and distinguishing dimension to the will. By disinheriting his heirs in said paragraph, testator has, by implication, expressed his intention that his stepdaughter, respondent Sharon Hall, should take under the will in the event of *any* termination of Roberta Eddy's precedent interest. This conclusion is virtually inescapable since a contrary interpretation of testator's intention in this regard leads to the anomalous conclusion that the testator intended that those whom he had specifically and unqualifiedly disinherited should, *under certain circumstances,* inherit the estate. Surely, such an absurd result should not be counten-

anced by this Court, especially where a rational alternative is available.

POINT V.

THE WILL SHOULD BE CONSTRUED IN SUCH MANNER AS TO AVOID INTESTACY AND IN ACCORDANCE WITH THE INTENTION OF THE TESTATOR.

It is a universal principle which is followed in every jurisdiction including the State of Utah that such interpretation should, if possible, be placed upon the provisions of a will as will prevent intestacy, especially where the will evinces an intention on the part of the testator to dispose of his whole estate.

74-2-10 *Utah Code Annotated* 1953, *California Probate Code*, Section 102.

Furthermore, a will must be construed according to the intention of the testator, expressed therein, and this intention must be given effect as far as possible.

74-2-1 *Utah Code Annotated* 1953, *California Probate Code*, Section 101.

A very recent California case, *Estate of Benton*, 4 Cal. App. 3rd 575, 85 Cal. Reptr. 633 (1970), demonstrates the current attitude of the courts in the application of these principles.

In *Benton*, the will provided that decedent's 2500 shares of stock in his company were to go to his daughter

and appellant (who had been hired by decedent to manage and eventually control the company), provided that the daughter and appellant executed a written agreement which was to provide that on the death of either the shares willed to the one dying should pass to the other.

The daughter refused to execute the agreement and the trial court found that this resulted in a failure of both bequests and that the entire estate should be distributed to the widow.

The trial court stated that it was the testator's intent that the bequests were conditioned upon mutual assumption of the obligations and that since the daughter did not agree to assume the required obligation, the bequest to both the daughter and appellant failed.

The appellate court noted three faults with this conclusion:

1. It results in intestacy as to the shares, *whereas the opposite should be assumed.*

2. The giving of the shares to the widow makes the will's expressions inoperative.

3. The widow receives shares reserved by the testator for others.

The court thereupon concluded that a reasonable interpretation of the will is that the daughter's refusal does *not* affect the bequest of 1250 shares to appellant, provided that he fulfilled all of the conditions required of him by the terms of the will. The appellate court pointed out that this

interpretation gave meaning to all of the provisions of the will and avoided intestacy as to any of the testator's property.

The analogy to our case is clear. By interpreting the will so as to give effect to the testator's intention that respondent Sharon Hall should take under the will in the event of *any* termination of Roberta Eddy's precedent estate, intestacy is avoided, the provisions of the will remain operative, and the disinherited heir, James Eddy, does not receive the estate which the testator had reserved for his step-daughter Sharon Hall.

CONCLUSION

Roberta Eddy has waived her right to inherit; James Eddy has been disinherited. Under these circumstances, the clearly expressed intention of Jack Eddy to bequeath his estate to his step-daughter Sharon Hall should not be thwarted, especially where this intention can be given effect in accordance with the well-established principles which have been discussed hereinabove.

Respectfully submitted,

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