

## THE WILL CONTEST

The reason that Kelley had come to see me on Friday was that he was very upset. He was upset that Pastor Bergland had a Will prepared that basically left Mary's estate to the church and had taken it to Mary Palm to sign 54 hours before she died. Kelley wanted me to overturn that Will, to get it thrown out of Court so that Mary's prior Will, which left everything to Kelley and his aunt, could be probated. It was fortunate that I was not able to see Kelley on that Friday afternoon when I first met him because I knew very little about Will contest cases. I had only been practicing law for a little over a year and I was very inexperienced. Having made the appointment to see Kelley at 10:00 a.m. on Saturday gave me the opportunity to do a great deal of research on Will contest cases on Friday evening and on Saturday morning before he came. When Kelley came in to see me on Saturday with his distant cousin Martha Cannon, I was a lot smarter about Will contest cases and immediately realized how important it was to immediately file a contest to the Will which had been filed by the church for probate. I was able to file the Will contest a few days after Kelley came to see me. It was a timely contest. This began the battle with the church.

We spent a long time that morning talking to Kelley about the Church and about his aunts and uncle who lived in the "Palm House" in Round Rock, Texas. (We talked about his job as a carpenter with Carpenter's Local Union 769 in Altadena, California) and Kelley explained to me all of the ins and outs of the relationship between the Palm family and the Palm Valley Lutheran Church of Round Rock. Kelley was convinced that Mary would not have ever left her property to the church, but would have left it to him and Marguerite, Mary's only surviving sister.

Kelley was staying with Martha Cannon, who lived in Austin. We got together several times during January and February, 1977, and I got to know Kelley and Martha a lot better. Kelley felt a grave injustice had been done and he was looking to me to right that injustice. Why Kelley trusted me, I don't know but there was an immediate and almost unspoken determination that I was going to be his lawyer and he was going to be my client.

I didn't quite understand the history of all of the relationships. There was a very complicated history between the church and the Palm family, a complicated history of how his other aunts and uncles had left their property and even some disputes with the church over the property. So the Palms from the very beginning were a complex family, one that I knew I would have to spend a lot of time on before I would really understand what was going on.

It wasn't just the Palm family or facts of the case that were difficult; and it wasn't just the intrigue of having Mary Palm sign her Will 54 hours before she died and how she died. There were the legal issues, how to do battle with a local church, a very respected local church. All of these things were running through my mind and I knew that I needed help. At that point I turned to my good friend Dale Rye who was a fellow Episcopalian

that I knew from church and was a good attorney who officed one block from my office. I immediately took this case over to see him and told him: "Dale I need your help!" Luckily Dale was willing to help me and even though Dale was inexperienced in trial work, he had an incredible ability to analyze legal issues and to research the law. The legal issues in the case were daunting. Early on we learned that Mary had left what purported to be a handwritten Will. Even if we won the Will contest case, we would still have to deal with this holographic Will which Mary herself had written. In the holographic Will she basically left her estate to her sister Marguerite and her nephew Kelley for their lifetimes with the remainder to the church. But the holographic Will was far from clear. A court would have to make a judicial determination of the intent of this Will. What did these words mean that Mary had written on this scrap of paper? Did it mean that Kelley and Marguerite would only get the income from the farm, which was almost nothing, and the dividends and interest from the approximate \$120,000 worth of stocks and certificates of deposit? All told, Mary's estate was worth less than \$200,000.00. A simple life estate was not really worth fighting over; at least that's what we thought.

It didn't take Dale and I long to conclude that this was an impossible case to win. The church had great witnesses: Pastor Bergland, a popular pastor of one of the largest Lutheran churches in the county; John Carter; a highly regarded local attorney; Steve Pena, a well-respected Certified Public Accountant from Round Rock; and Clyde Parker, a well-respected banker from Round Rock. These were the witnesses we were up against. Dale and I would have to convince the jury that all of these distinguished persons were either lying or were mistaken about Mary's competency that evening and we were sure that was impossible.

We did, however, have one very good witness: Beatrice Carpenter, an LVN at Trinity Lutheran Nursing Home where Mary was living at the time of her death. I had spoken with Beatrice Carpenter on the telephone and she had told me in no uncertain terms that on the night that Mary signed the Will that Mary was confused and out of her mind. She was quite sure because she was Mary's nurse on the evening shift when Pastor Bergland came for the Will signing. We had other witnesses, Ailene Leschber from Thrall and Clemmie Watson of Taylor who were Mary's sitters. They both were very upset because Pastor Bergland had asked them to leave the room when he and his entourage had come in to execute the Will. Mrs. Leschber and Mrs. Watson were very close to Mary and very protective of Mary. As Mrs. Leschber said to me: "Why would they ask us to leave if they weren't trying to hide something?" They were clearly on our side and suspicious of the church.

Our other witness, Dr. Frank Ruzicka, was Mary's doctor. We were going to call him to testify regarding Mary's condition and we were going to ask his expert opinion as to whether or not she would have had the capacity to know what she was doing on the particular evening she executed the Will. Dr. Ruzicka was a distinguished doctor in Taylor, Texas, who was from Yugoslavia and we thought he would make an excellent witness.

Dale and I thought long and hard about this case and finally concluded that it would be in Kelley's best interest to try to settle this suit out of court because we thought the odds were stacked against us. Even if we won the Will contest case, we would still have to get a court to interpret the hand-written Will in our favor, a very difficult and risky venture. It seemed to me the church was going to get some of this property whether Kelley liked it or not. We took a deep breath and we drafted a letter to Kelley which basically advised him to settle with the church. We had had preliminary talks with the attorneys for the church and they were open to settlement negotiations. We were both smart enough lawyers to realize that this was going to be a difficult case to try with a lot of risk to both parties. It wasn't going to be an easy case for either side. Each of us thought that settlement was the only way out of this mess.

In the early days of this case it was hard to talk to Kelley because he didn't like to talk on the telephone. He had always said that if it was worth talking about, it was better to be there in person. But Kelley lived in Altadena, California. He worked for Carpenter's Local Union 769 in Pasadena, California. It was a long trip between California and Texas so most of our conversations were in letter form but Kelley would rarely answer our letters and we sometimes had to send him a telegram. But we wrote Kelley a letter and we laid out our case as best we could and we recommended that he authorize us to begin settlement negotiations with Palm Valley Lutheran Church.

Well, this was one of those occasions where Kelley didn't answer our letter. The other side was pestering us as to why we couldn't get an answer from our client. We couldn't really admit to them that he hadn't replied to our letter; we decided the only way to get his attention was to send him a telegram. The telegram said: "Must settle with church. We cannot win this case. We are not willing to try this case considering the odds of winning it. Please get back in touch with us immediately." We thought we would get a response from Kelley and indeed we did! Kelley was outraged. He called us and read us the riot act. His speech went something like this: He would never settle with the church. He didn't care how much it would cost to try the case. He didn't even care if we won or lost but he was going to fight the church and we were going to go to battle for him. He wouldn't take no for an answer.

He understood that he may lose, that the odds were stacked against him. But he was determined that we should fight to the bitter end. Kelley's speech reminded me a little bit of Churchill's speech: "We shall fight them in the hills. We shall fight them in the streets. But we shall never surrender." It was a call to arms. It was a wake up call to Dale and me. We changed our viewpoint. It was no longer "if" we were going to try the case but "when". We didn't argue with Mr. Kelley that day. We knew better. We knew that we were going to do battle with the church until we either won or lost. There was no turning back no matter how scared or inexperienced we felt. Mr. Kelley's telephone call had energized us. We started looking at the case as to how to win it. We began to take depositions. This was only the second time in my legal career that I had ever taken depositions. Dale did not have a lot of experience either, but between the two of us we got along pretty well. We talked to Tim Wright, the attorney for the church, and

we set the case for trial on August 27, 1979. We both realized there was no turning back. This case was going to be tried. We were number one on the docket.

The summer of 1977 had seemed hotter than usual. When August came, it seemed to get even hotter. Everyone was tired of the heat. They were tired of the summer and they were just tired. Our case had been assigned to a visiting judge from Marlin, Texas, Thomas Bartlett; our Presiding Judge, Bill Lott, had a conflict of interest and had recused himself from the case because he had represented Mary Palm and had actually written Mary Palm's original Will which left everything to Kelley and his aunt, Marguerite.

By happenstance, I had been roommates my first year of law school with Judge Bartlett's nephew, Tommy Sehon. I don't know if this made any difference at all, but I sensed that for whatever reason Judge Bartlett was sympathetic to Dale and me; perhaps if only because he could see that we were highly inexperienced lawyers up against some very experienced trial lawyers from Austin, Texas.

Judge Bartlett looked over at us as we set up to begin our first day of trial. We had two metal filing bins with numerous files with each of the depositions of our witnesses well-labeled. We had a trial notebook. We had all the legal issues briefed. We had the pretrial motions prepared. Judge Bartlett could tell that we were intent and prepared even if we were inexperienced.

We had been assigned to the old courtroom in the Williamson County Courthouse on the Square in Georgetown. It did not have central air but had some noisy window units at that time. The first day Judge Bartlett heard pretrial motions. We won some and lost some but Judge Bartlett had been fair with us and that was all that we could possibly ask for. We felt like we were off to a good start.

As we picked the jury, we could tell that this old courtroom was going to be difficult. The window units made too much noise. As the trial began and the church started to call its witnesses, it became obvious that unless the witness had a very strong voice, we would have to turn off the air conditioners in order for the jury to hear the witnesses. I don't need to tell you that trying a case in a courtroom with little or no air conditioning in the middle of August was a physical and mental challenge. At lunch every day I had to change shirts because I was absolutely soaked. Kelley, Dale and I would go back to my office for lunch. Sandy, my wife, would have lunch prepared for all of us when we got there. Usually we were working furiously to prepare for the afternoon session so we would take our sandwiches to our desk or Dale and I would huddle to strategize as to what we should do next. After Kelley finished his lunch he would go sit in his faded silver Mustang GT with all of the windows rolled up. It was the hottest part of the day. The temperature was in the upper 90's. I had never known anybody that could take that much heat. But Kelley seemed to like it.

But then, Kelley was an odd duck. From the day I met him, he was unconventional. Having been divorced for many years, Kelley's habits were less than hygienic and certainly not within the norm for anyone that I knew. He had the habit of wearing the

same clothes every day. He didn't believe in washing clothes. When he felt that they were dirty, he simply threw them away and bought new ones. But, of course, he didn't like to go shopping so he rarely bought new clothes. Since he didn't bathe on a regular basis either, his body odor was extraordinary. You could always tell he was present in a room by his scent. As it happened, Kelley sat at the end of our table in the courtroom, which put him within arm's reach of the jury box. This meant that the jury could smell Mr. Kelley and could see his ragged clothes and his shoes which were about to fall apart. Perhaps in the end this evoked sympathy from the jury.

I didn't know it at the time, but Kelley lived out of his car and most nights he would sleep in his car. The back seat was filled with trash, sleeping bags, fishing gear, old clothes and the leftovers from many lunches that he had not quite finished. I had expected Kelley to dress up for the trial; I didn't expect to see a man who had not shaved, who had not changed his clothes, who hadn't bathed or combed his hair, who had a terrible case of body odor and who was wearing shoes that were almost falling apart. But he wasn't going to change because of the jury. Kelley wasn't going to change because of me. Kelley was going to be Kelley. And Kelley didn't care if it offended anybody. That was who he was. So what the jury saw of Mr. Kelley on the first day of the trial was pretty much what they saw on the last day, except he was a little bit more rumpled and smellier.

Despite Mr. Kelley's disheveled appearance the case continued and the church presented their evidence. It was a straight-forward case—almost a professional case, with professional witnesses who were neat, clean, articulate and who knew their testimony well.

We cross-examined the witnesses but we couldn't make a whole lot of progress. These were good witnesses. They knew their facts. They knew what they believed. They certainly weren't going to be messed up on cross-examination. Dale and I did not expect much less than this. We were hoping our witnesses could do as well. We believed the truth would eventually come out.

After arguing our pretrial motions and picking the jury, it finally came time for Dale and I to present our case. Our main witness was Beatrice Carpenter. She had been the LVN on duty on the evening when Pastor Bergland entered Mary's room to have Mary execute the new Will which had been prepared by the attorney John Carter. Beatrice Carpenter told me on the telephone prior to taking her deposition that Mary was confused that evening and that there was no way she could have understood what she was doing. But at the deposition she changed her testimony and she testified under oath that Mary did know what she was doing and that she was quite competent on that evening, the evening on which the Will was signed. I called her up after the deposition and asked her, "Beatrice, why did you change your testimony? Why didn't you tell the truth?" There was a long pause and then there was a sobbing voice and she told me that she had been told to change her testimony by the higher ups at the Trinity Lutheran Nursing Home, which of course had a very close relationship with the Palm Valley Lutheran Church. Beatrice Carpenter had been under a great deal of pressure and she

did what she was told to do. But Beatrice Carpenter was a simple woman who wanted to tell the truth and felt very uncomfortable with having told a lie under oath. I told Mrs. Carpenter that prior to signing the deposition she had the right to change her testimony. She could strike out the part that was untrue and she could interlineate her correct testimony. And that is what she did; she told the truth.

This, of course, presents a difficult problem in court. Beatrice Carpenter, our main witness, had already lied under oath. The jury now had to be convinced that she would not lie under oath again. We believed Beatrice Carpenter and we believed that the jury would understand the pressure that she was under when she changed her testimony. Only time would tell if the jury would accept her side of the story. But actually she made a good witness. She admitted that she had made a mistake. She admitted she had lied and she told the jury why she lied. She was afraid of losing her job; it was quite believable that she could have been pressured to change her testimony because this would have been a major gift to the Palm Valley Lutheran Church and Trinity Lutheran Nursing Home would have benefitted also. There was a lot more riding on this case than money. There was the question of Pastor Bergland: had he been honest? Had he been forthright with Mary that evening? There was the reputation and honor and reputation of Palm Valley Lutheran Church and the Trinity Lutheran Nursing Home.

In addition to Beatrice Carpenter, one of our other most important witnesses was Mary's doctor. Dr. Rusiska was Czechoslovakian, well-educated, having studied in Bratislava, Yugoslavia, sophisticated, and had a wonderful Czech accent which was appreciated by the members of the jury who were of Czech descent. We could tell that the women of the jury particularly appreciated Dr. Rusiska who was very handsome, had a deep voice and was an eastern European. He was our star expert witness.

Besides being handsome, Dr. Rusiska was extremely articulate in being able to explain the term "transient aschemic attack". He likened it to how a yard turns brown in the summertime. Of course, all yards had turned brown on this August day and we all knew what it meant when a yard turns brown. He said a transient aschemic attack is like when your yard turns brown but when the first rain comes in September, it turns green again. Dr. Rusiska said Mary had many transient aschemic attacks over the past several months and it was very likely that she was having a transient aschemic attack on the night in which Pastor Bergland entered her room for her to sign the Will. This was based upon the nurses notes that said Mary was confused. At any rate, it was Dr. Rusiska's expert opinion that Mary was incompetent at the time she signed the Will.

Dale and I realized early on that this case was the source of a lot of tension in the Palm Valley Lutheran Church. Dale and I attended an early morning church service each week at the Episcopal Church in Round Rock. We went to the 7:00 a.m. Eucharist and breakfast. We liked their Priest, Sid Gervais, and the small group that gathered there every Tuesday morning. We found out from talking to Father Gervais that he was a good friend of the Assistant Pastor at Palm Valley Lutheran Church, Pastor Toerne. Father Gervais told us that Pastor Toerne had told him that the Lutherans were praying on a daily basis for victory in the matter of the Will contest case. Our breakfast group

discussed this matter at length. We all believed that instead of praying for victory, the Lutherans should be praying “that the truth be known”. Father Gervais actually had the temerity to suggest to Pastor Toerne that they change their prayers from “victory” to “truth”.

This Will contest case had become a religious battle between Palm Valley Lutheran Church and William D. Kelley and his henchmen, Dale Rye and me. We were definitely the enemy and they were praying that we would lose and the church would win.

It was Friday, August 31, the last day of the trial and the church had concluded their case with the testimony of Pastor Bergland. He was, of course, an impressive and articulate speaker. This particular day Dale Rye was absent from the trial. Dale had promised many months before that he would participate in a “cursillo” on this particular day. These are short courses in Christianity made famous by the Catholic Church and adopted by the Episcopal Church. Dale was a learned Episcopalian who had always wanted to become a Priest and had applied to the Bishop to go to Seminary. Although Dale never got to seminary, he continued to be one of the most learned Episcopalians in our Diocese. I really missed Dale’s presence when Pastor Bergland was being questioned. The last question that the church’s attorney, Bill Knolle, asked Pastor Bergland was this: “Pastor Bergland, will you please tell the jury what were the last words you said to Mary Palm before you left her room that evening?”

Pastor Bergland asked permission of the Judge, “May I stand up?” The Judge allowed him to stand. He said, “I always stand up when I say the Benediction and that is what I said to Mary that evening.” So he stood up and at the same time that Pastor Bergland stood up, some 50 members of Palm Valley Lutheran Church who were in the audience stood up with him and Pastor Bergland began to recite the Benediction: “May the Lord bless you and keep you. May the Lord make His face to shine upon you and be gracious unto you. May the Lord lift up the light of His countenance upon you and give you peace, wisdom and courage this day and forever more. Amen.” All the members of the Palm Valley Lutheran Church in the back of the courtroom said “Amen”. I said “Amen”. Bill Knolle then said, “Pass the witness.”

I felt like I had a hot potato on my hands. I had just said “Amen” along with the Lutherans and I’m now supposed to cross-examine Pastor Bergland? Well, I’m not a hard-nosed lawyer and I’m not a person that likes to tear a person to pieces, but even more than that, I didn’t have the talent as an attorney to destroy the testimony of Pastor Bergland. He testified that he thought what he did was right—that he had the Will prepared because Mary had written him an hand-written note that said she wanted to change her Will. Pastor Bergland said emphatically, “I took the bull by the horns.” That was the phrase that Dale and I liked most because that really described Pastor Bergland. He was a man who was going to do what he thought was right. The only problem, at least in our minds, was that on the night which he arrived with the Will for Mary to execute, Mary simply was not competent. But that did not stop Pastor Bergland from getting Mary to sign the Will. Being competent did not seem to matter because

they were doing it for the right reason. At least that was our interpretation of his testimony.

The trial ended on Friday. It was Labor Day weekend, so I had Saturday, Sunday and Monday to prepare my closing arguments. I remember going to the courthouse. In those days, being a local attorney in a small town, I had a key to the courthouse. I went up to the courtroom and practiced my closing argument to the jury. This was only my second jury trial. I was scared to death that I would not sound very good, that I would not be convincing, that I would not be able to articulate my ideas in a persuasive and orderly way. I went each day and tried to argue this case to an empty jury box and each day I got more and more nervous. Instead of becoming more and more confident, each day I became less and less sure of myself.

Finally, on Tuesday we were each provided our time to make our final arguments. Dale Rye was now back from cursillo. I went first. I stumbled through my arguments and then Dale stood up and, without even having been at the trial for the last day, he gave a brilliant argument. He was an excellent speaker. He was not nervous. He was calm and he was good.

We broke for lunch and after lunch Judge Barlett submitted the charge to the jury and the jury departed to deliberate. As I recall, the deliberations took all afternoon. Finally, just before dinner time, which is typically a time when juries come to the realization they either have to make a decision or they will have to come back, they came to a decision. We were called back into the courtroom. The verdict of the jury was read. They found Mary Palm to be incompetent on the night in which she signed the Will written by John Carter on behalf of the Palm Valley Lutheran Church. We had won the hardest part of the case. Dale Rye and I were ecstatic. We had beaten the best. We had beaten the law firm from Austin. We had been the underdogs and we had won the race. We couldn't have asked for anything more than a verdict from the jury throwing out this Will. Unfortunately, though, we still had the problem with the holographic Will which had been written by Mary about a month prior to her death and how that related to the prior written Will which Bill Lott had written, which left everything to my client, Kelley, and his aunt Marguerite.

The jury had given us what we wanted. Now it was up to us to figure out how to get the Court to interpret the holographic Will of Mary Palm in a way that would be beneficial to our client. The Judge asked us to prepare briefs and gave us plenty of time to do so regarding the interpretation of the holographic Will written by Mary Palm. Dale Rye and I realized that we needed an expert at this point. So I called Professor Ernest Smith, my Property and Wills professor at UT Law School. He was one of the most brilliant legal minds in Texas and I knew if anyone could find a solution, he could. He agreed to take the case. He was happy to do so and I think he was intrigued by the facts of the case.

Several weeks later we received a well-written brief from Professor Smith that concluded that the way the codicil should be interpreted was indeed that Marguerite and

Kelley did have a life estate in Mary's estate, but that even though it was a life estate, they could, in fact, sell the property or convey the property during their life time and if, when they died, they no longer had any portion of the property, then the church would get nothing, i.e. this life estate was much more broadly interpreted than the average life estate which I had learned about in Professor Smith's Wills class.

We did not think that the Judge would necessarily accept this interpretation, and the opposing counsel's brief was intent that Kelley and Marguerite would only get a life estate, which would limit them to only the income produced by this piece of land and the relatively small amount of income-producing assets of Mary's estate.

When Judge Bartlett finally ruled, he ruled in our favor. He decided that our brief was the correct brief, thus making Kelley and Marguerite the absolute beneficiaries of Mary Palm's entire estate. We were still worried because the church could appeal this case and we could lose everything that we had won so far. Dale Rye and I started thinking what to do if the church did appeal this case: What errors had we made? What errors had the Judge made in his decisions? Was Ernest Smith's brief going to hold up in the Court of Civil Appeals? Was Judge Barlett right? Luckily we never had to find out because the church did not appeal the case. Dale Rye and I were ecstatic and even though the estate of Mary H. Palm did have to pay the church's attorney's fees, victory was sweet and we enjoyed every minute of it. But more than victory, I appreciated that Mr. Kelley trusted me with this very important case, even when I didn't trust myself. We couldn't have won the case without Dale Rye's expertise, but neither one of us would have even tried the case had it not been for Mr. Kelley's bull-headed determination, whether or not prudent or even possible.