

1995

In the Matter of the Estate of Marjorie S. Sims, Neil R. Mitchell v. Lynda Wood : Petition for Rehearing

Utah Court of Appeals

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BRIEF

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IN THE UTAH STATE COURT OF APPEALS

In the Matter of the Estate of
Marjorie S. Sims,

Deceased,

Appeal No. 950734 CA

Neil R. Mitchell,

(Civil No. 933900278 ES)

Petitioner / Appellant /
Cross-Appellee.

Priority No. 15

Lynda Wood,

Respondent / Appellee /
Cross-Appellant.

APPELLANT'S PETITION FOR REHEARING

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH, THE HONORABLE TIMOTHY R. HANSON, DISTRICT JUDGE

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FILED

MAY 31 1996

COURT OF APPEALS

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Appellant and Petitioner, Neil R. Mitchell ("Mr. Mitchell"), hereby petitions this Court for rehearing of the above-captioned appeal. In support of this Petition, Mr. Mitchell asserts the following points of law and fact which this Court overlooked or misapprehended in issuing its Opinion filed on May 16, 1996 (the "Opinion").

POINT I

THIS COURT'S ANALYSIS AS TO THE ESTATE
CHECKING ACCOUNT IS FLAWED.

Both this Court and the trial court acknowledge that by failing to fund the Bypass Trust, as required by Grant Sims' Will, Marjorie Sims breached her fiduciary duty as personal representative under Grant's Will. In exonerating her and her Estate from that breach, this Court ignored and misperceived the law and the facts as cited in Mr. Mitchell's briefs, in interpreting the relevant testamentary language and its effect.

First, in the Opinion, this Court paraphrases the operative provision of the Will and, by so doing, changes the meaning of the provision. With the language and the meaning altered, the Court's analysis of the passage is incorrect. The provision in question states as follows:

¹For the convenience of the Court, the abbreviations utilized in this Petition for Rehearing correspond directly to those utilized in Appellant's briefs in this appeal.

[t]he Trustees shall distribute to her [Mrs. Sims] without any conditions, all of the income of said trust. The trustees shall also distribute as much of the principal as is necessary for her proper health, support, and maintenance and to maintain her in the standard of living that she enjoyed during my lifetime.

After setting forth the full language of the provision, this Court then paraphrases it as follows:

The language of the Will clearly states that Mrs. Sims shall receive distributions from the principal of Mr. Sims' Estate "necessary for her proper health, support, and maintenance."

Significantly, the analysis omits the words "as is," which modify and qualify the word "necessary." This omission changes the phrase's meaning entirely and transforms it into an unqualified requirement for the trustee to distribute principal to Marge. This paraphrasing fits the Court's ultimate conclusion that Marge did no wrong, but does not square with the plain language of the Will.

In the next sentence of the Opinion, the Court again alters the language of the Will. In responding to Mr. Mitchell's argument that the phrase "as is necessary" requires the Trustee to consider the beneficiary's independent resources before distributing principal, the Court states:

We need not address that question because Mr. Sims' Will does not merely authorize the invasion of the principal for the "necessities of life."... Instead, Mr. Sims' Will mandates that Mrs. Sims shall have access to the principal "to maintain her [Mrs. Sims] in

the standard of living that she enjoyed during my lifetime."

Again, the Court omits the phrase "as is necessary" and glosses over the issue. The Court's rendition of the provision makes it appear that Marge was to have unfettered access to the principal of the Trust, which is not what is dictated by the plain language of the Will. Again, the alteration fits the Court's conclusion, but not the reality of the Will.

Further, by omitting the "as is necessary" language from the quote and focusing, instead, on the "shall distribute" language, the Court expressly avoided addressing the core issue of the meaning of the phrase "as is necessary" in this context. The Court's avoidance of this analytical responsibility is improper, particularly in an opinion designated for publication on an issue never before addressed by the appellate courts of Utah.

This issue was squarely before the Court. Ms. Wood cited cases analyzing similar clauses, and Mr. Mitchell cited several cases from other jurisdictions for the proposition that if a will or trust contains an "as is necessary" clause, the trustee is required or authorized to consider the beneficiary's independent resources before invading principal. See Appellant's Reply

²Contrary to the Court's analysis, Mr. Mitchell did not argue solely that Marge had to exhaust her resources before a distribution of principal could be made. He also argued, based on additional cases in his Reply brief, that the "as is

Brief, at pp. 8-14. In fact, on pages 12 and 13 of his Reply Brief, Mr. Mitchell cites three cases that hold that even if a will states that the trustee "shall distribute" principal payments, if the will also contains language that such distributions are only to be made "as is necessary," the trustee must examine the beneficiary's independent assets before making such a distribution. See In re Will of Flyer, 245 N.E.2d 718, 720 (N.Y. 1969); Hull v. Holloway, 20 A. 445, 447 (Conn. 1889); Stemple v. Middletown Trust Co., 15 A.2d 305, 307 (Conn. 1940). Mr. Mitchell's well-supported position, therefore, makes meaningless the distinction in the Opinion that because the Will says "shall distribute" the Court need not address the meaning of "as is necessary."

Mr. Mitchell also cites cases such as Security People's Trust Company v. United States, 238 F. Supp. 40 (W.D. Pa. 1965), that hold that a trustee of a testamentary trust has a fiduciary responsibility to the remainder beneficiaries to ensure that invasions of principal are proper. In this case, had the Trust been funded, Mr. Mitchell, as a co-trustee, would have owed the same fiduciary duty to the Remainder Beneficiaries.

necessary" language would have entitled him, as one of the co-trustees of the Trust, to consider Marge's vast personal wealth before invading the principal. The Court failed to even recognize this important aspect of Mr. Mitchell's position.

This Court failed to address these arguments or attempt to distinguish the cited case law. Even though the Court chose not to address the question of the meaning of the phrase "as is necessary," the issue was properly before the Court, and the Court's failure to analyze it undermines the integrity and value of the Opinion.

The second major flaw in the Court's analysis of Marge's breach is its failure to examine or consider Grant's intent in interpreting the operative provision. All of the cases cited by both sides in this matter hold that the court must first ascertain the intent of the testator before determining whether the phrase "as is necessary" requires examination of the beneficiary's independent resources.

An excellent discussion of the necessity and method of determining testamentary intent in analyzing such phrases is found in the case cited by Ms. Wood, First National Bank & Trust Co. v. Finkbiner, 416 P.2d 224 (Wyo. 1966). In that case, the Wyoming Supreme Court analyzed a testamentary provision similar to the one in the present case which authorized invasion of principal "as in [the trustee's] judgment may be necessary" for the beneficiary's proper care and support. The Wyoming Supreme Court made the following salient observations:

The great volume of litigation prompted by clauses similar to the one here and the struggle courts have

with those clauses in order to arrive at the intention of the grantor demonstrate the ambiguity. Usually, the divergence in results reached can be attributed in a large measure to the circumstances surrounding the creation of the trust. . . . Consequently, we think there is merit and defend its contention that competent evidence tending to show surrounding circumstances was admissible and was entitled to consideration. . . .

Because of the variance in the language of the clause being interpreted and the differing surrounding circumstances present in each case, reliance on precedents has its limitations. Seldom is it possible neatly to package an invasion clause into a particular class and say that it is controlled by some categorical general rule. . . .

As we have heretofore indicated, it is the intention of the grantor that must govern. That is to be ascertained, if possible, from the context of the trust instrument as a whole. Every word is to be given effect if that can be done without defeating the general purpose of the trust. If the intention of the grantor does not readily appear from the instrument, then the language used is to be read in light of the surrounding circumstances. . . . A narrow and unreasonable construction that would defeat the purpose intended by the grantor will not be adopted. Once ascertained, the intention must govern, provided that the result reached is not contrary to law.

Id. at 228-29 (citation omitted). The court must, therefore, determine the testator's intent by looking first to the language of the will and then to surrounding circumstances. The Finkbiner court applied this doctrine to the surrounding circumstances of that case and determined that the grantor intended the trust to benefit his spouse without regard to the spouse's independent resources.

The other two cases relied upon by Ms. Wood are correctly decided under these same principles. In In re Estate of

Lindgren, 885 P.2d 1280 (Mont. 1984), the beneficiary was in a nursing home and was represented by a conservator. The conservator had made payments out of her own pocket to support the beneficiary. Although need had not been established in the eyes of the trustee, the principal disbursements were necessary to reimburse the conservator and maintain the beneficiary in the nursing home. The motivation to establish the trust was to benefit the spouse but not to give her unfettered access to the principal because of her mental and physical condition.

In Godfrey v. Chandley, 811 P.2d 1248 (Can. 1991), both the trustee and the beneficiary had adequate wealth. However, the terms of the trust are dramatically different from those in the present case. The trust forbade the trustee to invade the principal. Only the income of the trust was subject to "as is necessary" restrictions. The purpose of the trust was clearly set forth in the will, and was to support the spouse. The court attempted first to ascertain the intent of the grantor.

In both Lindgren and Godfrey, the courts looked to the circumstances surrounding the wills and determined the testator's intent. The wills contained provisions similar to the one in Grant's Will, and the courts, like the Finkbiner court, found the generic provisions to be ambiguous enough to warrant resort to extrinsic evidence for interpretative guidance.

Dunklee v. Kettering, 225 P.2d 853 (Colo. 1950), relied upon by Mr. Mitchell, was also decided using the same principles. There, however, the surrounding circumstances demonstrated the testator's intent that the trustee examine the beneficiary's independent resources before invading the principal of the trust.

Thus, all of the cases cited by both sides were decided in accordance with Mr. Mitchell's position. Mr. Mitchell would, therefore, request that this Court reexamine this appeal to apply the Finkbinder rules to consider the circumstances and facts surrounding the creation of the Will. By so doing, this Court will conclude that Grant intended not only to benefit Marge, but also to preserve the bulk of his Estate for the Remainder Beneficiaries.

The form of the Will, on its face, as well as those facts in the record, support Mr. Mitchell's position but were completely ignored by this Court in drafting the Opinion. For example, Marge had abundant assets of her own, and the Trust was established with two co-trustees in order to safeguard the principal. The Court failed to address either of these facts, or those additional facts set forth in Mr. Mitchell's Reply Brief at pages 15 through 17, which demonstrate Grant's intent.

Further, other facts and circumstances surrounding the creation of the Will which are not in the record evidence Grant's

intent that most of the Estate be passed along to Mr. Mitchell and his family, as Remainder Beneficiaries. For example, Grant made substantial gifts of money and personal property to Mr. Mitchell and his family prior to his death. Mr. Mitchell and Grant enjoyed essentially a father/son relationship during the last years of Grant's life. Accordingly, Grant had genuine affection for Mr. Mitchell and his family and desired to benefit them through his Will.

Mr. Mitchell moved the trial court for summary judgment based on the undisputed fact, which this Court has acknowledged, that Marge breached her fiduciary duty in failing to fund the Trust. In hindsight, Mr. Mitchell now realizes that Grant's true intent can only be fully ascertained in a plenary evidentiary proceeding, rather than in summary fashion. He, therefore, requests that this Court rehear this appeal in order to remand it to the Trial Court in order to prevent injustice and avoid creating precedent without full factual development.

POINT II

THIS COURT'S AWARD OF \$2,875.40 IS IMPROPER

This Court, in upholding the Trial Court's award of \$2,875.40 to Marge's estate, has allowed her estate to be reimbursed twice for that amount. This is an error for three

reasons. First, even under Appellee's position, Marge was not entitled to take income from the Estate if she was taking principal to pay for her necessary living expenses. The Will, taken as a whole and in light of the surrounding circumstances and trust law, did not entitle Marge to the income from the Estate in addition to principal.

Mr. Sims declared in his will that:

[t]he Trustees shall distribute to her [Mrs. Sims] without any conditions, all of the income of said trust.

The words "without any conditions" are solely meant to place no limitation on the distribution of income in the event the income exceeds the amount necessary for her living expenses. A fundamental rule of trusts requires the trustees to first distribute the trust income to the beneficiary and then, and only then, to distribute so much of the principal to cover any deficiency in the case where the income is not sufficient.

Assuming the income of the Estate had been sufficient for Marge's living expenses, the trustees would have been forbidden from invading the principal.

It is undisputed that Marge withdrew \$96,642.55 from the Estate for her living expenses. This is all that she was entitled to under Appellee's theory of the case. Appellee stated in the Trial Court that "Grant's intention was to provide his

wife with the most discretionary use of his money possible by law . . . [emphasis added]."

Appellee has never maintained that Mrs. Sims was entitled to the Estate income and, in addition, her living expenses except in the context of this offset to Appellant's claim.

Second, the figure of \$2,875.40 awarded by the Court and labeled by the Appellee "interest" is not interest on the certificate of deposit appropriated by Marge. The figure has the following history. Grant's Estate filed a claim against Marge's estate on May 8, 1993. Part of that claim was for a cash deficiency of \$52,866.71. It was made up of seven specific adjustment items based on an accounting by the accounting firm of Grant Thornton. Some were positive, some were negative. One item was moved subsequently to a post Marge's death reconciliation bringing the total claim to \$52,875.40. The major item on the reconciliation is the \$50,000.00 certificate of deposit. Ms. Wood merely deducted \$50,000.00 from the figure and labeled the difference, \$2,875.00, "interest." The figure does not represent interest or income of Grant's Estate. There is no support in the record for the proposition that this figure represents interest. It is simply a sum of money for which Marge failed to account.

One of the six items in the \$52,875.40 reconciliation shows that Marge's estate suffered a cash deficiency in gross income of \$2,652.00 for 1992 which is the total gross income earned of \$13,094.77, less the gross income actually deposited by Marge in the bank account of \$10,438.27. After this disclosure, Appellee, Ms. Wood, did not make a claim for income of the Estate or ask for an accounting of total Estate income for the entire period between Grant's death and Marge's death. This implies she did not believe the Will gave Marge the income for herself and, in addition, the principal for her living expenses. The amount of \$2,875.40 should be returned to Grant's Estate even under the Appellee's theory of the case. It was not Estate income, Ms. Wood has not asked for Estate income, and Marge was not entitled to Estate income in addition to her living expenses.

Finally, there is no evidence on the record that Grant's Estate gained any income during the time between Grant's death and Marge's death. Marge's estate, therefore, is not entitled to this sum as "interest" or "income" of the Estate, as such did not exist.

POINT III

THIS COURT'S OPINION CREATES PROBLEMATIC PRECEDENT

From a pragmatic standpoint, the Opinion creates dangerous precedent and makes a destructive inroad into the sanctity and security of testamentary instructions. This Opinion will no doubt be cited in the future to excuse inappropriate behavior by personal representatives or trustees who wish to substitute their own desires for those of the testator. Marge's breach of duty, carried to a logical extreme, could have been far more damaging to Grant's Estate and still have been excused under this Opinion. If, for example, she had been younger and in better health at the time Grant died, she could have left her money untouched, which she did, and she could have spent all of Grant's Estate on travel, entertainment, and luxury purposes. Based on the record, the couple lived lavishly, and she could justify these expenditures of Grant's money as "maintain[ing] her in the standard of living that she enjoyed during [Grant's] lifetime," as instructed by the Will. Under this Court's Opinion, that behavior would be perfectly acceptable, regardless of the fact that the Trust had never been formed, the co-trustees had never been appointed, Grant's beneficiaries would be left with nothing, and Marge's estate, left untouched, would have grown larger by the day. Such a scenario is obviously unfair, but it is a

foreseeable possibility in the future under this Opinion. This Court should, therefore, vacate the Opinion and remand the matter to the Trial Court for further factual determinations, rather than create such a judicial escape hatch for complete disregard for testamentary fiduciary duties.

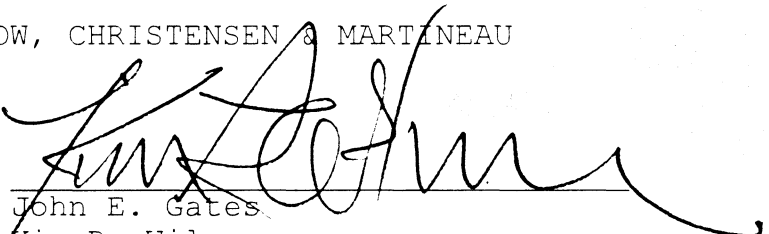
CONCLUSION

Based on the foregoing, Mr. Mitchell respectfully requests that this Court grant a rehearing of his appeal, and after reconsideration of the matter, remand it to the Trial Court for factual determination.

DATED this 30 day of May, 1996.

SNOW, CHRISTENSEN & MARTINEAU

By


John E. Gates

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Mitchell

ATTORNEY'S CERTIFICATION

Pursuant to Rule 35(a), Utah Rules of Appellate Procedure, I, Kim R. Wilson, counsel for Petitioner/Appellant Neil R. Mitchell, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

DATED this 30 day of May, 1996.

SNOW, CHRISTENSEN & MARTINEAU

By 

Kim R. Wilson

Attorneys for Appellant, Neil R.
Mitchell

Certificate of Mailing

I hereby certify that on the 30th day of May, 1996, I caused to be mailed two true and correct copies of the foregoing **Appellant's Petition for Rehearing** first class, postage prepaid, to the following:

John L. McCoy
310 South Main, #1305
Salt Lake City, UT 84101

SNOW, CHRISTENSEN & MARTINEAU

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