

1973

In the Matter of the Estate of Bliss L. Hubbard : Proponents-Appellants' Brief In Support Of Petition For Rehearing

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Nature of This Case

This case is a contested proceeding for the admission to probate of a document offered as a codicil to the Will of the Decedent, Bliss L. Hubbard.

Disposition in Lower Court

A trial before a jury was held in the Court of the Honorable Gordon R. Hall, Judge in the Third Judicial District Court on December 7, 8, and 12, 1972. A special verdict was returned by the jury upon interrogatories submitted to it. The jury found that the decedent, Bliss L. Hubbard, was competent when she executed the codicil in question, that the codicil was executed under factual circumstances complying with the legal requirements for such execution, and that the decedent was not operating under any mistake at the time of the

execution of said codicil. (R. 525-26). The jury also found, however, that at the time of execution, the decedent was acting under undue influence. (R. 526). For this reason, the Trial Court entered a judgment that the codicil was not to be admitted to probate and was void and legally inoperative.

Nature of Relief Sought

On appeal, Proponents-Appellants sought a decision from this Court that the evidence did not support a finding of undue influence under well-established Utah case authority. On December 4, 1973, this Court entered an opinion upholding the jury and Trial Court judge. Proponents-Appellants now seek a rehearing of this matter.

Statement of Facts

The Proponents-Appellants, Laura K Mitchell and Eva L. Tiemersma, were the only living sisters of the decedent, testatrix, Bliss L. Hubbard. The Contestant-Respondent is the Walker Bank, acting as the trustee of a memorial fund created in the testatrix's will. Only the Bank has objected to the codicil; no individual beneficiary of Mrs. Hubbard's estate has objected to the codicil advanced by Proponents-Appellants.

Mrs. Mitchell, Mrs. Tiemersma, and Mrs. Hubbard were very close (R. 309, 375, 376, 311), and in November, 1971, when Mrs. Hubbard suffered a stroke, Mrs. Mitchell and Mrs. Tiemersma frequently visited with Mrs. Hubbard, who was confined to a rest home. Slowly, Mrs. Hubbard regained her strength (R. 318) and the sisters believed that she would survive the set-back and be restored to health (R. 325).

The jury found that Mrs. Hubbard was competent to execute the codicil in question. In fact, the only evidence introduced relating to Mrs. Hubbard's condition during the afternoon on which the codicil was signed, showed that Mrs. Hubbard was "very alert" (R. 318, 362, 368) and looked "very good" (R. 362). There was "no question" that she knew what she was doing (R. 351).

In the early morning hours (about 1:30 a.m.) preceding the afternoon on which the codicil was signed, Mrs. Tiemersma awoke and was unable to sleep (R. 318). As she lay awake, she reminisced in her mind about the good times the three sisters had enjoyed together. She recalled Mrs. Hubbard's reference several years earlier to a fund to memorialize her deceased husband (R. 312). Mrs. Tiemersma wondered whether the fund had, in fact, been established, and, if so, whether her sister,

Mrs. Hubbard, would be willing to give the interest on the fund to her other sister, Mrs. Mitchell, during Mrs. Mitchell's lifetime (R. 312). In accord with this thinking, Mrs. Tiemersma rose from her bed, went to her kitchen table and at about 3:00 a.m. that same morning, she typed the proposed codicil (R. 312). The beneficiary of the codicil, Mrs. Mitchell, knew nothing of its existence until several days after it was signed (R. 376, 389, 390).

Shortly before 3:00 p.m. that afternoon, approximately twelve hours after the codicil had been typed, Mrs. Tiemersma went to the rest home and visited with her sister, the decedent. Because she appeared to be improving so markedly, Mrs. Tiemersma hesitated to discuss the codicil she had prepared (R. 325). She decided to proceed, however, and presented the codicil to

her sister, Mrs. Hubbard, and asked whether Mrs. Hubbard would consider letting her sister, Laura Mitchell, have the interest from the memorial fund so long as Laura was alive. Mrs. Hubbard responded affirmatively (R. 312), and then the codicil was carefully read to Mrs. Hubbard (R. 314). Mrs. Hubbard was then asked if she was willing to do what the codicil said, and again, she responded, "Yes" (R. 314). Mrs. Tiemersma asked her if she realized that it would mean that Laura would have the interest from the whole memorial fund until Laura died, and the decedent said, "Yes" (R. 314, 331). Finally, it was reiterated that the memorial fund would eventually be distributed to the party for which it was designed and that Laura would benefit from the income only during her life. To this the decedent responded, "Yes, I wish I had thought of that" (R. 314).

After reading the codicil part by part, making sure that it was understood (R. 331), Mrs. Tiemersma asked if she could bring in some witnesses to witness the signing of the codicil. Mrs. Hubbard said, "Yes" (R. 314), and Mrs. Tiemersma then approached the two nurses who were charged with Mrs. Hubbard's care (R. 350, 362). As she re-entered the decedent's room, Mrs. Tiemersma said that the nurses were there to witness the signing. One witness stated that the decedent acquiesced with a smile (R. 334, 336), pleased with the prospect of having the codicil witnessed (R. 360).

The codicil was again read to the decedent, this time in the presence of the witnesses (R. 315, 331, 349, 359). The decedent was asked whether this is

what she wanted and whether she agreed with the document to which she said, "Yes" (R. 315, 334, 335, 348, 349, 335, 360). Mrs. Hubbard then signed the document in the presence of the witnesses (R. 315, 349-60, 361), and each witness signed in the presence of each other and in the presence of the decedent (R. 316, 350, 361).

The uncontradicted testimony of Nurse Glover (one of the witnesses to the signing) was that when the codicil was signed, Mrs. Hubbard knew what she was doing, was aware of the nature of the codicil, and was "perfectly willing to sign it" (R. 352). The other witness, Nurse Staley, corroborated this testimony (R. 360).

Argument

Were the facts in this case as stated in the opinion of the Court, this petition would be unnecessary. Indeed, there would have been no appeal in the first place.

A. Uncontroverted Material Facts Were Overlooked, Misconstrued, And Misstated, Clearly Affecting The Results Of This Case.

The opinion of this Court makes no mention of the fact that the jury found the testatrix was of sound and disposing mind on December 3, 1971, when the codicil was signed. (R. 526.) But with particularity, the Court sets out incorrect facts or limited portions of the facts indicating that the testatrix was not competent to exercise her own independent judgment and was, therefore, unduly influenced.

Set forth below are statements contained in the Opinion as contrasted with the uncontradicted facts:

Opinion

1. "Appeal from a judgment after a jury verdict that a decedent was subjected to undue influence when suffering from a stroke, and who signed a codicil to her will, executed many years before, switching a memorial trust fund which would then go to a sister."

2. "The codicil was executed some time after 1:30 a.m., a week before decedent died, when another sister had awakened suddenly, thought about it, and promoted it."

Uncontradicted Facts

The codicil did not switch the memorial trust fund to a sister. It merely conveyed the income from the fund to a sister, during the sister's lifetime. That sister played no part in the drafting or signing of the codicil. See copy of codicil. (R. 20)

The codicil was executed after 3:00 p.m. in the afternoon. (R. 313): "Q: Now will you tell me about what time of day that was [that Mrs. Tiemersma arrived at the Rest Home]? "A: [Mrs. Tiemersma] It was very close to 1:30. But as I had been in the morning finishing a personal task and when that was finished

I went and had some lunch and went straight to Midgley Manor, taking the little codicil with me; so it was around 2 o'clock. I guess, when I asked her about this -- close to 2:00." And see R. 356 [Nurse Glover's testimony]: "Q: [by Waldo] That's about 6 o'clock in the evening, is that?" "A: [by Mrs. Glover] Yes. About 3 hours after this will was executed -- well, at least a couple."

The witnessing nurses worked a 3:00 p.m. to 11:00 p.m. shift and witnessed the signing a "short time" after coming to work." (R. 353.)

3. "[T]he advocate for admission of the will to probate, awoke one night, at 1:30 a.m. a week before an apparently terminal patient died, went to a rest home where decedent obviously was dying

The impression conveyed by the opinion is incorrect. The jury found that Mrs. Hubbard was competent on the day in question (R. 525.) On that day she was not obviously dying. The Record showed that prior to the execution of the codicil, Mrs. Hubbard had improved. (R. 318.) In fact, the testimony was that "we thought then she was

going to make it."
(R. 311, 325).

On the date the codicil was signed, Mrs. Hubbard was described by her attending nurses as being "very alert" (R. 318, 362, 368), looking "very good" (R. 362) with good facial expression and color (R. 376). The following day a very close friend described her as being alert and in good spirits (R. 378), and as being "very bright mentally."

and stated she had reminisced about the many good times the three sisters had had together, and that during that period of reminiscing, the idea came to her to inquire as to whether interest on the fund "set up by her sister" to memorialize her deceased husband, should be diverted to her other sister. An hour and half later, at 3:00 a.m., on a typewriter in her kitchen, the moving party here

The Court's sense of the timing of these critically important events is incorrect. Mrs. Tiemersma could not sleep in the early morning hours of December 3, 1971. She lay in bed in her apartment and thought about the good times past. She remembered the memorial fund and then, alone, rose from her bed and typed the codicil. Over twelve hours later, she went to the rest home. There, in the early afternoon,

created and gave birth, in type, to the codicil subject to this action, had her sister sign it and

she discussed it fully with her sister, Bliss Hubbard. After the codicil was discussed, Bliss said she wanted to sign it and wished she had thought of it herself. It was then signed. (R. 311, 312, 313, 318, 356, 314).

procured a couple of nurses standing in the rest home hallway to witness it."

The nurses were not merely any nurses just "standing in the hallway." These were the specific nurses who had cared for Bliss Hubbard for weeks and months. (R. 350, 362). One of the nurses had known Bliss Hubbard for decades. (R. 361). Both nurses testified that the decedent knew what she was doing and was willing and pleased to sign the codicil. Moreover, the jury found upon competent evidence that these witnesses were serving at the request of Mrs. Hubbard. (R. 525-526).

It is little wonder that the Court found "facts" to support undue influence if

it is considered that the foregoing inaccuracies served as the premise for the decision. When these facts are corrected, however, there remains no basis for a finding of undue influence.

In reconsidering this case in the light of the corrected facts, the true question to be determined is not simply whether there was sufficient evidence to support a verdict and judgment of undue influence. The question ignored by the opinion is whether the veniremen, having first found that the testatrix was competent, "prerogatively canvassed the facts in an atmosphere of reasonable credibility," and then properly assessed those facts and determined that there was substantial and tangible evidence to support a verdict of undue influence.

B. Incorrect Principles Of Law
Were Applied Or Correct Principles
Of Law Were Improperly Applied,
Clearly Affecting The Result In
This Case.

We feel sure that this Court did not intend to indicate that a woman, even though she had suffered from a stroke, could not while competent execute a codicil to her will nine days before her death. Nor do we believe this Court intended to modify or overrule the previous decisions of this Court on the matter of undue influence.

As found by the jury, Mrs. Hubbard was of sound and disposing mind when she signed the codicil. (R. 526.) The evidence does not show that persuasion was used by Mrs. Tiemersma to have the

testatrix sign the codicil. After the reading of the codicil, Mrs. Hubbard replied, "I wish I had thought of that." (R. 314.) The jury further found that at the time of the signing of the document Mrs. Hubbard declared to the witnesses that it was a modification of her will. (R. 526.) The jury also found that the witnesses signed the document at the request of Mrs. Hubbard and that at the time Mrs. Hubbard signed the document, she did not do so by reason of a mistake as defined by the instructions of the Court. (R. 526.)

We have no quarrel with the law on this subject as stated by this Court in previous decisions. Our complaint is that a misapprehension of the facts of the case deprives the testatrix of her

legal right to change her will and deprives the beneficiary of the right to receive the interest from the trust fund as directed by the testatrix. We take the liberty of paraphrasing the words of this Court in Anderson v. Anderson, 43 Utah 26, 134 Pac. 553 (1913).

Is there anything in what we have set forth that can be dignified by the name of evidence which in any way tends to show undue influence practiced upon the decedent, or from which it may legitimately be inferred that she was influenced to make any kind of a codicil by anyone? It is not beyond the peradventure of a doubt that whatever influences were permissible from Mrs. Tiemersma's acts and conduct are just as likely to have emanated from pure sisterly motives to assist the sister of both the testatrix and Mrs. Tiemersma as from motives bent upon influencing her in the

the disposition of her property in accordance with Mrs. Tiemersma's will? (556.)

One is almost shocked by the assertion that the kindly offices of one sister to another when the latter is in distress may without any tangible facts be contorted into evidence showing sinister motives. If wills can be set aside by Courts upon the ground of undue influence upon proof such as in the present case, then any will may be assailed in any case where the decedent was sick for any length of time, and was so situated that her immediate relatives were concerned in her welfare and made any attempts whatever to alleviate her suffering or to comply with her express wishes or requests. What is said that Mrs. Tiemersma did or what is inferred she did as shown by this record cannot be tortured into evidence supporting the charge that she practiced undue influence upon Mrs. Hubbard. (556-7.)

We further take the liberty of paraphrasing the language In re Bryan's Estate, 82 Utah 390, 25 P.2d 602 (1933).

Mrs. Hubbard, if of sound and disposing mind and memory, had a right to dispose of her property as she saw fit . . . the codicil cannot be set aside on the mere suspicion that the sister suggested to her a certain disposition of her property. To vitiate the will, there must be more than mere influence or suggestion, it must be undue influence. However exhibited, it must be such influence as to destroy the free agency of the testatrix and impel her to do what she would not have done had she been free from the control of such influence. (610.)

Again, paraphrasing the Anderson case:

Undue influence may be established without showing any physical coercion or constraint. The influence that vitiates may be subtle and entirely without outward demonstration, but in whatever form it may appear, it must nevertheless, be made to appear from competent evidence that the will of the one accused of practicing undue influence dominated the will of the testatrix-- that the testament is in fact and effect the will of Mrs. Tiemersma and not of the testatrix. (557.)

The law as stated above has long and consistent support from other jurisdictions. [See Tibbe v. Kamp, 154 Mo. 579, 54 S.W. 879 (1899); Ginter v. Ginter, 79 Kan. 721, 101 Pac. 634 (1909), In re Kelly, 150 Ore. 598, 46 P.2d 84 (1935).]

There is a distinct difference between influences, which have been exerted upon the mind and have convinced the judgment, and importunities, machinations, and subtle appeals which overcome the will but do not convince the judgment. The latter but not the former constitute undue influence. (See Page, Wills, Section 15.6.)

The opinion in the case at bar does not disclose an intention to depart from the principles of law as above stated but at the same time it clearly deprives

the testatrix of her rights provided by those principles and takes from the beneficiary, who had nothing to do with the execution of the instrument, her property rights by avoiding the true issue. The distortion of the facts leaves the Proponents-Appellants without a remedy and writes into the enduring print of this Court's reports an abortive decision with a deceptive outward appearance of right.

Conclusion

To allow the present opinion to stand achieves finality without justice and furnishes no answer to the true


question presented by the appeal. A rehearing should be granted.

Dated: December 24, 1973.

Respectfully submitted,

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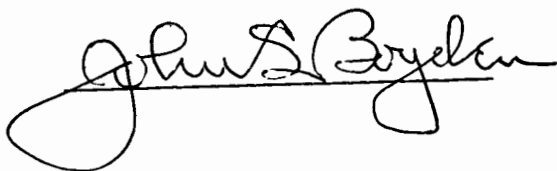
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Rehearing and Supporting Brief was served upon the individuals named below by mailing a copy thereof by First Class mail this 24th day of December, 1973.

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A handwritten signature in cursive script, reading "John S. Boyden". The signature is written in black ink and is positioned below the typed names of the recipients. It features a large, looping initial "J" and a long horizontal stroke that extends across the width of the signature.