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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

In the Matter of the Estate of Merlin Morrison, Sr.,	:	
Deceased.	:	
______________________________	:	**REPLY BRIEF OF APPELLANTS**
Kathleen Kelly, Edna Morrison, Jim Morrison, John Morrison, Merlin Morrison Jr. and Marjorie M. Stead,	: :	 Case No. 960060-CA
Plaintiffs and Appellants,	:	Priority No. 15
vs.	:	
West One Trust Company,	:	
Defendant and Appellee	:	

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT DATED OCTOBER 31, 1995, THE HONORABLE FRANK G. NOEL PRESIDING

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IN THE UTAH COURT OF APPEALS

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ARGUMENT

I. SECTION 75-3-1006 OF THE UTAH CODE ANNOTATED BARS THE ESTATE'S RIGHT TO COMPEL REPAYMENT OF THE DISTRIBUTION TO THE ESTATE.

Appellee's argue that they may recover an improper distribution under § 75-3-909 and that § 75-3-1006 does not limit that recovery. Utah Code Ann. § 75-3-909 provides:

> Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him.

Appellee argues that recovery of the improperly distributed sales proceeds is not barred by adjudication or estoppel which points are argued in the parties' principal briefs. Nevertheless, a plain reading of Utah Code Ann. § 75-3-1006 in conjunction with § 75-1-201(41) reveals that appellees are barred from recovering the sales proceeds.

Utah Code Ann. § 75-3-1006 provides:

> (1) Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is barred at the later of:
>
> (a) as to a claim by a creditor of the decedent, one year after

the decedent's death;
and

(b) as to any other claimant and any heir or devisee, at the later of:

i. three years after the decedent's death; or
ii. one year after the time of distribution thereof.

In the instant case, the decedent died on January 17, 1983. The sale proceeds of the Ninth South property were distributed on or about December 23, 1992. See Exhibits "A" and "B" of Appellants principal brief. Appellee did not claim that the distribution of the sale proceeds of the Ninth South property was improper until its Response to Jr.'s Motion to Determine Claim Priority on March 3, 1995--at least 26 months after the distribution. Accordingly, under § 75-3-1006(1)(b) of the applicable statute, appellee has been barred from claiming that the distribution was improper since December 24, 1993.

Appellee, however, argues that they are neither a creditor, heir, devisee or successor personal representative, therefore, the limitation of § 75-3-1006 does not bar their recovery of the distribution of the sales proceeds. Nonetheless, under § 75-1-201(41), Utah Code Ann., a successor personal representative "means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative." Appellee's own statement of facts in their principal brief indicate that they were appointed as personal representative, succeeding two previous personal representatives. See Appellee's brief, Statement of Facts, ¶ 3-5. Therefore, appellee fits the statutory definition of a successor personal representative and thus, appellee is barred from claiming that the distribution was improper.

II. THE 1995 ORDER IS A FINAL APPEALABLE ORDER, AND THIS COURT SHOULD NOT DISMISS THIS APPEAL.

On October 31, 1995, the district court entered an order (the "1995 Order") finding that (1) the attorney fees are a cost of administration and have priority over the payment of taxes and (2) that "the previous distribution to the heirs in the amount of $326,000.00 from the sale proceeds of the 900 South Property was improper and sufficient funds should be repaid on a pro rata basis so that the claims against the estate may be satisfied." Appellees argue that this order is not a final appealable order and thus the appeal is not properly before the court.

Utah Rule of Appellate Procedure 3 provides for appeals from "final orders and judgments." Utah R. App. P. 3. In analyzing this rule, the Utah Supreme Court has stated that "a judgment, to be final, must dispose of the case as to all the parties, and finally dispose of the subject-matter of the litigation on the merits of the case." Kennedy v. New Era Industries, Inc., 600 P.2d 534, 536 (Utah 1979). The 1995 Order disposes of the case as to all of the parties and disposes of the subject-matter litigation on the merits of the case. The 1995 Order decided the appropriateness of the distribution as to all the parties as well as the priority of payment. Additionally, at least one state statute has declared similar orders as final appealable orders. In re Estate of Stepp, 648 N.E.2d 1120, 1122, quoting 134 Ill.2d R. 304, Committee Comments--1988, at 245-46. Therefore, the 1995 Order is a final order and judgment and this Court has jurisdiction of this appeal.

III. RECOVERY OF THE SALES PROCEEDS FROM THE HEIRS VOIDS THE 9TH SOUTH PROPERTY SALES TRANSACTION.

Should this Court require the distributees of the sale proceeds of the Ninth South property to repay appellee for its attorney fees, the sale of the Ninth South property should be rendered void or voidable. Judge Noel's December 23, 1992, Order required appellee to accept Morrison's offer if appellee had not completed the sale of property by December 21, 1992. See Exhibit "B" of Appellant's principal brief. Morrison Jr.'s offer provides, in relevant part, that "[t]he proceeds from the sale of the fore said [sic] property will be held in Escrow. Only the costs directly attributable to the sale, IE Court Costs, Attorney Fees, Taxes and Closing Costs and a winding down of the Estate will be paid from the Escrow account [sic]. The remaining funds will be distributed to the Heirs, A.S.A.P. [sic]." See Exhibit "A" of Appellant's principal brief.

Appellees, however, argue that they have complied with the terms of the offer and Judge Noel's Order and that there was no condition in Jr.'s offer that the sales proceeds could not be recovered to pay the costs of administration or other obligations of the Estate. Nonetheless, Jr.'s offer was expressly conditional in that only the costs directly attributable to the sale itself were to be paid from the Escrow account. Appellee's attorney fees are not directly attributable to the sale, rather they are attributable to the 1988 Action. Accordingly, recovering the sale proceeds from the distributees for attorneys fees not directly attributable to the sale would violate the primary condition in Jr.'s offer. Thus, should this Court require the distributees of the sale proceeds to repay appellee for its attorney fees, the sale of the Ninth South property should be

rendered void or voidable and Morrison Jr. would thus be entitled to $200,000.00 in improvements that he has made to the Ninth South property..

Appellees, next, argue that appellants did not raise this point in the lower court and therefore, this issue cannot be raised for the first time on appeal. Nevertheless, appellants did raise this point during oral argument on the motion, thus, this issue is not being raised for the first time on appeal.

IV. THE COURT HAS PREVIOUSLY RULED THAT THE SALE TO MORRISON JR. CANNOT BE VOIDED AND CANNOT THEREFORE, REQUIRE A REPAYMENT OF FUNDS UNDER CIRCUMSTANCES THAT WOULD MANDATE A RECISSION OF THE SALE.

Since the sale was conditioned upon the heirs irrevocably receiving the distribution which appellee is seeking to rescind the sale would have to be rescinded in order to achieve the result sought by the appellee. Morrison Jr., on the date of May 3, 1994, filed a motion to rescind the sale. R. 1386 The court denied the motion on the date of October 31, 1994, R. 1543. This decision is res judicata and the judge cannot now reconsider that issue at this late date.

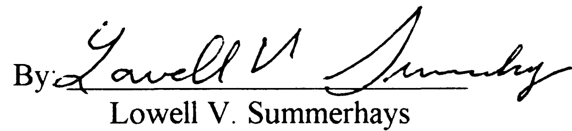
CONCLUSION

Wherefore, premises considered, the Morrison distributees ask that this Court reverse Judge Noel's Order dated October 31, 1995, and remand this matter to the probate court for

further proceedings consistent with the positions set forth herein.

RESPECTFULLY SUBMITTED this 31st day of July, 1996.

ADAMSON & SUMMERHAYS
Attorneys for Plaintiffs/Appellants



By: ______________________
Lowell V. Summerhays

CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS were hand delivered, this 31st day of July, 1996, to the foregoing:

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