

1996

In the Matter of the Estate of Majorie S. Sims,  
Deceased: Neil R. Mitchell v. Lynda Wood :  
Petition for Writ of Certiorari

Utah Court of Appeals

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John L. McCoy; Attorney for Respondent/Appellee.

John E. Gates; Kim R. Wilson; David L. Pinkston; Attorneys for Petitioner/Appellant.

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UTAH SUPREME COURT

BRIEF

960353

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IN THE SUPREME COURT OF THE STATE OF UTAH

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In the Matter of the Estate of  
Marjorie S Sims,

Deceased,

Appeal No 960353

Neil R Mitchell,

(Civil No 933900278 ES)

Petitioner,

Priority No

Lynda Wood,

Respondent

---

PETITION FOR WRIT OF CERTIORARI

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APPEAL FROM THE UTAH COURT OF APPEALS

---

JOHN E GATES  
KIM R WILSON  
DAVID L PINKSTON  
Attorneys for Petitioner/Appellant  
#10 Exchange Place, 11th Floor  
P O Box 45000  
Salt Lake City, UT 84145

JOHN L MCCOY  
Attorney for Respondent/Appellee  
310 South Main, #1305  
Salt Lake City, UT 84101

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P O Box 45000  
Salt Lake City, UT 84145

JOHN L MCCOY  
Attorney for Respondent/Appellee  
310 South Main, #1305  
Salt Lake City, UT 84101

## **I. LIST OF ALL PARTIES**

1.     Petitioner: Neil R. Mitchell, Successor Personal Representative of the Estate of G.  
Grant Sims
2.     Respondent: Lynda Wood, Personal Representative of the Estate of Marjorie S.  
Sims

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#### IV. QUESTIONS PRESENTED FOR REVIEW

1. Did the Utah Court of Appeals err in holding that a personal representative under a will did not commit an actionable breach of her fiduciary duty when she disregarded testamentary instructions and converted estate funds for her own use rather than funding a testamentary bypass trust, as instructed by the will?

2. If a will instructs the personal representative to place the residue of the estate in trust and that the principal of the trust is only to be invaded and distributed to the life beneficiary “as is necessary for maintenance and support. . .,” may or must the trustee consider the life beneficiary’s independent assets and resources before the principal may be invaded? Did the Utah Court of Appeals incorrectly analyze the meaning and effect of such testamentary instructions when it excused (1) the personal representative’s failure to fund the trust and (2) the personal representative’s unilateral invasion of estate principal for her own benefit, without consultation with the co-trustee of the unfunded trust and when she had abundant independent resources of her own?



## V. OPINION OF THE UTAH COURT OF APPEALS

The Court of Appeals' Opinion in this matter is published at the following citation:

In re Estate of Marjorie S. Sims, Neil R. Mitchell v. Lynda Wood, 918 P.2d 132 (Utah Ct. App. 1996).

## VI. GROUNDS FOR JURISDICTION

1. Mr. Mitchell seeks review of the Opinion of the Court of Appeals, entered in this matter on May 19, 1996 (the "Opinion"). (A copy of the Opinion is attached in Appendix A).
2. Mr. Mitchell petitioned the Court of Appeals for rehearing, which petition was denied by order dated July 19, 1996. (A copy of the Order Denying Rehearing is attached in Appendix A).
3. The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(a) and (5).

## VII. CONTROLLING STATUTORY PROVISIONS

Mr. Mitchell submits that the following Utah statutes are controlling:

Utah Code Ann., §§ 75-3-703, 75-3-711, and 75-3-909 (Copies are attached hereto in Appendix C)

## VIII. STATEMENT OF THE CASE

### A. Nature of the Case

This case involves a claim made against the estate of Marjorie S. Sims who acted as personal representative of her husband's estate and who breached her fiduciary duties as set forth in her husband's will. Mr. Mitchell, as Successor Personal Representative of the Estate of G. Grant Sims (the "Estate"), filed a claim against the Estate of Marjorie S. Sims, a probate proceeding pending in the Third Judicial District Court of Salt Lake County, State of Utah, under Probate No. 933900278 ES. Marjorie S. Sims was the original personal representative under the Last Will and Testament of G. Grant Sims (the "Will"). (A copy of the Will is attached in Appendix C). Under the Will, Marjorie Sims had specific duties which she did not carry out, and she converted funds of the Estate to her own use, contrary to the Will's specific instructions. The Estate was damaged by these actions and, therefore, Mr. Mitchell, as Successor Personal Representative of the Estate, presented the claim against the estate of Marjorie S. Sims after her death.

On or about August 18, 1993, Lynda Wood ("Ms. Wood"), as Personal Representative of the Estate of Marjorie S. Sims, denied Mr. Mitchell's claim. Mr. Mitchell then filed his Petition and First Amended Petition for Allowance of Claim, setting forth before the trial court his position that Marjorie Sims breached her fiduciary duty under the Will, that she misappropriated funds of the Estate, and that her estate was liable for the return of those funds.

**B. Course of Proceedings and Disposition Below**

Mr. Mitchell moved the Trial Court for summary judgment on his Petition. Ms. Wood also moved for summary judgment seeking to deny his claim. After oral argument, the Trial Court issued its Memorandum Decision granting in part and denying in part both motions. (Copies of the Memorandum Decision and accompanying Order are attached in Appendix B).

Mr. Mitchell filed a Notice of Appeal in this Court on July 19, 1995, taking appeal from that part of the Trial Court's Order on Motions for Summary Judgment that denied part of Mr. Mitchell's Motion and granted part of Ms. Wood's Motion. Pursuant to this Court's pour-over jurisdiction, Utah Code Ann. § 78-2-2(4), the appeal was heard by the Utah Court of Appeals. After full briefing and oral argument, the Court of Appeals affirmed that part of the Trial Court's Order denying Mr. Mitchell's Motion for Summary Judgment. The Court of Appeals did, however, reverse part of the Trial Court's Order that allowed Mrs. Sims' estate to retain \$1,900.00 as personal representative fees.

Mr. Mitchell petitioned the Court of Appeals to rehear the appeal. The petition was denied on July 19, 1996. Mr. Mitchell now seeks review of that part of the Court of Appeals' Opinion that affirms the Trial Court's Order denying Mr. Mitchell's motion.

**C. Statement of Facts**

G Grant Sims ("Grant") died on November 14, 1991, leaving his Last Will and Testament (the "Will"). Trial Court Record ("R."), at 61, 117. The Will named Grant's wife, Marjorie S. Sims ("Marge") as personal representative of Grant's Estate (the "Estate"), and appointed Marge and Mr. Mitchell as co-trustees of a testamentary trust named, "The George Grant Sims Estate

Tax Bypass Trust” (the “Trust”). R. 64, 65. Marge was not a beneficiary under the Will except as to items of personal property. R. 62.

The Will instructed Marge as personal representative to fund the Trust with the residue of the Estate. R. 62-63. The Will and the Trust also provided that Trust income be paid to Marge without condition, but that the co-trustees “shall also distribute” to Marge “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 [Grant’s] lifetime.” R. 62-63. The Will further directed that the Trust corpus be distributed to other beneficiaries upon Marge’s death. R. 63-64.

From the date of Grant’s death on November 14, 1991, until Marge’s death on February 27, 1993, Marge served as Personal Representative of the Estate. R. 7, 258. After her death, Mr. Mitchell was appointed Successor Personal Representative under the Will and continues to function in that capacity. R. 62-64, 258.

During the fifteen months Marge functioned as Personal Representative of the Estate, she never funded the Trust. R. 248, 511. Although she was not entitled to receive money personally from the Estate, she nonetheless drew checks on the Estate checking account in the amount of \$96,642.55 to pay for personal living expenses (the “Checking Account Payments”). R. 281-82, 351, 355-58. Marge’s expenditures were carefully recorded during her life by the accounting firm of Grant Thornton. R. 350-71.

At the date of Grant’s death, the value of the Estate was \$420,204.64. R. 329-30. At that same time, Marge’s net worth was \$515,455.21. R. 282-283. At the date of Marge’s death, the value of her estate was at least \$522,078.29 while Grant’s Estate had been seriously depleted by

Marge's withdrawals. R. 282. At the time Grant executed the Will, Marge simultaneously executed a will identical to Grant's Will, naming the same devisees and beneficiaries. R. 570-71. Marge revoked her duplicate will after Grant died. Her new will, currently being probated, named as devisees Respondent, Lynda Wood ("Ms. Wood") and her brother and mother, Terry and Wanda Short. R. 544.

On or about May 8, 1993, Mr. Mitchell filed a claim against the Estate of Marjorie S. Sims to recover the Checking Account Payments and other funds (the "Claim"). The Claim was denied by Ms. Wood, as Personal Representative, on August 18, 1993. R. 17, 47, 161. Mr. Mitchell then filed his Petition and First Amended Petition for Allowance of Claim and moved the Trial Court for summary judgment on the Claim based on the fact that Marge had used money of the Estate in contravention of the terms of the Will. R. 50, 207, 345. Ms. Wood also moved for summary judgment seeking to disallow the Claim. R. 381.

The Trial Court granted both motions in part and denied both motions in part. R. 510-15, 520-22. Specifically, as to the Checking Account Payments, the Trial Court found that it was not disputed that Marge had breached her fiduciary duty to fund the Trust. R. 511-12. Nonetheless, the Trial Court concluded that the moneys she took from the Estate were funds to which she would have been entitled, "as a matter of law," had the Trust been funded. R. 511. As support for this conclusion, the Trial Court, without further explanation, found that "the intent of Mr. Sims was to benefit his spouse, rather than conserve his Estate for residual beneficiaries." R. 511. As such, the Trial Court ruled that the breach was not actionable. R. 511-12.

On appeal, the Utah Court of Appeals affirmed the Trial Court's Order regarding the

Checking Account Payments. It stated:

We agree with the trial court's determination that "while there was a technical breach of [Marge's] fiduciary responsibilities to fund the bypass trust, the breach resulted in no damages and therefore is not actionable."

918 P.2d at 135. In arriving at this conclusion, however, the Court of Appeals paraphrased the relevant testamentary language in such a way as to alter its meaning. It omitted certain words in its analysis that made it appear as though the Will placed no restrictions on, and essentially mandated, the distribution of Trust principal to Marge. The court reached its holding with little or no analysis of Grant's testamentary intent or the effect of the "as is necessary" restriction in the Will.

Mr. Mitchell now seeks review of the Court of Appeals' Opinion.

#### IX. ARGUMENT

The following arguments set forth "special and important reasons," within the meaning of Rule 46, Utah R. App. P., justifying review of the Court of Appeals' Opinion by writ of certiorari.

## POINT I

### BY EXCUSING MARGE’S BREACH OF FIDUCIARY DUTY THE COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAS SANCTIONED SIMILAR DEPARTURES BY LOWER COURTS

The Utah Uniform Probate Code imposes fiduciary duties upon personal representatives and places them under a duty to strictly adhere to testamentary instructions. Utah Code Ann. § 75-3-703(1) provides that “A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code.” (emphasis added). Accordingly, Marge, as personal representative under the Will, was under a duty to carry out the terms of the Will with exactness and in conformity with the probate code.

Both the Trial Court and the Court of Appeals concluded that Marge breached that fiduciary duty but that the breach was not actionable against her estate. The Court of Appeals therefore allowed Marge to completely ignore the terms and instructions of the Will. The court failed to pay deference to Grant’s intent, as set forth in clear and unambiguous terms, and it excused Marge’s breach of fiduciary duty. The Court of Appeals sanctioned, in its published Opinion, the wholesale disregard for such testamentary instructions. It is clear from the terms of the Will that Grant intended to benefit not only his spouse, but also the Remainder Beneficiaries listed in the Will and Trust. The Court of Appeals’ Opinion, however, obviated that intent. Regardless of whatever estate tax planning vehicles or mechanisms employed by testators for the benefit of ultimate heirs, beneficiaries, or remaindermen in the future, this Opinion will render

such careful planing a nullity by permitting personal representatives to substitute their own choices and 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 the Opinion. If, for example, she had been younger and in better health at the time Grant died, Marge could have left her own assets untouched, which she did, and she could have completely exhausted all of Grant's Estate on travel, entertainment, and luxury purposes. Based on the record, the couple lived "lavishly," and she could have justified these expenditures of Grant's Estates' money as "maintain[ing] her in the standard of living that she enjoyed during [Grant's] lifetime." Under the 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. While Marge did not entirely deplete Grant's Estate, she did manage to significantly deplete it during her brief tenure as personal representative. In future cases, however, the logical extreme, while completely unfair to similarly situated remainder beneficiaries, is foreseeable because the Opinion's analysis is so scant and its language so broad. This Court should, therefore, grant certiorari to review the Opinion and ensure that such a rule does not become the law of this state and that such an undesirable outcome does not occur in the future..

Further, the Court of Appeals failed to properly analyze testamentary intent in the Opinion. It is a cannon of testamentary construction that courts must look to the four corners of the will in order to determine the testator's intent. Where an ambiguity exists, courts are then



authorized to examine the surrounding circumstances. Boyle v. National Union Fire Insurance Co., 866 P.2d 595 (Utah Ct. App. 1993). In this case, Mr. Mitchell has argued that the terms of the will clearly prohibit Marge's unfettered access to Estate principal. One fact alone--that Grant required two co-trustees to control the Trust and make distribution conditioned on Marge's necessity--demonstrates that intent. The Court of Appeals made no mention whatsoever of this evidence that Grant wished to have another person involved in the decision of which distributions of principal, if any, should be made to Marge during her lifetime. Had the Trust been created and funded, Marge could not have unilaterally withdrawn the funds as she did. To the extent any ambiguities exist as to the meaning and effect of such terms, the Court of Appeals should have remanded the matter for further factual determination.

The Court of Appeals made little or no attempt to analyze these terms or others in the Will to ascertain how they reflected Grant's testamentary intent. Because both parties argued that the terms had different meaning and effect, the court should have, at the very least, remanded the matter to the trial court for further factual determination regarding the circumstances surrounding the creation of the Will. The Court of Appeals' failure to correctly determine Grant's intent and its failure to attempt to analyze surrounding circumstances should be reviewed by this Court.

## POINT II

### THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF STATE LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THE UTAH SUPREME COURT

This appeal presents a question of first impression. Specifically, Utah courts have never interpreted the testamentary language at issue here or determined the meaning and effect of the instructions that trustees only “distribute as much of the principal as is necessary for proper health support and maintenance. . . .” In this case, Marge had abundant personal wealth. None of the Trust’s principal (had the Trust even been funded) would have been “necessary” for Marge’s maintenance or support because she could have easily paid for those expenses with her own funds. The record reflects that at the time of Grant’s death, Marge’s personal worth was approximately one-half million dollars, which only grew larger until her death. It is therefore necessary for this Court to determine if the “as is necessary” language permits or requires a personal representative or trustee to examine the beneficiary’s independent resources before invading principal on their behalf.

Courts from many other jurisdictions have addressed this issue and have determined that a trustee is permitted--and in some cases, required--to examine the beneficiaries’ independent resources before invading trust principal on their behalf. See, e.g., Dunklee v. Kettering, 225 P.2d 853 (Colo. 1950), which is a well-reasoned and well-supported decision on this issue.<sup>1</sup>

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<sup>1</sup>The Dunklee court relies upon several similar cases: In re Martin’s Will, 199 N.E. 491, 492 (N.Y. 1936) (“the private income of the beneficiary must be considered in determining whether such need exists”); In re Seacrist’s Estate, 66 A.2d 836, 838 (Pa. 1949) (“To know the quality and quantity of [the beneficiary’s] private estate becomes very material in order to

Several courts have held that even if the will instructs that the “trustee shall distribute principal,” the trustee is entitled to consider the beneficiaries’ other assets before making an invasion into the principal of the trust.<sup>2</sup> This rationale is sound. The trustee has a fiduciary duty to remainder beneficiaries and must safeguard their interests against improper access to trust principal. If the life beneficiary can easily pay expenses with her own assets, as in this case, then to distribute principal to her is contrary to the interests of the remainder beneficiaries and a violation of fiduciary responsibility..

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determine his good faith and his necessities.”); Board of Visitors v. Safe Deposit and Trust Company, 46 A.2d 280 (Md. Ct. App. 1946) (“circumstances and income of the beneficiary should be taken into consideration in determining whether to invade the principal of the trust.”); Bridgeport City Trust Company v. Beech, 174 A. 308 (Conn. 1934) (holding under similar circumstances and testamentary language that, without a showing of need, principal may not be invaded.).

Subsequent to the Dunklee decision, several other jurisdictions analyzed the issue and rendered similar holdings. See, e.g., Sibson v. First National Bank & Trust Company, 165 A.2d 800 (N.J. Supp. Ct. 1960) (“the separate income of the life tenant must be considered in determining whether it is necessary to invade corpus.”); Security-People’s Trust Company v. United States, 238 F. Supp. 40 (W.D. Pa. 1965) (“Since there are a series of further life beneficiaries and remaindermen, the trustee would be under a strong duty to protect their interests in the face of any request of the [wife] for invasion. Under the Pennsylvania decisions, a court would be bound to look into the assets of her own estate, which were well known to the trustee, who managed them.”); N.C.N.B. National Bank of Florida v. Shanaberger, 616 So.2d 96 (Fla. Ct. App. 1993) (holding that in order to fulfill fiduciary his obligation, the trustee was required to look at the life beneficiary’s own assets to determine whether there was a need to invade the principal).

<sup>2</sup>See, e.g., In re Will of Flyer, 245 N.E.2d 718 (N.Y. 1969) (holding that even though the trustee had absolute and sole discretion, the testamentary gift of principal was conditioned upon the widow’s need); Hull v. Holloway, 20 A. 445, 447 (Conn. 1889) (“So long as [the husband] is able to support himself . . . , the trustee has no right to pay over to him, . . . , any portion of the income or principal of the trust fund.”); Stemple v. Middletown Trust Company, 15 A.2d 305 (Conn. 1940) (“[beneficiary’s] personal estate, . . . is to be taken into account by the trustees in future payments to her.”).

This is a significant question of state law, as this language is commonly utilized in testamentary instruments. The Court of Appeals' analysis of the provision, however, is disappointingly insufficient given the importance of the issue. While the court properly characterized many of the facts, it simply glossed over many others. It also misquoted, paraphrased, and omitted words from the "as is necessary" restriction in its Opinion. By so doing, it altered the syntax, meaning, and effect of the phrase. The analysis, therefore, fits the court's ultimate conclusion but does not square with the plain language of the Will.

One example of this distortion is found on page 4 of the Opinion. After setting forth the full language of the provision, the 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."

918 P.2d at 134. Significantly, the Opinion 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.

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. Such an issue deserves more careful analysis and should therefore be addressed by the Utah Supreme Court. Those individual and corporate trustees in Utah who make daily decisions regarding disbursements of funds held in trust based on similar language are entitled to the analysis and guidance of this Court to assist them in fulfilling their fiduciary duties.

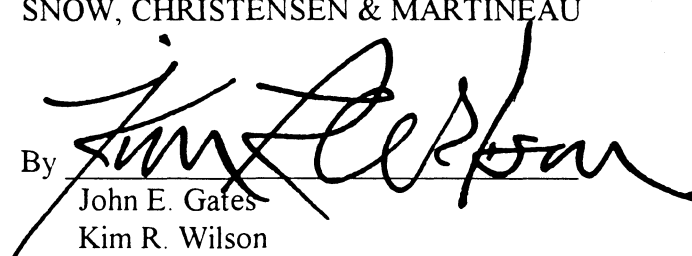
XI. CONCLUSION & RELIEF REQUESTED

Mr. Mitchell respectfully requests that this Court issue a writ of certiorari to the Utah Court of Appeals and that it review the Court of Appeals' Opinion in this matter.

DATED this 19 day of August, 1996.

SNOW, CHRISTENSEN & MARTINEAU

By

  
John E. Gates

Kim R. Wilson

David L. Pinkston

Attorneys for Appellant, Neil R. Mitchell

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of August, 1996, I mailed two true and correct copies of the foregoing **Petition for Certiorari** first class, postage prepaid, to the following:

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

SNOW, CHRISTENSEN & MARTINEAU

By 

John E. Gates  
Kim R. Wilson  
David L. Pinkston  
Attorneys for Neil R.  
Mitchell, Appellant

N: 17693 1 DLP CERTPET.3

## APPENDICES

### Contents:

#### Appendix "A"

Opinion of the Utah Court of Appeals, filed May 16, 1996 (slip Opinion and published Opinion)

Order of the Utah Court of Appeals denying Appellant's Petition for Rehearing, dated July 19, 1996

#### Appendix "B"

Memorandum Decision entered by the Third Judicial District Court, Salt Lake County, State of Utah, dated March 13, 1995

Order on Motions for Summary Judgment, entered by the Third District Court, dated June 30, 1995

#### Appendix "C"

Text of controlling statutes, Utah Code Annotated §§ 75-3-703, 75-3-711, 75-3-909  
Last Will and Testament of George Grant Sims



## APPENDIX "A"

FILED

This opinion is subject to revision before  
publication in the Pacific Reporter.

MAY 16 1996

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

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

OPINION  
(For Official Publication)

Neil Mitchell,

Case No. 950734-CA

Appellant and Cross-  
appellee,

F I L E D  
(May 16, 1996)

v.

Lynda Wood,

Appellee and Cross-  
appellant.

-----

Third District, Salt Lake County  
The Honorable Timothy R. Hanson

Attorneys: John E. Gates, Kim R. Wilson, and David L. Pinkston,  
Salt Lake City, for Appellant and Cross-appellee  
John L. McCoy, Salt Lake City, for Appellee and  
Cross-appellant

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Before Judges Davis, Bench, and Jackson.

BENCH, Judge:

Neil Mitchell appeals the trial court's entry of summary judgment in favor of Marjorie Sims's estate. Lynda Wood cross-appeals. We affirm in part and reverse in part.

#### BACKGROUND

Grant and Marjorie Sims enjoyed a long married life together. Mr. Sims died in 1991, leaving a will which provided for the creation of a bypass trust and designated Mrs. Sims the personal representative of his estate. He also named Mrs. Sims and Mitchell co-trustees of the bypass trust, which was to be funded from the residue of his estate. The will provided that trust income was to be paid to Mrs. Sims, without condition. The

will further provided that the trustees were required to distribute to Mrs. Sims as much of the principal as necessary for her proper health, support, and maintenance. After Mrs. Sims's death, the residue of the trust's corpus was to be distributed to other beneficiaries, including both Mitchell and Wood.

During the time that Mrs. Sims served as personal representative, she never funded the trust. Instead, she withdrew \$96,642.55 directly from the estate checking account to pay for her personal living and medical expenses. Mrs. Sims received an additional \$52,875.40 from the estate, derived from a \$50,000 certificate of deposit plus interest. Finally, Mrs. Sims received a \$12,445.86 personal injury settlement for injuries Mr. Sims had sustained before his death.

Mrs. Sims died in 1993. Her will named Wood as the personal representative of her estate. Mitchell, as co-trustee and a remainder person of Mr. Sims's estate, filed a claim against Mrs. Sims's estate for the monies that Mrs. Sims had removed from Mr. Sims's estate. Wood conceded that \$48,100 from the certificate of deposit in Mr. Sims's name had been wrongfully taken from Mr. Sims's estate.<sup>1</sup> Mitchell moved for summary judgment for return of all the funds removed from Mr. Sims's estate. Wood also filed for summary judgment seeking to disallow Mitchell's claim.

The trial court granted in part and denied in part both parties' motions for summary judgment. The trial court found that Mrs. Sims had failed to fund the trust, but that she was nonetheless entitled to the \$96,642.55 from the estate checking account. The trial court determined that the funds were used for her necessary support and maintenance and that there was therefore no damage to Mr. Sims's estate. Regarding the certificate of deposit, the trial court found that \$48,100 was undisputedly owed by Mrs. Sims's estate and ordered that amount paid to Mr. Sims's estate plus 10% interest. The trial court also allowed Mrs. Sims's estate to retain the \$2875.40 in interest income from the certificate of deposit and the \$1900 claimed as personal representative fees. Finally, the trial court found that Mrs. Sims's acceptance of the \$12,445.86 personal injury settlement was an improper diversion of the money from Mr. Sims's estate and awarded that amount to Mr. Sims's estate.

Mitchell appeals from the trial court's decision concerning the \$96,642.55 that Mrs. Sims withdrew from the estate checking

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1. Wood argued that Mrs. Sims's estate was entitled to the \$2875.40 in interest and an additional \$1900 as personal representative fees.

account and the allowance of interest income and personal representative fees from the certificate of deposit. Wood cross-appeals the trial court's summary judgment in favor of Mr. Sims's estate on the personal injury settlement amount and award of interest.

## STANDARD OF REVIEW

Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993). Because entitlement to summary judgment is a question of law, we accord no deference to the trial court's resolution of the legal issues presented. Id.; Ferree v. State, 784 P.2d 149, 151 (Utah 1989).

## ANALYSIS

### A. Estate Checking Account

Mitchell first argues that the trial court erred when it allowed Mrs. Sims's estate to keep the \$96,642.55 that Mrs. Sims had drawn from the checking account of Mr. Sims's estate. Mitchell contends that because Mrs. Sims did not fund the trust provided for in Mr. Sims's will, she must return all the money to Mr. Sims's estate. We disagree.

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 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.

The trial court found that although Mrs. Sims did not fund the trust, she was entitled to the funds since they were used for her support and maintenance. The record reflects that Mrs. Sims spent approximately \$76,000 from the estate's checking account on her medical expenses. The balance of the money drawn from the estate's checking account was for Mrs. Sims's living expenses. The accounting report and affidavit of the accountant for Mr. Sims's estate confirm these expenses. Mitchell did not dispute Mrs. Sims's expenses, contending merely that the expense accounting was irrelevant because any money used was "improperly

converted from the estate." Because Mitchell did not challenge Mrs. Sims's expenses below, he is precluded from challenging them on appeal. Jensen v. Bowcut, 892 P.2d 1053, 1056 (Utah App.) (holding acquiescence to opposing argument before trial court precluded challenge on appeal), cert. denied, 899 P.2d 1231 (Utah 1995); see also Salt Lake City v. Ohms, 881 P.2d 844, 847 (Utah 1994) (stating court will review only those issues presented below unless exceptional circumstances or plain error are shown).<sup>2</sup>

The language of the will clearly states that Mrs. Sims shall receive distributions from the principal of Mr. Sims's estate "necessary for her proper health, support, and maintenance." Mitchell argues that, in other jurisdictions, the use of "as is necessary" language requires the beneficiaries of a trust to exhaust their own resources before invading trust principal. See Dunklee v. Kettering, 225 P.2d 853, 855-57 (Colo. 1950). But see In re Estate of Lindgren, 885 P.2d 1280, 1282-83 (Mont. 1994). We need not address that question because Mr. Sims's will does not merely authorize the invasion of the principal for "the necessities of life." Dunklee, 225 P.2d at 853. Instead, Mr. Sims's 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." Therefore, we agree with the trial court's determination that "while there was a technical breach of her fiduciary responsibilities to fund the bypass trust, the breach resulted in no damages and therefore is not actionable."

#### B. Certificate of Deposit

Mitchell challenges the trial court's award to Mrs. Sims's estate of \$1900 in personal representative fees and \$2875.40 that Mrs. Sims claimed as interest earned from Mr. Sims's \$50,000 certificate of deposit. Mitchell first argues that Mrs. Sims's estate did not properly petition the trial court for the \$1900 in claimed personal representative fees pursuant to Utah Code Ann. § 75-3-718(1) (1993). Wood stated in her Memorandum in Response to Mitchell's Motion for Summary Judgment that she deducted from the \$50,000 "\$1900 as fees for acting as personal representative." We need not decide whether this qualifies as a proper claim

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2. Mitchell also claims that Wood should be estopped from claiming Mrs. Sims's estate had no liability towards Mr. Sims's estate. Mitchell concedes that estoppel is a new argument but contends that it is not a new issue. However, "[w]e decline to honor such a distinction." Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp., 850 P.2d 447, 455 n.31 (Utah 1993). Consequently, we will not address the estoppel issue.

pursuant to section 75-3-718(1), since Wood provided no evidence to support the fees after Mitchell challenged them on summary judgment. See Utah R. Civ. P. 56(c). Consequently, we reverse that portion of the award.

Mitchell also asserts that the trial court improperly awarded Mrs. Sims's estate \$2875.40 in claimed interest from the certificate of deposit. Wood argues that the money was interest earned from the certificate of deposit in Mr. Sims's name and that, since Mr. Sims's will declared Mrs. Sims the beneficiary of all income from Mr. Sims's estate, she was entitled to keep the interest earned. Mitchell simply contends that because the trust was not funded, Mrs. Sims did not have the right to keep that money. We disagree. Again, although Mrs. Sims did not fund the trust as Mr. Sims's will directed, Mr. Sims explicitly stated that Mrs. Sims was to receive the income from Mr. Sims's estate "without condition." Thus, the trial court properly allowed Mrs. Sims's estate to retain the interest from the certificate of deposit.

#### C. Settlement Proceeds

Wood cross-appeals the trial court's order to return to Mr. Sims's estate the \$12,445.86 received from the settlement of Mr. Sims's personal injury claim. Wood argues that since Mrs. Sims claims to have paid a large portion of Mr. Sims's medical expenses, Mrs. Sims could retain the settlement proceeds pursuant to Utah's survival statute. See Utah Code Ann. § 78-11-12 (1992). Utah's survival statute provides:

If prior to judgment or settlement the injured person dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representative or heirs of that person are entitled to receive no more than the out-of-pocket expenses incurred by or on behalf of that injured person as the result of his injury.

Utah Code Ann. § 78-11-12(1)(b) (1992). According to Utah's survival statute, Mrs. Sims could only recover the personal injury settlement in her capacity as personal representative of Mr. Sims's estate. Wood's reliance on In re Behm's Estate, 117 Utah 151, 213 P.2d 657 (1950) for the argument that she is entitled to the settlement proceeds is misplaced. Behm is a wrongful death case and not a personal injury settlement case. In a wrongful death cause of action, the heirs of the decedent personally hold claims for lost support and other personal losses. See Haro v. Haro, 887 P.2d 878, 879 (Utah App. 1994).

In a personal injury case, by comparison, the cause of action is owned not by the heirs, but by the injured party. As personal representative of Mr. Sims's estate, Mrs. Sims was therefore authorized to receive the settlement only on behalf of his estate. Mrs. Sims could then present a claim to his estate for out-of-pocket expenses, pursuant to the survival statute. She has never done that.<sup>3</sup> We therefore affirm the trial court's award of the settlement proceeds to Mr. Sims's estate.

We have considered the other issues raised, and we adjudge them to be without merit. Accordingly, we do not address them. See State v. Carter, 776 P.2d 886, 888 (Utah 1989) ("Court need not analyze and address in writing each and every argument, issue or claim raised."), cert. denied, 116 S. Ct. 163 (1995).

#### CONCLUSION

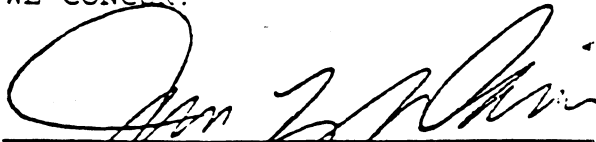
We affirm the order of the trial court except as to the award of \$1900 in personal representative fees. That portion of the judgment is reversed. The case is remanded to the trial court for entry of a new judgment consistent with this opinion.

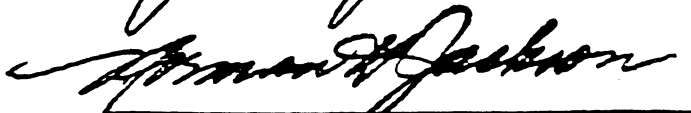


Russell W. Bench, Judge

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WE CONCUR:

  
James Z. Davis,  
Associate Presiding Judge

  
Norman H. Jackson, Judge

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3. Mrs. Sims's estate argues that because she was Mr. Sims's "only surviving intestate heir," she is entitled to the settlement proceeds. However, it is evident that Mr. Sims did not die intestate. He had a will that designated Mrs. Sims as the personal representative, and devisee of personal property. Thus, she could not take the settlement as an intestate heir.

**In the Matter of the ESTATE OF  
Marjorie S. SIMS, Deceased.**

**Neil MITCHELL, Appellant  
and Cross-Appellee,**

**v.**

**Lynda WOOD, Appellee and  
Cross-Appellant.**

**No. 950734-CA.**

**Court of Appeals of Utah.**

**May 16, 1996.**

Co-trustee and remainderman of decedent's husband's estate brought claim against decedent's estate for monies removed from husband's estate. Co-trustee and remainderman and personal representative for decedent's estate cross-moved for summary judgment. The District Court, Third District, Salt Lake County, Timothy R. Hanson, J., granted in part and denied in part both motions. Parties cross-appealed. The Court of Appeals, Bench, J., held that: (1) decedent's estate was not required to remit to husband's estate funds decedent had withdrawn from husband's estate's checking account; (2) decedent's estate was not entitled to personal representative fee award from husband's estate; (3) decedent's estate was entitled to retain interest earned on certificate of deposit that had been part of husband's estate; and (4) decedent was not entitled to receive settlement from testator's personal injury claim.

Affirmed in part, reversed in part, and remanded.

**1. Appeal and Error ⇨842(1)**

Inasmuch as entitlement to summary judgment is question of law, reviewing court accords no deference to trial court's resolution of legal issues presented.

**2. Executors and Administrators ⇨81**

Although personal representative's failure to fund husband's testamentary trust with estate residue was technical breach of

quired to remit to husband's estate funds personal representative withdrew from husband's estate checking account, given will provision that personal representative was entitled to trust principal as needed for her medical and living expenses and trial court's finding that withdrawn funds were used for personal representative's support and maintenance.

**3. Executors and Administrators ⇨256(4)**

Trust residuary beneficiary, whose claim against settlor's surviving spouse's estate for monies she removed from settlor's estate was denied, was precluded on appeal of that denial from challenging medical and living expenses of spouse, who, pursuant to settlor's will, was entitled to distributions of trust principal to extent required for such expenses, by his failure to challenge expenses below.

**4. Appeal and Error ⇨170(1)**

Appellate court would not address estoppel argument raised for first time on appeal despite appellant's contention that issue was not new even though argument was.

**5. Executors and Administrators ⇨501**

**Judgment ⇨185.3(1)**

Estate of personal representative of testator's estate was not entitled to personal representative fee award from testator's estate when personal representative's estate failed to provide evidence to support award after co-trustee and residuary beneficiary of testator's testamentary trust challenged fees on summary judgment. Rules Civ.Proc. Rule 56(c).

**6. Executors and Administrators ⇨313**

Interest earned on certificate of deposit that was part of testator's estate was properly retained by testator's spouse's estate, even though spouse, as personal representative, had failed to fund testator's testamentary trust, given will provision granting spouse right to receive estate's income without condition.

**7. Executors and Administrators ⇨49**

Testator's surviving spouse, who served as personal representative of his



testator's personal injury claim on ground that she paid large portion of testator's medical expenses; under survival statute, spouse could recover settlement only in her capacity as personal representative on behalf of estate, and could then present claim to estate for out-of-pocket expenses. U.C.A.1953, 78-11-12(1)(b).

#### 8. Death ⇨7

In wrongful death cause of action, heirs of decedent personally hold claims for lost support and other personal losses, while in personal injury case, cause of action is owned not by heirs, but by injured party.

#### 9. Descent and Distribution ⇨45

Testator's surviving spouse could not take testator's personal injury settlement as testator's only surviving intestate heir; testator, who had will that designated spouse as personal representative and devisee of personal property, did not die intestate.

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John E. Gates, Kim R. Wilson, and David L. Pinkston, Salt Lake City, for Appellant and Cross-Appellee.

John L. McCoy, Salt Lake City, for Appellee and Cross-appellant.

Before DAVIS, BENCH and JACKSON, JJ.

### OPINION

BENCH, Judge:

Neil Mitchell appeals the trial court's entry of summary judgment in favor of Marjorie Sims's estate. Lynda Wood cross-appeals. We affirm in part and reverse in part.

### BACKGROUND

Grant and Marjorie Sims enjoyed a long married life together. Mr. Sims died in 1991, leaving a will which provided for the creation of a bypass trust and designated Mrs. Sims the personal representative of his estate. He also named Mrs. Sims and Mitchell co-trustees of the bypass trust, which was

to be funded from the residue of his estate. The will provided that trust income was to be paid to Mrs. Sims, without condition. The will further provided that the trustees were required to distribute to Mrs. Sims as much of the principal as necessary for her proper health, support, and maintenance. After Mrs. Sims's death, the residue of the trust's corpus was to be distributed to other beneficiaries, including both Mitchell and Wood.

During the time that Mrs. Sims served as personal representative, she never funded the trust. Instead, she withdrew \$96,642.55 directly from the estate checking account to pay for her personal living and medical expenses. Mrs. Sims received an additional \$52,875.40 from the estate, derived from a \$50,000 certificate of deposit plus interest. Finally, Mrs. Sims received a \$12,445.86 personal injury settlement for injuries Mr. Sims had sustained before his death.

Mrs. Sims died in 1993. Her will named Wood as the personal representative of her estate. Mitchell, as co-trustee and a remainder person of Mr. Sims's estate, filed a claim against Mrs. Sims's estate for the monies that Mrs. Sims had removed from Mr. Sims's estate. Wood conceded that \$48,100 from the certificate of deposit in Mr. Sims's name had been wrongfully taken from Mr. Sims's estate.<sup>1</sup> Mitchell moved for summary judgment for return of all the funds removed from Mr. Sims's estate. Wood also filed for summary judgment seeking to disallow Mitchell's claim.

The trial court granted in part and denied in part both parties' motions for summary judgment. The trial court found that Mrs. Sims had failed to fund the trust, but that she was nonetheless entitled to the \$96,642.55 from the estate checking account. The trial court determined that the funds were used for her necessary support and maintenance and that there was therefore no damage to Mr. Sims's estate. Regarding the certificate of deposit, the trial court found that \$48,100 was undisputedly owed by Mrs. Sims's estate and ordered that amount paid

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to Mr. Sims's estate plus 10% interest. The trial court also allowed Mrs. Sims's estate to retain the \$2875.40 in interest income from the certificate of deposit and the \$1900 claimed as personal representative fees. Finally, the trial court found that Mrs. Sims's acceptance of the \$12,445.86 personal injury settlement was an improper diversion of the money from Mr. Sims's estate and awarded that amount to Mr. Sims's estate.

Mitchell appeals from the trial court's decision concerning the \$96,642.55 that Mrs. Sims withdrew from the estate checking account and the allowance of interest income and personal representative fees from the certificate of deposit. Wood cross-appeals the trial court's summary judgment in favor of Mr. Sims's estate on the personal injury settlement amount and award of interest.

### STANDARD OF REVIEW

[1] Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993). Because entitlement to summary judgment is a question of law, we accord no deference to the trial court's resolution of the legal issues presented. *Id.*; *Ferree v. State*, 784 P.2d 149, 151 (Utah 1989).

### ANALYSIS

#### A. Estate Checking Account

[2] Mitchell first argues that the trial court erred when it allowed Mrs. Sims's estate to keep the \$96,642.55 that Mrs. Sims had drawn from the checking account of Mr. Sims's estate. Mitchell contends that because Mrs. Sims did not fund the trust provided for in Mr. Sims's will, she must return all the money to Mr. Sims's estate. We disagree.

[3,4] 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 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.

The trial court found that although Mrs. Sims did not fund the trust, she was entitled to the funds since they were used for her support and maintenance. The record reflects that Mrs. Sims spent approximately \$76,000 from the estate's checking account on her medical expenses. The balance of the money drawn from the estate's checking account was for Mrs. Sims's living expenses. The accounting report and affidavit of the accountant for Mr. Sims's estate confirm these expenses. Mitchell did not dispute Mrs. Sims's expenses, contending merely that the expense accounting was irrelevant because any money used was "improperly converted from the estate." Because Mitchell did not challenge Mrs. Sims's expenses below, he is precluded from challenging them on appeal. *Jensen v. Bowcut*, 892 P.2d 1053, 1056 (Utah App.) (holding acquiescence to opposing argument before trial court precluded challenge on appeal), *cert. denied*, 899 P.2d 1231 (Utah 1995); *see also Salt Lake City v. Ohms*, 881 P.2d 844, 847 (Utah 1994) (stating court will review only those issues presented below unless exceptional circumstances or plain error are shown).<sup>2</sup>

The language of the will clearly states that Mrs. Sims shall receive distributions from the principal of Mr. Sims's estate "necessary for her proper health, support, and maintenance." Mitchell argues that, in other jurisdictions, the use of "as is necessary" language requires the beneficiaries of a trust to exhaust their own resources before invading trust principal. *See Dunklee v. Kettering*, 123 Colo. 43, 225 P.2d 853, 855-57 (1950). *But see In re Estate of Lindgren*, 268 Mont. 96, 885 P.2d 1280, 1282-83 (1994). We need not address that question because Mr. Sims's

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decline to honor such a distinction." *Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 455 n. 31 (Utah 1993). Consequently, we will not

will does not merely authorize the invasion of the principal for "the necessities of life." *Dunklee*, 225 P.2d at 853. Instead, Mr. Sims's 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." Therefore, we agree with the trial court's determination that "while there was a technical breach of her fiduciary responsibilities to fund the bypass trust, the breach resulted in no damages and therefore is not actionable."

### B. Certificate of Deposit

[5] Mitchell challenges the trial court's award to Mrs. Sims's estate of \$1900 in personal representative fees and \$2875.40 that Mrs. Sims claimed as interest earned from Mr. Sims's \$50,000 certificate of deposit. Mitchell first argues that Mrs. Sims's estate did not properly petition the trial court for the \$1900 in claimed personal representative fees pursuant to Utah Code Ann. § 75-3-718(1) (1993). Wood stated in her Memorandum in Response to Mitchell's Motion for Summary Judgment that she deducted from the \$50,000 "\$1900 as fees for acting as personal representative." We need not decide whether this qualifies as a proper claim pursuant to section 75-3-718(1), since Wood provided no evidence to support the fees after Mitchell challenged them on summary judgment. See Utah R. Civ. P. 56(c). Consequently, we reverse that portion of the award.

[6] Mitchell also asserts that the trial court improperly awarded Mrs. Sims's estate \$2875.40 in claimed interest from the certificate of deposit. Wood argues that the money was interest earned from the certificate of deposit in Mr. Sims's name and that, since Mr. Sims's will declared Mrs. Sims the beneficiary of all income from Mr. Sims's estate, she was entitled to keep the interest earned. Mitchell simply contends that because the trust was not funded, Mrs. Sims did not have the right to keep that money. We disagree. Again, although Mrs. Sims did not fund the trust as Mr. Sims's will directed, Mr. Sims

explicitly stated that Mrs. Sims was to receive the income from Mr. Sims's estate "without condition." Thus, the trial court properly allowed Mrs. Sims's estate to retain the interest from the certificate of deposit.

### C. Settlement Proceeds

[7-9] Wood cross-appeals the trial court's order to return to Mr. Sims's estate the \$12,445.86 received from the settlement of Mr. Sims's personal injury claim. Wood argues that since Mrs. Sims claims to have paid a large portion of Mr. Sims's medical expenses, Mrs. Sims could retain the settlement proceeds pursuant to Utah's survival statute. See Utah Code Ann. § 78-11-12 (1992). Utah's survival statute provides:

If prior to judgment or settlement the injured person dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representative or heirs of that person are entitled to receive no more than the out-of-pocket expenses incurred by or on behalf of that injured person as the result of his injury.

Utah Code Ann. § 78-11-12(1)(b) (1992). According to Utah's survival statute, Mrs. Sims could only recover the personal injury settlement in her capacity as personal representative of Mr. Sims's estate. Wood's reliance on *In re Behm's Estate*, 117 Utah 151, 213 P.2d 657 (1950) for the argument that she is entitled to the settlement proceeds is misplaced. *Behm* is a wrongful death case and not a personal injury settlement case. In a wrongful death cause of action, the heirs of the decedent personally hold claims for lost support and other personal losses. See *Haro v. Haro*, 887 P.2d 878, 879 (Utah App. 1994). In a personal injury case, by comparison, the cause of action is owned not by the heirs, but by the injured party. As personal representative of Mr. Sims's estate, Mrs. Sims was therefore authorized to receive the settlement only on behalf of his estate. Mrs. Sims could then present a claim to his estate for out-of-pocket expenses, pursuant to the survival statute. She has never done that.<sup>3</sup>

3. Mrs. Sims's estate argues that because she was Mr. Sims's "only surviving intestate heir," she is

is evident that Mr. Sims did not die intestate.

We therefore affirm the trial court's award of the settlement proceeds to Mr. Sims's estate.

We have considered the other issues raised, and we adjudge them to be without merit. Accordingly, we do not address them. *See State v. Carter*, 776 P.2d 886, 888 (Utah 1989) ("Court need not analyze and address in writing each and every argument, issue or claim raised."), *cert. denied*, — U.S. —, 116 S.Ct. 163, 133 L.Ed.2d 105 (1995).

### CONCLUSION

We affirm the order of the trial court except as to the award of \$1900 in personal representative fees. That portion of the judgment is reversed. The case is remanded to the trial court for entry of a new judgment consistent with this opinion.

DAVIS, Associate P.J., and JACKSON, J., concur.



STATE of Utah, Plaintiff and Appellee,

v.

Lewis Ricky YATES, Defendant  
and Appellant.

No. 950444-CA.

Court of Appeals of Utah.

May 23, 1996.

Defendant was convicted of class A misdemeanor theft, following plea agreement before the Third District Court, Salt Lake City, Leslie A. Lewis, J. Defendant appealed his sentence. The Court of Appeals, Jackson, J., held that: (1) defendant was required to be sentenced pursuant to statute amended following entry of plea agreement but prior to his actual sentencing, and (2) defendant's failure to appear for sentencing did not affect

property. Thus, she could not take the settle-

his entitlement to lesser punishment set forth in amended statute.

Reversed and remanded.

Bench, J., concurred in result only, with opinion.

#### 1. Criminal Law §1134(3)

Whether defendant is entitled to lesser sentence when legislature reduces penalty for crime charged after conviction but before sentencing is question of law, to be reviewed by Court of Appeals for correctness according no deference to trial court's conclusions.

#### 2. Criminal Law §1134(3)

Whether defendant's dilatory conduct affects his entitlement to lesser sentence is question of law, to be reviewed by Court of Appeals for correctness according no deference to trial court's conclusions.

#### 3. Criminal Law §1134(6)

Appellate court may affirm decision of trial court on any proper ground.

#### 4. Criminal Law §1130(5)

State's failure to cite to any helpful authority in support of its contention that re-sentencing defendant, convicted of class A misdemeanor theft following plea agreement, pursuant to statute amended following entry of agreement but prior to actual sentencing deprived state of benefit of its bargain under contract theory precluded Court of Appeals from considering such argument for first time on appeal.

#### 5. Criminal Law §1206.3(2)

Defendants are entitled to benefit of lesser penalty afforded by amended statute made effective subsequent to their commission of offense and prior to their sentencing; punishment is imposed as deterrent to crime, as means of removing offender as harm from society, and as means of rehabilitation of offender, and not as punishment, and if legislature finds reduction in the penalty for given crime necessary and appropriate to meet those goals, then lesser penalty should be granted to all defendants sentenced subsequent to modification.

ment as an intestate heir.

**FILED**  
Utah Court of Appeals

JUL 19 1996

Marilyn M. Branch  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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

ORDER

Case No. 950734-CA

\_\_\_\_\_  
Neil Mitchell, )  
Appellant and )  
Cross-appellee, )

v. )

Lynda Wood, )  
Appellee and )  
Cross-appellant. )

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This matter is before the court upon appellant and Cross-appellee's petition for rehearing, filed May 16, 1996.

IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 19<sup>th</sup> day of July, 1996.

FOR THE COURT:

Marilyn M. Branch

Marilyn M. Branch  
Clerk of the Court

CERTIFICATE OF MAILING

I hereby certify that on July 19, 1996, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

John E. Gates  
Kim R. Wilson  
David L. Pinkston  
Snow, Christensen, & Martineau  
10 Exchange Place, Eleventh Floor  
P. O. Box 45000  
Salt Lake City, Utah 84145

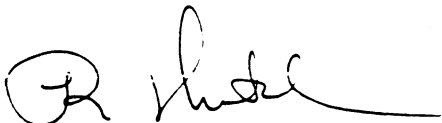
John L. McCoy  
310 South Main Street, Suite 1305  
Salt Lake City, Utah 84101

and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

Third District Court  
Attn: Appeals Clerk  
451 South 200 East  
Salt Lake City, Utah 84111

Dated this July 19, 1996.

By



Robin Hutcheson  
Deputy Clerk

Case No. 950734-CA  
Third District Court, Salt Lake County, Case No. 933900278 ES

## APPENDIX "B"

PAGE 13 11/15

*E. Thompson*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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IN THE MATTER OF THE ESTATE : MEMORANDUM DECISION  
OF: :  
MARJORIE S. SIMS, : CASE NO. 933900278  
:   
Deceased. :  
:   
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The above-referenced matter is before the Court on reciprocal Motions for Summary Judgment. The petitioner, Neil Mitchell, as successor personal representative of the Estate of G. Grant Sims, originally filed his Motion for Summary Judgment seeking an Order from this Court that the original personal representative of the Estate of G. Grant Sims, prior to her demise, failed to act in accordance with Mr. Sims' Will in funding a bypass trust, and was therefore required to return to Mr. Sims' Estate certain funds which the petitioner believes were inappropriately used by Mrs. Sims. Inasmuch as Mrs. Sims is deceased, the petitioner seeks repayment from the Estate of Marjorie S. Sims.

The Estate of Marjorie S. Sims, through its personal representative Lynda Wood, has filed in response to the aforementioned Motion for Summary Judgment, a counter Motion for Summary Judgment seeking from this Court an Order that the Estate of G. Grant Sims is not entitled to repayment of sums used by Mrs. Sims during her lifetime in her capacity as personal representative



of Mr. Sims' Estate. The Estate of Marjorie S. Sims does agree, however, that certain cash funds retained by Mrs. Sims while she was acting as personal representative of the Estate of Mr. Sims should be returned and has offered to return \$48,100 of the \$52,875.40 that the petitioner claimed was not deposited into Mr. Sims' Estate accounts. The difference between the \$48,100 and the \$52,875.40 are outlined in the Memoranda filed by Mr. McCoy on behalf of Lynda Wood, personal representative of the Marjorie S. Sims Estate, and have not been challenged as being inappropriate by the petitioner.

While it is without dispute in this matter that Mrs. Sims as personal representative did not fund the trust as her deceased husband's Will provided, the manner in which she used the funds were, as a matter of law, funds that she would have been entitled to receive had she funded the trust as Mr. Sims' Will provided. The terms of the trust would have allowed Mrs. Sims to receive the funds she took, without any depletion of her own funds. Accordingly, while there was a technical breach of her fiduciary responsibilities to fund the bypass trust, the breach resulted in no damages and therefore is not actionable.

The intent of Mr. Sims was to benefit his spouse, rather than conserve his Estate for residual beneficiaries. That purpose was

adhered to by Mrs. Sims, albeit not in strict compliance with the formal procedures his Will required.

Based upon the foregoing, the Court determines that the Estate of Marjorie Sims has no obligation to repay the Estate of G. Grant Sims, with the exception of the \$48,100 which the personal representative of Marjorie Sims has offered to return heretofore. As those funds should properly be with the Estate of Grant Sims, the Estate of Marjorie Sims is to repay that amount to his Estate forthwith.

There is a question regarding funds received by Mrs. Sims in her capacity as personal representative of Mr. Sims' Estate for personal injury and a subsequent settlement after Mr. Sims died. The evidence is undisputed that the personal injury claim arose before Mr. Sims' death, but was settled after his death. The applicable statutory provisions provide that the only claims that survive a death are claims for expenses related to the injury, where the death of the personal injury claimant is not related to the personal injury claim. The settlement was for \$12,445.86, and as it was received after the death of Mr. Sims, it was for actual expenses incurred by Mr. Sims as a result of the personal injury, and pursuant to statute is required to be paid over to the personal representative of the deceased's (Mr. Sims') Estate, or the heirs

of the deceased if a death was intestate. As Mr. Sims did not die intestate, the funds were properly paid to Mrs. Sims in her capacity as personal representative, and should have been deposited in the accounts for the Estate, the funds representing expenses incurred personally by Mr. Sims as a result of the personal injury case.

Accordingly, the Estate of Marjorie S. Sims is also required to repay the Estate of G. Grant Sims the sum of \$12,445.86, representing an improper diversion of the personal injury settlement funds received by Mrs. Sims after her husband's death.

Based upon the foregoing, the Court has granted the Summary Judgment of the petitioner, Neil Mitchell, in part as it relates to the personal injury settlement funds, and has granted the Summary Judgment of the personal representative of the Marjorie S. Sims Estate in part. The Court determines that the amounts to be paid from Marjorie S. Sims Estate to the G. Grant Sims Estate of \$48,100 is not subject to this Summary Judgment, even though the Order should contain a requirement for such payment based upon the fact that said sums have been offered and outstanding for some substantial period of time and have not really been at issue.

Counsel for the parties are to confer and determine the manner in which an appropriate Order encompassing the decisions of this

Court on the reciprocal Motions for Summary Judgment can be drafted. Inasmuch as the Court has partially granted each Motion for Summary Judgment, the Order needs to provide that an approval as to form, or the participation in the preparation of an Order encompassing the Court's rulings on these reciprocal Motions for Summary Judgment does not constitute a waiver of either side to object and pursue an appropriate appeal in relation to the Court's ruling contained in the Order.

Once the Order has been properly prepared and approved by both sides as being reflective of this Court's decision, the same should be submitted to the Court for its review and signature pursuant to the Code of Judicial Administration.

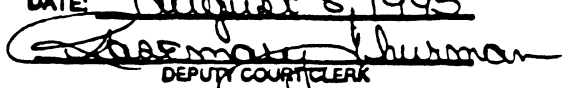
Dated this 13 day of March, 1995.

  
TIMOTHY R. HANSON  
DISTRICT COURT JUDGE



I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE: August 8, 1995

  
DEPUTY COURT CLERK

SIMS ESTATE

PAGE SIX

MEMORANDUM DECISION

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 13 day of March, 1995:

John L. McCoy  
Attorney for Personal Representative  
Lynda Wood  
310 S. Main, Suite 1305  
Salt Lake City, Utah 84101

John E. Gates  
Kim R. Wilson  
Attorneys for Personal Representative  
Neil Mitchell  
10 Exchange Place, 11th Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145

A handwritten signature in cursive script, appearing to read "G. Thompson", is written over a horizontal line.

JOHN E. GATES (A1169)  
KIM R. WILSON (A3512)  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Neil R. Mitchell, Successor  
Personal Representative of the  
Estate of G. Grant Sims  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

FILED DISTRICT COURT  
Third Judicial District

JUN 30 1995

*Shirley Galloway*  
By \_\_\_\_\_  
Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

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In the Matter of the Estate  
of

MARJORIE S. SIMS,  
Deceased.

ORDER ON MOTIONS FOR SUMMARY  
JUDGMENT

Probate No. 933900278 ES  
Timothy R. Hanson

---

The Motion for Summary Judgment of Neil R. Mitchell ("Mitchell"), as Successor Personal Representative of the Estate of G. Grant Sims (the "Motion for Summary Judgment") seeking allowance of Mitchell's First Amended Petition for Allowance of Claim and the Motion for Summary Judgment of Lynda Wood as Personal Representative of the Estate of Marjorie S. Sims (the "Cross-Motion for Summary Judgment") seeking denial of Mitchell's First Amended Petition for Allowance of Claim came on for hearing pursuant to notice, before the above-entitled court, the Honorable Timothy R. Hanson presiding, on January 13, 1995, at 2:00 p.m. and Kim R. Wilson appeared for Mitchell and John L. McCoy appeared for Wood, and the Court having considered the

motions, the memoranda and affidavits supporting and opposing the motions and the files and records herein, having heard arguments of counsel, having issued its Memorandum Decision dated March 13, 1995, which is incorporated herein by reference, and being fully advised in the premises and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. Mitchell's entitlement to payment of the sum of \$48,100.00 is not contested, and Wood, be and the same is hereby directed to forthwith pay to Mitchell the sum of \$48,100.00 together with interest thereon from August 27, 1993, until paid at the statutory rate of 10% per annum.

2. The Motion for Summary Judgment is granted in part and denied in part.

3. The Cross-Motion for Summary Judgment is granted in part and denied in part.

4. In addition to the amounts provided in Paragraph 1, Mitchell's claim is approved and allowed in the sum of \$12,445.86 and Wood is directed to forthwith pay to Mitchell the sum of \$12,445.86 together with interest thereon from August 27, 1993, until paid, at the statutory rate of 10% per annum.

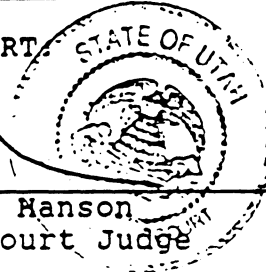
5. Recovery is denied for all other amounts sought in Mitchell's First Amended Petition for Allowance of Claim.

6. In accordance with Rule 54(b), Utah Rules of Civil Procedure, the court determines that there is no just reason for delay, and this Order is deemed to be a final judgment.

DATED this 30 day of June, 1995.

BY THE COURT

  
Timothy R. Hanson  
District Court Judge



APPROVED AS TO FORM:

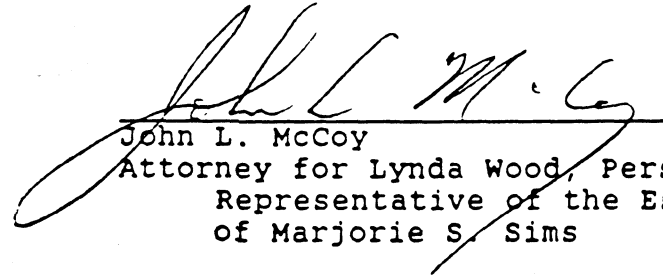
SNOW, CHRISTENSEN & MARTINEAU

By

  
John E. Gates

Kim R. Wilson

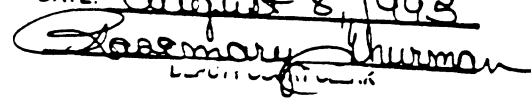
Attorneys for Neil R. Mitchell,  
Successor Personal Representative  
of the Estate of G. Grant Sims

  
John L. McCoy

Attorney for Lynda Wood, Personal  
Representative of the Estate  
of Marjorie S. Sims

I CERTIFY THAT THIS IS A TRUE COPY OF AN  
ORIGINAL DOCUMENT ON FILE IN THE THIRD  
DISTRICT COURT, SALT LAKE COUNTY, STATE  
OF UTAH.

DATE: August 8, 1995

  
Rosemary Thurman  
Clerk of Court



## APPENDIX "C"

### 75-3-703. General duties — Relation and liability to persons interested in estate — Standing to sue.

(1) A personal representative is a fiduciary who shall observe the standard of care applicable to trustees as described by Section 75-7-302. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

(2) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a supervised administration proceeding. Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children, and any pretermitted child of the decedent as described elsewhere in this code.

(3) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and courts of any other jurisdiction as his decedent had immediately prior to death.

**History:** C. 1953, 75-3-703, enacted by L. 1975, ch. 150, § 4.

**Editorial Board Comment.** — This and the next section are especially important sections for they state the basic theory underlying the duties and powers of personal representatives. Whether or not a personal representative is supervised, this section applies to describe the relationship he bears to interested parties. If a supervised representative is appointed, or if supervision of a previously appointed personal representative is ordered, an additional obligation to the court is created. See § 75-3-501.

The fundamental responsibility is that of a trustee. Unlike many trustees, a personal representative's authority is derived from appointment by the public agency known as the court. But, the Code also makes it clear that the personal representative, in spite of the source of his authority, is to proceed with the administration, settlement and distribution of the estate by use of statutory powers and in accordance with statutory directions. See §§ 75-3-106 and 75-3-704. Subsection (2) is particularly important, for it ties the question of personal liability for administrative or distributive acts

to the question of whether the act was "authorized at the time." Thus, a personal representative may rely upon and be protected by a will which has been probated without adjudication or an order appointing him to administer which is issued in no-notice proceedings even though proceedings occurring later may change the assumption as to whether the decedent died testate or intestate. See § 75-3-302 concerning the status of a will probated without notice and § 75-3-102 concerning the ineffectiveness of an unprobated will. However, it does not follow from the fact that the personal representative distributed under authority that the distributees may not be liable to restore the property or values received if the assumption concerning testacy is later changed. See §§ 75-3-909 and 75-3-1004. Thus, a distribution may be "authorized at the time" within the meaning of this section, but be "improper" under the latter section.

Subsection (3) is designed to reduce or eliminate differences in the amenability to suit of personal representatives appointed under this Code and under traditional assumptions. Also, the subsection states that so far as the law of

possessed by the personal representative. Thus, if the power is unexercised prior to its termination, its lapse clears the title of devisees and heirs. Purchasers from devisees or heirs who are "distributees" may be protected also by § 75-3-910. The power over title of an absolute owner is conceived to embrace all possible transactions which might result in a conveyance or encumbrance of assets, or in a change of rights of possession. The relationship of the personal representative to the estate is that of a trustee. Hence, personal creditors or successors of a personal representative cannot

avail themselves of his title to any greater extent than is true generally of creditors and successors of trustees. Interested persons who are apprehensive of possible misuse of power by a personal representative may secure themselves by use of the devices implicit in the several sections of Parts 1 and 3 of this chapter. See especially §§ 75-3-501, 75-3-605, 75-3-607 and 75-3-611.

**Compiler's Notes.** — The corresponding section in the official text of the Uniform Probate Code is numbered § 3-711.

### 75-3-711. Improper exercise of power — Breach of fiduciary duty.

If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in Sections 75-3-712 and 75-3-713.

**History:** C. 1953, 75-3-711, enacted by L. 1975, ch. 150, § 4.

**Editorial Board Comment.** — An interested person has two principal remedies to forestall a personal representative from committing a breach of fiduciary duty. (1) Under § 75-3-607 he may apply to the court for an order restraining the personal representative from performing any specified act or from exercising any power in the course of administration. (2) Under § 75-3-611 he may petition the court for an order removing the personal representative.

Evidence of a proceeding, or order, restraining a personal representative from selling, leasing, encumbering or otherwise affecting ti-

tle to real property subject to administration, if properly recorded under the laws of this state, would be effective to prevent a purchaser from acquiring a marketable title under the usual rules relating to recordation of real property titles.

In addition, §§ 75-1-302 and 75-3-105 authorize joinder of third persons who may be involved in contemplated transactions with a personal representative in proceedings to restrain a personal representative under § 75-3-607.

**Compiler's Notes.** — The corresponding section in the official text of the Uniform Probate Code is numbered § 3-712.

### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 31 Am. Jur. 2d Executors and Administrators § 528.

**C.J.S.** — 33 C.J.S. Executors and Administrators §§ 184, 207, 210 to 213, 215, 219, 220, 242 to 251, 272, 322.

**A.L.R.** — Liability of executor or administrator for negligence or default in defending action against estate, 14 A.L.R.3d 1036.

Agent or attorney, liability of executor or administrator, or his bond, for loss caused to estate by act or default of his, 28 A.L.R.3d 1191.

Liability of executor, administrator, trustee, or his counsel for interest, penalty, or extra taxes assessed against estate because of tax law violations, 47 A.L.R.3d 507.

Overpaying or unnecessarily paying tax, liability of executor or administrator to estate because of, 55 A.L.R.3d 785.

Garnishment against executor or administrator by creditor of estate, 60 A.L.R.3d 1301.

**Key Numbers.** — Executors and Administrators ⇐ 91, 103, 104, 116 to 120.

**75-3-907. Distribution in kind — Evidence.**

If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring, or releasing the assets to the distributee as evidence of the distributee's title to the property.

**History:** C. 1953, 75-3-907, enacted by L. 1975, ch. 150, § 4.

**Editorial Board Comment.** — This and sections following should be read with § 75-3-708 which permits the personal representative to leave certain assets of a decedent's estate in the possession of the person presumptively entitled thereto. The "release" contemplated by this section would be used as evidence that the personal representative had determined that he would not need to disturb the possession of an heir or devisee for purposes of administration.

Under § 75-3-710, a personal representative's relationship to assets of the estate is described as the "same power as an absolute owner would have." A personal representative may, however, acquire a full title to estate assets, as in the case where particular items are conveyed to the personal representative by sellers, transfer agents or others. The language of this section is designed to cover instances where the instrument of distribution operates as a transfer, as well as those in which its operation is more like a release.

**75-3-908. Distribution — Right or title of distributee.**

Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper.

**History:** C. 1953, 75-3-908, enacted by L. 1975, ch. 150, § 4.

**Editorial Board Comment.** — The purpose of this section is to channel controversies which may arise among successors of a decedent because of improper distributions through the personal representative who made the dis-

tribution, or a successor personal representative. Section 75-3-107 does not bar appointment proceedings initiated to secure appointment of a personal representative to correct an erroneous distribution made by a prior representative. But see § 75-3-1006.

**75-3-909. Improper distribution — Liability of distributee.**

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.

**History:** C. 1953, 75-3-909, enacted by L. 1975, ch. 150, § 4.

**Editorial Board Comment.** — The term "improperly" as used in this section must be read in light of § 75-3-703 and the manifest purpose of this and other sections of the Code to shift questions concerning the propriety of various distributions from the fiduciary to the distributees in order to prevent every administration from becoming an adjudicated matter.

Thus, a distribution may be "authorized at the time" as contemplated by § 75-3-703, and still be "improper" under this section. Section 75-3-703 is designed to permit a personal representative to distribute without risk in some cases, even though there has been no adjudication. When an unadjudicated distribution has occurred, the rights of persons to show that the basis for the distribution (e.g., an informally probated will, or informally issued letters of

674-022/10

FILED DISTRICT COURT  
Third Judicial District

DEC 24 1991

LAST WILL AND TESTAMENT

OF

GEORGE GRANT SIMS

By Julie R. [Signature]  
SALT LAKE COUNTY  
Clerk

913901376 ES

I, GEORGE GRANT SIMS, a resident of Salt Lake City, Utah, being of sound and disposing mind and memory, do hereby make and publish this, my Last Will and Testament.

ARTICLE I

REVOCATION OF PRIOR WILLS AND CODICILS

I hereby revoke all other wills and codicils heretofore made by me.

ARTICLE II

WIFE AND BENEFICIARIES

I am married to MARJORIE S. SIMS (hereinafter referred to as "my wife"). The beneficiary of my estate will be my wife (either outright or in trust, or both, as hereinafter set forth) or, if she predeceases me, the beneficiaries of my estate shall be the individuals named or indicated in Article V.

ARTICLE III

PAYMENT OF TAXES, DEBTS AND EXPENSES

I direct that all of my due and unpaid debts, all expenses of my last illness, burial, and the administration of my estate, and all taxes due at the date of my death or as a result of my death, shall be paid as soon after my death as practical.

ARTICLE IV

BEQUEST OF PERSONAL PROPERTY AND EFFECTS

I hereby give, devise and bequeath certain items of my tangible personal property to those persons in the manner set forth in a written statement or list which has been, or which will be, prepared, dated and signed by me and attached to this Will and which statement or list I intend to be in existence at the time of my death. Said list describes the items devised and the devisees thereof. All of the rest and residue of my personal effects, including all household furniture and contents, jewelry, automobiles, and the like, I leave to my wife if she survives me. However, if my wife predeceases me, all of my personal property and effects not set forth in the attached list shall become a part of the residue of my estate and be disposed of as hereinafter set forth.

ARTICLE V

BEQUEST OF RESIDUE OF ESTATE

If my wife survives me, my personal representative shall divide the residue of my estate into two parts, hereinafter referred to as Part A (the "GEORGE GRANT SIMS ESTATE TAX BYPASS TRUST") and Part B (the "MARJORIE S. SIMS MARITAL DEDUCTION PORTION") each ascertained as hereinafter set forth in Article VIII.

The Marjorie S. Sims Marital Deduction Portion shall be distributed as soon after my death as practical to my wife outright and free of trust.

The George Grant Sims Estate Tax Bypass Trust shall be held in Trust by the Trustees hereinafter named for the benefit of my wife during her lifetime. The Trustees shall distribute to her 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. Upon the death of my wife, the Trustee shall pay to the following persons, the following specific sums:

\$10,000.00 to DONALD E. SMITH, MD

\$10,000.00 to MARK MUIR, MD

The Trustee shall then distribute the residue of this Trust in the following manner:

ONE-THIRD: ELNA MITCHELL

ONE-THIRD: NEIL MITCHELL

ONE-THIRD: LINDA WOOD

If any of the above individuals, except LINDA WOOD, are then deceased, his or her share shall be distributed to his or her issue by right of representation. As to LINDA WOOD, if she should be deceased at the time of my death, then her share shall

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be distributed to IAN MITCHELL and AMY MITCHELL, in equal shares.

If my wife predeceases me, the residue of my estate shall be distributed to: DONALD E. SMITH, MD. and MARK MUIR, MD., \$10,000.00 each and to ELNA MITCHELL, NEIL MITCHELL and LINDA WOOD, one-third each, but if any of them, except LINDA WOOD, predecease me, then to his or her issue by right of representation. If LINDA WOOD predeceases me, then her share shall be distributed to IAN MITCHELL and AMY MITCHELL, in equal shares.

#### ARTICLE VI

##### COMMON DISASTER

In the event my wife and I die under such circumstances that it cannot be determined which of us were first to die, all properties of my estate shall be administered as though my wife were the last to die.

#### ARTICLE VII

##### APPOINTMENT OF FIDUCIARIES

1. Appointment of Personal Representative. I appoint my wife to be Personal Representative of my Will. If my wife does not survive me or is otherwise unable or unwilling to serve as personal representative, then I appoint my nephew, NEIL MITCHELL, to serve as co-personal representatives of my estate. In the event both are unable or unwilling to serve as Personal

gms



Representative of my Will, the Personal Representative shall be IAN MITCHELL, son of NEIL MITCHELL.

2. Appointment of Trustees. I appoint my wife and NEIL MITCHELL, to be the co-trustees of the George Grant Sims Estate Tax Bypass Trust created under this Will. In the event either Trustee is unable or unwilling to serve, the other of them shall serve as Trustee. In the event both are unable or unwilling to serve, the other of them shall serve as Trustee. In the event both are unable or unwilling to serve as Trustee, the Trustee shall be IAN MITCHELL, son of NEIL MITCHELL.

3. Appointment of Guardian and Conservator. In the event I become incompetent during my lifetime, I direct that my wife be appointed the guardian of my person and the conservator of my estate. If she is unable or unwilling to serve, I direct that NEIL MITCHELL be appointed guardian and conservator or, if he is unable or unwilling to serve, then IAN MITCHELL, his son shall serve as the sole guardian and conservator. My guardian and conservator shall serve without bond. I direct that as long as there are funds available I be taken care of in my home and not placed in a nursing home or similar facility unless home care is impossible because of the nature of the care required. It is my desire and direction that whatever funds are necessary be spent for my support, care and maintenance without regard or concern

for conserving any portion of my estate for subsequent beneficiaries thereof.

ARTICLE VIII

ASCERTAINMENT OF GEORGE GRANT SIMS ESTATE TAX BYPASS TRUST  
AND MARJORIE S. SIMS MARITAL DEDUCTION PORTION.

If my wife survives me, Part A and Part B as set forth in Article V shall be ascertained as follows:

1. There shall first be determined the value of my gross estate (including property not administered in my estate) for the purpose of the United States Federal Estate Tax.

2. There shall be deducted from such value the amount, to the extent allowable as a deduction in the computation of the Federal Estate Tax, of all funeral and administration expenses, and all claims against my estate but there shall not be deducted any estate, inheritance, transfer, legacy or succession taxes, referred to in Article III. The amount so determined shall be paid out pursuant to Article III above.

3. Part A shall be equal to the amount (currently \$600,000) that may pass free of Federal Estate Tax by reason of the Unified Credit Against Tax under Section 2010 of the Internal Revenue Code of 1986, as amended (or its successor) reduced by the total of (1) all items includable in my estate for federal estate tax purposes which are disposed of in previous Articles of this Will

or which pass outside of this Will but only if such items do not qualify for the federal estate tax marital deduction or the federal estate tax charitable deduction, and (2) the amount of any administration expenses claimed as income tax rather than estate tax deductions. Part A shall be held, administered and distributed as set forth in Article V.

For purposes of allocating my residuary estate between Part A and Part B, all property owned by me at the time of my death shall be valued at the same value that was used for federal estate tax purposes. If I should die possessed of any terminable or other interest which cannot qualify for the "marital deduction" under the Federal Estate Tax law, such interest shall be allocated to this Part A. If there are any federal or state estate and inheritance taxes due and payable on my death, they shall be paid out of the foregoing assets allocated to Part A. No estate taxes shall be paid out of Part B.

4. Part B shall consist of the rest, residue and remainder of my estate not disposed of pursuant to the foregoing provisions of my Will. I hereby direct that whenever possible, assets that will qualify for the federal estate tax "marital deduction" shall be allocated to Part B after, however, Part A is properly funded. If there are assets that will not qualify for the marital deduction I direct that those assets be allocated, to the extent

possible without exceeding the limits set forth above, to Part A above. If there are assets that will cause the limitations on Part A to be exceeded, those assets shall be allocated to Part B although they will not qualify for the marital deduction. The decision of my Personal Representative as to the property to be allocated to Part A and Part B shall be final and conclusive and binding upon all beneficiaries. However, the property allocated to Part B shall have an aggregate fair market value clearly representative of the appreciation or depreciation in the value to the date of dates of each distribution of all property then available for distribution. Part B shall not be diminished by any estate, inheritance, transfer, legacy or succession taxes or duties, either state or federal. If the value of my residuary estate is less than the amount that may be allocated to Part A (currently \$600,000), no part of my estate shall be allocated to Part B.

#### ARTICLE IX

#### TRUSTEE POWERS

Trustee shall have the additional powers, authorities, and discretions set forth in Part 4, Chapter 7, Title 75 of the Uniform Trustees' Powers Provisions of the Utah Uniform Probate Code (or its successor), which are incorporated herein by reference.

*gus*

I, GEORGE GRANT SIMS, the Testator, sign my name to this instrument this 11<sup>th</sup> day of July, 1991, and being first duly sworn, do hereby declare to the undersigned authority that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes expressed in it, and that I am eighteen (18) years of age or older, of sound mine, and under no constraint or undue influence.

GEORGE GRANT SIMS, Testator

WE, the undersigned, as witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the Testator signs and execute this instrument as his Last Will and Testament and that he signs it willingly and that each of us, in the presence and hearing of the Testator and or each other, hereby signs this Will as witness to the Testator's signing, and that to the best of our knowledge the Testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.

NAME	ADDRESS
<u>Lillian H. Overton</u>	<u>2242 Bryan Circle</u>
<u>Marian C. Dunn</u>	<u>2228 Bryan Circle</u>
	<u>Salt Lake City 84108</u>

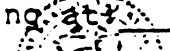
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COUNTY OF SALT LAKE )  
 ) SS.  
STATE OF UTAH . )

SUBSCRIBED AND SWORN to before me by GEORGE GRANT SIMS,  
the Testator, or, and subscribed and sworn to before me by  
LILLIAN F. OVERTON and MARIAN C. DUNN,  
witnesses, this 22 day of July, 1991.

My Commission Expires:

2/3/54

*Doris S. Wearingen*  
 NOTARY PUBLIC  
 Residing at  
  
 DORIS SWEARINGEN  
 Notary Public  
 STATE OF UTAH  
 My Commission Expires  
 February 3, 1994  
 310 S Main #135, S.C. UT 84101

29 June 56