

2008

Walker v. Stowell : Addenda

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

In The Matter of the Estate of Gary Wayne Ostler, Deceased.	APPELLANT'S AMENDED ADDENDUM
Melissa Walker, on behalf of her Son, Adam Kunic Moses Walker, Plaintiff and Appellant, v. Douglas L. Stowell, as the Personal Representative of the Estate of Gary Wayne Ostler, Defendant and Appellee	Appellate Case No. 20080180-CA District Court No. 033901263

Appeal from the Third Judicial District Court, Salt Lake County, State of Utah
The Honorable Leon A. Dever

Appellant's Amended Addendum

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

IN THE MATTER OF THE ESTATE OF
GARY WAYNE OSTLER.

RULING

Case No. 033901263

Judge: L.A. DEVER

The above entitled matter is before the Court on the Estate's Motion To Dismiss Complaint of Adam Kunic Moses Walker ("Plaintiff"). Having reviewed the Estate's Motion and Opposition thereto; and, having heard the arguments on January 22, 2008, the Court makes the following Ruling.

Plaintiff¹, a minor, by and through his Guardian, Melissa M. Walker, alleges that Gary Wayne Ostler ("Decedent"), caused the death of his father on July 13, 2003, by negligently piloting his airplane into the Pacific Ocean. The Decedent, Plaintiff's father, and others died in the crash. (Estate's Mot. To Dismiss Compl., 1-2). Pursuant to Utah Code Annotated 75-3-801², notice to Decedent's creditors was first

¹Plaintiff was born on March 27, 2004, and DNA testing for paternity was completed on April 8, 2004. (Estate's Mot. To Dismiss Compl., 4).

²Subsection One (1) provides in relevant part: "Unless notice has already been given under this section, a personal representative upon his appointment shall publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the county announcing the personal representative's appointment and address and notifying creditors of the estate to present their claims within three months after the date of the first publication of the notice or be forever barred." (2003).

published on September 26, 2003, Id. at 3. Therefore, the deadline, as asserted by the Estate, for Plaintiff's wrongful death claim, as filed in his Complaint of June 29, 2007, was the earlier of December 26, 2003, consistent with Section 75-3-801(1) or, July 13, 2004, pursuant to Section 75-3-803(1)³. Id.

Plaintiff initially filed his claim against the Estate on April 16, 2007, more than three years after the prescribed deadline i.e. the creditor's deadline, had passed. Id. The Estate filed a notice of Disallowance of Claim disallowing Plaintiff's claim on the basis that it was untimely under both Sections 75-3-801(1) and 75-3-803(1). Id. at 2. The Estate asserts that Plaintiff's claim is barred, Utah Code Ann. § 75-3-804(1)(b) (2004)⁴, and, that the tolling statute, Utah Code Ann. § 75-12-36 (2004)⁵, has no impact

³"All claims against a decedent's estate which arose before the death of the decedent [the Estate asserts that Decedent caused the crash minutes before his own death], including claims of the state and any subdivision of it, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented *within the earlier* of the following dates:

(a) one year after the decedent's death; or

(b) within the time provided by Subsection 75-3-801(2) for creditors who are given actual notice, and where notice is published, within the time provided in Subsection 75-3-801(1) for all claims barred by publication."

(2003).

⁴Provides in relevant part: "The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction to obtain payment of the claim against the estate, but the *commencement of the proceeding must occur within the time limited for presenting the claim.*" (emphasis added).

⁵"If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either under the age of majority or mentally incompetent and without a legal guardian, the time of the disability is not a part of the time limited for the commencement of the action."

on the time restrictions of the aforementioned Probate Code provisions.

There has been little case law in Utah addressing whether the tolling statute tolls the time provisions in the Probate Code when a claimant is in the age of minority. In In re Estate of Garza, 725 P.2d 1328 (Utah 1986), the Utah Supreme Court held that although the claimants, minor children of the deceased, filed their wrongful death claim approximately four-years after the death of their father, their claim was not barred by two year statute of limitations for wrongful death claims as it was tolled during their minority. The key difference, however, between the case before this Court and In re Estate of Garza, is that the Garza childrens' guardian presented their claim against the estate two days before the end of the three-month period allowed for the presentment of claims after publication of notice was made to creditors. Id. at 1328-29. Similarly, in Ellis v. Estate of Ellis, 2007 UT 77, 169 P.3d 441, the Court states that "[b]ecause [Mrs. Ellis'] claim was brought more than a year after Mr. Ellis' death, the Estate's liability was limited to the extent of the decedent's insurance coverage." Id. at ¶13 (citing Utah Code Ann. § 75-3-803(1)(a), 4(b) (1993)).

Because this is a matter of first impression, this Court looks to other jurisdictions to find persuasive authority. In re Estate of Daigle, 634 P.2d 71 (Colo. 1981), presents facts and issues parallel to the one before this Court.

On March 10, 1978, Daigle was operating a plane which crashed killing Daigle and his passenger Snyder. Id. at 73. Daigle's estate was opened on March 28, 1978.

Id. The First National Bank of Denver was appointed as personal representative of Daigle's estate and issued notice to creditors. Id. August 7, 1978, was the last day for filing claims against the estate⁶. Id. On September 7, 1978, the wife of Snyder filed a wrongful death claim on behalf of herself and her three minor children against the Daigle estate. Id. The personal representative disallowed the claim on the basis that it was not filed prior to the last day fixed in the notice to the creditors. Id. Mrs. Snyder petitioned the court for allowance of the claim, contending that the children's claim was tolled by their minority. Id.

The Colorado Supreme Court denied Mrs. Snyder's claim on behalf of children explaining that the purpose of the probate code was to promote a speedy and efficient system for the settling the estate of the decedent making distribution to the successors⁷ and, that tolling the prescribed time restrictions would render the estate's liability indeterminable. Id. 76-77. While the court denied the children's claim as the Colorado Probate Code created a jurisdictional bar to claims untimely filed, the court did clarify

⁶Colorado Probate Code Section 15-12-801 (1980 Supp.) provides that "the notice to creditors shall fix a date for the filing of creditors' claims, which shall be not earlier than four months from the date of first publication or one from the date of death, whichever occurs first." Id. at n.2; Compare C.R.S. § 15-12-801(1) (2007) ("Unless one year or more has elapsed since the death of the decedent, a personal representative shall cause a notice to creditors to be published in some daily or weekly newspaper published in the county in which the estate is being administered, or if there is no such newspaper, then in some newspaper of general circulation in an adjoining county. Such notice shall be published not less than three times, at least once during each of three successive calendar weeks"); with Utah Code Ann. § 75-3-801(1) at supra n.2.

⁷See Utah Code Ann. § 75-1-102(2): "The underlying purposes and policies of this code are: (c) To promote a speedy and efficient system for administering the estate of the decedent and making distribution to his successors[.]" (2007).

that “[t]he Snyder children’s claim, like that of Mrs. Snyder, is limited to the amount of liability insurance protecting the estate. Id. at 77. The Utah Uniform Probate Code, Utah Code Ann. § 75-3-803(4)⁸, provides a similar provision as that referenced by the Daigle court.

In distinguishing between a nonclaim statute⁹ and a statute of limitations, the court explained:

A nonclaim statute operates to deprive a court of jurisdiction. The personal representative of an estate can neither waive it nor toll it A nonclaim statute imposes a condition precedent to the enforcement of a right of action; that is to say, the claim must be presented within the time set in the notice to creditors or be *barred*. A statute of limitations, on the other hand, does not bar the right of action but only the remedy Such a statute may be tolled. Such a statute is a defense which is waived if not affirmatively pleaded.

Id. at 75 (citation omitted) (emphasis in the original). The court further stated, “[i]f the legislature intended to exempt late claims by minors and other persons under disability from the jurisdictional bar of the nonclaim statute it reasonably may be assumed that appropriate statutory language would have been included in section 15-12-803¹⁰, to

⁸“Nothing in this section affects or prevents: . . .

(b) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance;”

(2007).

⁹Referencing the creditor’s notice statute. See Utah Code Ann. § 75-3-801; see also In re Estate of Anderson, 821 P.2d 1169 (Utah 1992) (referencing Utah’s nonclaim statute).

¹⁰Parallel to relevant language in Utah Code Ann. § 75-3-803.

accomplish this result." Id. at 76.

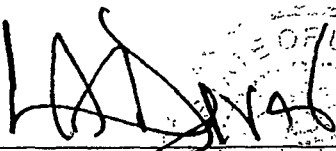
Similarly, this Court finds that Plaintiff's claim is barred except as allowed by Utah Code Ann. § 75-3-803 (4)(b). To hold otherwise, would frustrate the basic purpose of the Utah Probate Code and "would cast substantial doubt on the finality of any distribution to an heir or devisee and the distributee's right thereto." Id. (citations omitted); See Utah Code Ann. § 75-3-1001 et. seq.

Based on the foregoing, the Estate's Motion is GRANTED.

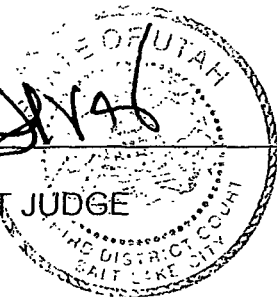
This Ruling stands as the Order of the Court. No further Order is required.

Dated 29th day of January, 2008.

BY THE COURT:



L.A. DEVER
DISTRICT COURT JUDGE



CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling dated this 29 day of January, 2008, postage prepaid, to the following:

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

IN THE MATTER OF THE ESTATE OF
GARY WAYNE OSTLER,

Deceased.

**REPLY MEMORANDUM IN SUPPORT
OF ESTATE'S MOTION TO DISMISS
COMPLAINT OF ADAM KUNIC
MOSES WALKER, A MINOR**

Probate No. 033901263

Judge L.A. Dever

Douglas L Stowell, as Personal Representative of the Estate of Gary Ostler (the "Estate"), submits this reply memorandum in support of the Estate's motion to dismiss the complaint filed on June 29, 2007 in this matter (the "Complaint") by Adam Kunic Moses Walker, a minor, by and through his Guardian, Melissa M. Walker ("Plaintiff").

BACKGROUND

Plaintiff, a three-year old minor child, through his mother and legal guardian, Melissa Walker ("Ms. Walker") is seeking to assert a time-barred wrongful death claim (the "Claim") against the Estate for the wrongful death of Plaintiff's father allegedly caused by Gary Ostler, the decedent of

this Estate¹. The decedent Gary Ostler, and Plaintiff's father, died on July 13, 2003 in a crash of an airplane piloted by Gary Ostler. Plaintiff's Claim is that Gary Ostler caused the wrongful death of Plaintiff's father on that date. The Estate was opened in a formal probate proceeding on September 17, 2003; notice to creditors was first published on September 26, 2003; the deadline for presentment of the Claim was 90 days later, on December 26, 2003; yet Plaintiff did not present the Claim to the Estate until more than three years after the deadline, on April 16, 2007. When Plaintiff presented the Claim on April 16, 2007, more than three years late, he admitted the late filing by also filing a Petition for Leave to File Late Creditor's Claim.

The Estate filed a Notice of Disallowance of Claim on May 2, 2007, disallowing Plaintiff's Claim on the ground that it was forever barred by reason of its late presentment. Petitioner then filed a Complaint in this matter on June 29, 2007 for the wrongful death of his father, notwithstanding the Estate's disallowance of the Claim. The Estate then filed the present motion to dismiss the Complaint on the grounds that this Court lacks jurisdiction to hear the Complaint because presenting the Claim within the claim presentment deadline is a jurisdictional prerequisite. The above facts are not in dispute, but are set forth on the face of the pleadings in this matter.

REPLY ARGUMENT

The Uniform Probate Code provides that all claims against a decedent's estate are forever barred unless they are "presented" before carefully defined deadlines. This claims presentment requirement is often referred to as the "nonclaim statute." Utah's enactment of the nonclaim statute is set forth in Utah Code § 75-3-803 and was discussed in the Estate's Motion to Dismiss. Under

¹ The Estate has not conceded the paternity of the Plaintiff, but will assume that paternity has been established solely for purposes of this memorandum.

Utah's nonclaim statute, Plaintiff's Claim should have been presented by December 26, 2003, which was 90 days after first publication of notice to creditors.

Plaintiff's opposition memorandum does not cite any legal authority for permitting this Court to allow him to present his Claim more than three years late. Plaintiff cites only Utah's normal two-year wrongful death statute of limitations and the statute providing for the tolling of the normal statute of limitations during a claimant's minority. The Estate's reply is that the nonclaim statute of Utah's probate code clearly states that the claims presentment requirement supersedes, and shortens, any other applicable statute of limitations and does not provide for tolling during minority. "All claims . . . if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within [the nonclaim statute deadlines]." Utah Code § 75-3-803(1) (emphasis added). Likewise, Utah's general limitations statute itself states that it is superseded by any other more specific limitations period. "Civil actions may be commenced only within the periods prescribed in this chapter, . . . except in specific cases where a different limitation is prescribed by statute." Utah Code § 78-12-1 (emphasis added). Plaintiff does not cite any authority to the contrary.

Plaintiff cites only one case in this section, In the Matter of Rolando S. Garza, Deceased, 725 P.2d 1328 (Utah 1986), yet Plaintiff admits in his discussion of that case that the claim in Garza was presented two days before expiration of the claims presentment deadline. Thus Garza supports the Estate's argument that the Claim is barred, not the Plaintiff's argument to the contrary. The Garza case was actually about how the 90-day claims presentment deadline would be calculated and had nothing to do with making an exception to the claims presentment deadline for minor claimants. The

only similarity between the Garza case and this case is that they both involved wrongful death claims brought by minor children.

Plaintiff's argument is not only incorrect, it would also turn Utah's probate administration on its head. Under Plaintiff's theory, Plaintiff could have waited eighteen years to present his claim, not just the four years that his mother actually took. If Plaintiff's argument is correct, the Estate, and every probate estate in Utah, will be forced to remain open for at least eighteen years to allow for the possibility that the decedent could have harmed a young child the day before he died, which child is allowed eighteen years to bring its claim. Four men died in the plane crash that took the life of Plaintiff's father. Who is to say that Plaintiff's father or the other three men did not have or conceive other children in the weeks or months before then? The Estate was shocked and surprised to learn of the existence of the Plaintiff, four years late. But if it can happen once, it can happen again.

The remainder of Plaintiff's argument is a plea to be allowed to file three years late based on three equitable factors: (1) that family members of the decedent induced Ms. Walker to forgo legal counsel with promises of voluntary financial support, (2) that the claims presentment deadline expired before Plaintiff was even born, and (3) that the Estate will not be harmed by allowing this Claim because the Estate is still open. The Court should disregard these equitable arguments because Plaintiff has not provided any legal authority that would permit the Court to waive jurisdictional prerequisites on the basis of equitable factors.² The Estate is entitled to an order of dismissal on the face of the pleadings themselves, which include Plaintiff's admission that the Claim was presented after the nonclaim statute deadline.

² See Mountain Am. Credit Union v. McClellan, 854 P.2d 590, 591 (Ct. App. Utah 1993) ("A court may enter judgment on the pleadings when the moving party is entitled to judgment on the face of the pleadings themselves.").

Addressing these three equitable arguments very briefly, however, as to the first allegation that family members of the decedent induced Ms. Walker to forgo legal counsel with promises of voluntary financial support, the Estate points out that the Personal Representative, Douglas Stowell, is not a family member and had no knowledge of Ms. Walker, the Plaintiff, or the Claim until it was presented to him four years late. Plaintiff has cited no authority that would impute the knowledge or promises of potential heirs and other claimants to an unrelated personal representative.

Ms. Walker's second equitable argument is that it is unfair to hold her to the statutory claims presentment deadline because Plaintiff was not born until three months after it expired. But even if this justified some delay, Plaintiff does not explain why she is entitled as a matter of equity and fairness to take three full years after birth to present the claim. Moreover, Ms. Walker admits in her Affidavit that she was certain as to Plaintiff's paternity as soon as she discovered she was pregnant towards the end of July, 2003, five months before the claims presentment deadline. The nonclaim statute does not require that suit be filed. All that would have been required was for Ms. Walker to have sent the personal representative some form of "written statement of the claim, indicating its basis, the name and address of the claimant, and the amount claimed . . ." Utah Code § 75-3-804(1)(a).

Ms Walker's last argument is that because the Estate is still open, no harm will result by allowing Plaintiff's claim to be presented four years late. As explained above, this presumes the opposite of what has already actually happened to the Estate, namely that no other presently unknown minor will come forward years from now to make the same request. Moreover, the Estate has disallowed three other late-filed claims. Excusing Plaintiff's late presentment on equitable grounds will open the door for the other three disallowed claimants. Finally, the Estate has already


filed and had audited its federal estate tax return. The Estate is in a 50% tax bracket. Payments on wrongful death claims are deductible. If the Plaintiff's Claim had been timely filed, the Estate could have claimed a larger deduction on the estate tax return, thereby reducing its after-tax cost of any settlement with Plaintiff by 50%. Plaintiff has deprived the Estate of that opportunity by his mother's late presentment without undergoing a difficult and expensive procedure to reopen the estate tax return and attempting to convince the IRS that this was a valid existing claim that should have been deducted in the first place.

Plaintiff also argues that it is not fair for a minor child to suffer because of the delay or neglect of adults in taking steps to preserve his Claim. Yet, the only adult that could have taken the necessary steps for the Plaintiff is Ms. Walker, Plaintiff's own mother, who was the only one with certain knowledge of the paternity of her unborn child. Nor has the Estate discriminated against Ms. Walker or Plaintiff. The Estate has consistently disallowed every claim presented after the nonclaim statute presentment deadline and has consistently conceded the timeliness of all claims presented before the deadline.

CONCLUSION

Plaintiff has not cited any authority, legal or equitable, that would permit the Court to ignore the jurisdictional prerequisite of timely presentment of his wrongful death claim. The lateness of the Claim is apparent on the face of the pleadings in this matter. Therefore, the Estate's motion to dismiss Plaintiff's Complaint should be granted.

Dated: November 30, 2007



Alan R. Andersen, Attorney for Personal Representative

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2007, I caused a true and correct copy of the foregoing
**REPLY MEMORANDUM IN SUPPORT OF ESTATE'S MOTION TO DISMISS
COMPLAINT OF ADAM KUNIC MOSES WALKER, A MINOR** to be mailed, postage
prepaid, to:

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

IN THE MATTER OF THE ESTATE OF **OPPOSITION TO MOTION TO**
GARY WAYNE OSTLER, **DISMISS COMPLAINT**

Deceased.

Probate No. 033901263
Judge L. A. Dever

Adam Kunic Moses Walker ("Adam, Jr."), a minor, by and through his Guardian and mother, Melissa M. Walker ("Plaintiff"), and through his legal counsel, Moses Lebovits and Mary Jane Whisenant, hereby files this, his Opposition to the Motion to Dismiss Complaint ("Motion") filed in this matter by Douglas L. Stowell, as Personal Representative of the Estate of Gary Wayne Ostler ("Estate"). Plaintiff respectfully requests that the Estate's Motion be DENIED.

BACKGROUND

1. Adam, Jr. was conceived by his mother, Plaintiff Melissa Walker, and his father, Adam Woodruff Moses ("Adam, Sr."), on or about July 1, 2003.

2. Adam, Sr. was killed in a tragic plane crash off the coast of Alaska, on July 13, 2003, approximately two weeks after Adam, Jr.'s conception. At the time of Adam, Sr.'s death, Plaintiff did not yet even know that she was pregnant with Adam, Jr.

3. The plane was piloted by Gary Wayne Ostler ("Ostler"), who was the brother-in-law of Adam, Sr., as Ostler was married to Adam, Sr.'s sister, Christa Moses-Ostler. It is undisputed in this matter that the negligence of Mr. Ostler was the sole cause of the fatal crash.

4. The first Notice to Creditors of Ostler's estate was published on September 26, 2003. Ninety (90) days after the notice was first published would have been approximately December 26, 2003. Adam, Jr. was not even born on December 26, 2003.

5. The birth of Adam, Jr. occurred on March 27, 2004.

6. Adam, Sr.'s paternity of Adam, Jr. was established on April 8, 2004.

7. July 13, 2004 was one year after Ostler's death. On this date, Adam, Jr. was approximately three months and one week old and the identity of his father had only been established for approximately three months.

8. Plaintiff filed a Notice of Creditor's Claim against the Estate on behalf of Adam, Jr. on April 16, 2007, just after Adam, Jr.'s third birthday and before a guardian had ever been appointed for him.

9. The Estate filed a Notice of Disallowance of Claim as to Plaintiff's claim on May 2, 2007.

10. Plaintiff was appointed as Adam, Jr.'s guardian on July 20, 2007.

ARGUMENT

The instant lawsuit is an action for the wrongful death of Adam Moses, Sr. Adam, Sr. was killed on July 13, 2003, in the tragic crash of a plane negligently piloted by Ostler off the coast of Alaska, when Ostler disregarded the flight plan and not once, but twice changed his intended refueling destination airport. Ostler foolishly and fatally, with the lives of five (5) others in his hands, decided to attempt to make it all the way to his final destination of Gustavus, Alaska, causing the plane to run out of fuel 12 miles short of the airport in open waters. The plane sank in near-freezing ocean water a mile from the nearest shore. Four (4) of the plane's six (6) passengers were killed, including Adam, Sr. and Ostler. Also killed were Ostler's son, Christopher Ostler, and other brother-in-law, Gordon Moses. It is undisputed that the crash was due solely to the negligence of Ostler. The National Transportation Safety Board cited the cause of the accident as Ostler's "inadequate in-flight decision making process, and failure to refuel the airplane prior to fuel exhaustion, which resulted in a total loss of engine power."

Due to Ostler's negligence, Adam, Jr. must now grow up without his father. His mother, Melissa Walker, is doing her best to raise Adam, Jr. alone as a single-mother, while struggling, and many months failing, to make ends meet as a full time student with two part time jobs.

I.

**THE UTAH WRONGFUL DEATH STATUTE, WITH ITS TWO-YEAR
STATUTE OF LIMITATIONS AND TOLLING PROVISION FOR MINORS,
CONTROLS THIS ACTION**

The statute of limitations for a wrongful death action in Utah is two (2) years. Utah Code § 78-12-28(2). The cause of action accrues at the time of death; hence the two-year period begins to run at that time. If the claim holder is a minor, the statute of limitations is tolled during his or her minority. Utah Code § 78-12-36; *Switzer v. Reynolds*, 606 P.2d 244 (Utah 1980). Utah Code § 78-12-36 states:

If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, **either under the age of minority or mentally incompetent and without a legal guardian**, the time of the disability is not a part of the time limited for the commencement of the action. (Emphasis added.)

It is undisputed in this matter that Adam, Jr. was, at the time the wrongful death cause of action in this case accrued, and still is, a minor. Therefore, under Utah Code §§ 78-12-28(2) and 78-12-36, the statute of limitations on Plaintiff's wrongful death cause remains presently tolled.

II.

**UTAH CODE § 75-3-803(1)(a) & (b) ARE INAPPLICABLE BECAUSE
ADAM WALKER, JR. WAS NOT EVEN BORN 90 DAYS AFTER THE FIRST
PUBLICATION OF NOTICE TO CREDITORS AND WAS BARELY THREE
MONTHS OLD WITH NO GUARDIAN ONE YEAR AFTER OSTLER'S DEATH**

The Estate has filed a Motion to Dismiss Complaint claiming that Plaintiff's claim "was not timely filed and thus did not constitute a properly presented claim in that it was filed after the deadline for presenting claims set forth in Utah Code § 75-3-803(1)." This section stipulates that the time limit for presenting claims based on events arising before the death of the decedent is the earlier of one year after the decedent's death, Utah Code § 75-3-803(1)(a), or ninety (90) days after the first publication of notice to creditors, Utah Code § 75-3-803(1)(b).

In the Matter of the Estate of Rolando S. Garza, Deceased, 725 P.2d 1328, (Utah 1986), the guardian of two minor children presented a claim against the estate two days before the end of the ninety (90) day period allowed for the presentment of claims after the first publication of notice to creditors, but more than three (3) years after their father's wrongful death. The Utah Supreme Court held that because the claimants were minors, the two-year statute of limitations for wrongful death actions, Utah Code § 78-12-28(2), was tolled during their minority by Utah Code § 78-12-36(1), and thus the claim was not barred under Utah Code § 75-3-803(1)(a). Nor did § 75-3-803(1)(b) bar the claim. (*Garza*, at 1330). The Court stated, "the two-year period being tolled, the wrongful death

action is not barred; therefore, the claim is not 'barred earlier by other statute of limitations.'" (*Garza*, at 1329).

In *Garza*, both minor children were born at the time their father, whose wrongful death was at issue, died. Further, both had a guardian appointed to look after their interests by the time one year passed after their father's wrongful death. On or about December 26, 2003, when the ninety (90) days passed after the first publication of Notice to Creditors in the instant matter, Adam, Jr. was still a fetus in utero. Adam, Jr. was not born until March 27, 2004. Therefore, he could not possibly have received the Notice to Creditors filed on behalf of the Estate on September 26, 2003. When one (1) year passed after the date of Ostler's death, Adam, Jr. was an approximately three month and one week old infant and the paternity of his deceased father had only been established for approximately three months. Unlike the minors in *Garza*, at both of these points, no guardian had been appointed on behalf of Adam, Jr. If the minors in *Garza* were not barred from bringing their claims for the wrongful death of their father, then Adam, Jr. certainly should not be barred from making his valid claim against the Estate due to a deadline which passed before he was even born or due to another deadline which passed when he was only three months old and had no guardian appointed on his behalf.

III.

THE OSTLER FAMILY AND THE ESTATE KEPT PLAINTIFF FROM SEEKING AN ATTORNEY BY MAKING REPEATED ASSURANCES TO HER

**THAT THEY WOULD PROVIDE FOR ADAM, JR. WITHOUT THE
NECESSITY OF INVOLVING THE LEGAL SYSTEM**

Once Adam, Sr.'s paternity was established, Plaintiff asked for and received repeated assurances from the Ostler family, i.e., Adam Jr.'s aunt and Ostler's widow, Christa Moses-Ostler, that Adam, Jr. would be taken care of out of the Estate. Plaintiff preferred to handle this matter informally as well, and strongly hoped to avoid filing a lawsuit against the Estate, since the Ostlers were related to Adam Jr.'s father and had lost Mr. Ostler and three (3) other family members in the crash themselves. The Ostlers include Adam, Sr.'s sister, Christa Moses-Ostler, who is the widow of the deceased pilot, Gary Wayne Ostler, and other members of his family. Plaintiff did not want to sue them. She only did so as a last resort after repeated broken promises by the Ostlers and the Estate that Adam, Jr. would be provided for.

One example of the Ostler's empty promises involves a 1965 Ford Mustang which belonged to Adam, Sr. Plaintiff was initially promised that the car would go to Adam, Jr. Then the Ostlers gave the car to Adam, Sr.'s brother, Aaron Moses, "to hold for Adam, Jr." When Mr. Moses sold the Mustang for \$12,000.00, Plaintiff was led to believe that at least half of the proceeds would go to Adam, Jr. Then she was told that Adam, Jr. would receive "some" of the money. Finally, Plaintiff received a mere \$700.00 for Adam, Jr. Once it became clear that the Ostlers were only stringing Adam, Jr. along, Plaintiff filed a claim against the Estate on Adam, Jr.'s behalf. When Ostler's widow, Christa Moses-Ostler, heard that Plaintiff had filed suit on Adam Jr.'s behalf, she

made statements to the effect that, "Adam, Jr. won't get anything now because of the statute of limitations." If the goal of the Estate and family was to delay Plaintiff in making a legal claim long enough to keep from paying anything to Adam, Jr. for the death of his father caused by Ostler, then they believed they had succeeded. The Court should not allow them to do so.

IV.

SINCE THE ESTATE IS STILL OPEN AND HAS NOT BEEN SETTLED,
NO HARM WILL RESULT OR PUBLIC POLICY BROKEN BY ALLOWING
ADAM, JR. TO MAKE HIS RIGHTFUL CLAIM TO THE ESTATE

The policy behind Utah Code § 75-3-803(1)(a)-(b) is to allow estates to become finalized, so that they are not disrupted years later by claims made after an estate is settled. Plaintiff is not asking the Court to disrupt an already settled estate. The Estate is not closed and is still pending.

The Estate had actual notice of Adam, Jr.'s claim well within one (1) year of Ostler's death, and the family encouraged Plaintiff well within that year's time not to involve the legal system by promising Plaintiff that Adam, Jr. would be taken care of out of the Estate. In its motion, the Estate also claims that Adam Jr.'s "mother, grandparents, or any other interested person could have applied for appointment as the personal representative of Adam, Sr.'s estate in order to file this wrongful death claim against the Estate." Adam, Jr., a minor, should not be penalized for the false promises or

failure of these adults to apply for appointment as the personal representative of Adam Sr.'s estate.

Since Plaintiff was unable to get the promised cooperation from the Estate, she was finally forced to engage an attorney to investigate making a legal claim on Adam, Jr.'s behalf. A creditor's claim was filed on April 16, 2007, but Adam, Jr. still had no legal guardian. A legal guardian was appointed July 20, 2007. Adam, Jr. should not be punished because he did not have a guardian sooner, especially since allowing him to make his claim will not disrupt an already closed and settled estate.

The Estate inexplicably claims in its motion that it "is not denying the Claim on technicality." That is exactly what the Estate is attempting to do. Then the Estate summons the nerve to close its motion by accusing a fetus (at the 90 day after publication point) or a three month old infant (at the one year point after Ostler's death) of "sitting on his rights," as if Adam, Jr. even to this day, has any idea what his rights are.

IV.

CONCLUSION


Due to the fact that Adam, Jr. was not born at the time of the death of Adam Sr., and still is, a minor, the statute of limitations on his wrongful death claim for the death of Adam, Sr. is tolled. Utah Code § 75-3-801(1)(a) & (b) are inapplicable to this action because at the time the ninety (90) day period after publication to creditors period and one year period after the decedent's death expired, Adam, Jr. was not yet born and a three month and one week old infant with no guardian, respectively. Plaintiff Melissa Walker

did not want to sue the Ostlers, and Adam Sr.'s sister, and was promised repeatedly by the Ostlers and the Estate that such was not necessary because they would take care of Adam, Jr. out of the proceeds of the Estate. As soon as Plaintiff gave up all hope of the Ostlers and the Estate making good on their promises to provide for Adam, Jr. after the wrongful death of his father due to the negligence of Ostler, and not until she finally gave up such hope, Plaintiff filed this legal action on Adam, Jr.'s behalf. The estate remains unsettled, so no harm or violation of public policy will result by allowing Adam, Jr. to make his rightful claim.

This document is further supported by the Affidavit of Melissa Walker, filed herewith.

Therefore, Plaintiff respectfully prays that the Court set a date and time for this Motion to be heard, and that Estate's Motion to Dismiss Complaint be DENIED.

DATED this 14 day of November, 2007.



Moses Lebovits
Mary Jane Whisenant
Attorneys for Claimant

CERTIFICATE OF MAILING

I certify that on this 16 day of Nov, 2007, I caused a true and correct copy of the foregoing to be sent by first class mail to the following:

Melissa Walker
351 East 720 South #B
Orem, UT 84058

James G. Swensen, Jr.
Alan R. Andersen
SWENSON & ANDERSEN, PLLC
136 S. Main Street #318
Salt Lake City, UT 84101

A handwritten signature in cursive script, appearing to read "M. J. Swensen", is written over a horizontal line.

Alan R. Andersen (3912)
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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE ESTATE OF

GARY WAYNE OSTLER,

Deceased.

MOTION TO DISMISS COMPLAINT

Probate No. 033901263
Judge L.A. Dever

Douglas L Stowell, as Personal Representative of the Estate of Gary Ostler (the "Estate"), through his legal counsel, Swensen & Andersen PLLC, hereby moves to dismiss the Complaint filed on June 29, 2007 in this matter (the "Complaint") by Adam Kunic Moses Walker, a minor, by and through his Guardian, Melissa M. Walker. ("Plaintiff").

BACKGROUND

1. Plaintiff filed a creditor's claim against the Estate on April 16, 2007 (the "Claim"). The Claim is for the wrongful death, and related damages, of Plaintiff's father. Plaintiff is allegedly the sole heir of Plaintiff's father.

2. The Claim alleges that Gary Wayne Ostler, the decedent in this probate Estate ("Decedent"), caused the death of Plaintiff's father on July 13, 2003 by negligently piloting his

Cessna 401 into the waters of the Pacific Ocean resulting in the simultaneous deaths of the Decedent, Plaintiff's father, and others.

3. On May 2, 2007, the Estate filed a Notice of Disallowance of Claim, disallowing the Claim on the grounds that it was not timely filed and thus did not constitute a properly presented claim in that it was filed after the deadline for presenting claims set forth in Utah Code § 75-3-803(1).¹

4. The Plaintiff then filed the Complaint that is the subject of this Motion to Dismiss on June 29, 2007.

ARGUMENT

1. The Complaint is clearly barred by Utah Code § 75-3-804(1)(b), which provides that "the claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction to obtain payment of the claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim." (emphasis added).

2. The time limit for presenting claims based on events arising before the death of the Decedent (Decedent allegedly caused the crash minutes before his own death) is the earlier of one year after Decedent's death or 90 days after first publication of notice to creditors. Utah Code § 75-3-803(1).

¹ The Estate also disallowed the Claim in the grounds that no guardian had been appointed for the Plaintiff. However, a Guardian has subsequently been properly appointed and the Estate now drops that ground for disallowance.

3. Decedent died on July 13, 2003 and notice to creditors was first published on September 26, 2003. Thus the deadline for Plaintiff's Claim was the earlier of December 26, 2003 (next business day after 90 days after creditor notice) or July 13, 2004 (one year after date of death).

4. Therefore, even giving Plaintiff the benefit of the later of the two deadlines, Plaintiff was required to file a properly presented claim, or to commence legal proceedings against the Estate, no later than July 13, 2004. Yet Plaintiff did not file the claim until April 16, 2007, over three years late.

5. The time limitations of Utah Code § 75-3-803 clearly apply to this wrongful death claim. The statute itself refers to claims "whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations" Utah Code § 75-3-803 (emphasis added). Thus this time limit applies to tort claims and also supersedes any tolling of the regular time limit on bringing wrongful death claims that may exist because of Plaintiff's legal incapacity as a minor.

6. Nor can Plaintiff validly argue that his minority creates any unfairness or harshness in the application of this absolute Probate Code time limit because wrongful death claims for the death of a person are permitted to be brought either by "his heirs, or his personal representative for the benefit of his heirs." Utah Code § 78-11-7. Therefore, Plaintiff's mother, Plaintiff's father's parents, or any other interested person could have applied for appointment as the personal representative of Plaintiff's deceased father in order to file this wrongful death claim against the Estate.

7. Moreover, even disregarding this option of having a personal representative appointed to preserve Plaintiff's claim, Plaintiff was born alive on March 27, 2004 and DNA testing for paternity was completed on April 8, 2004, yet neither Plaintiff's mother nor any other interested person took any action to file the Claim until over three years later. Thus, the Estate is not denying the Claim on a technicality. Rather, it would be grossly unjust to the Estate and its beneficiaries to permit Plaintiff to bring this Claim after sitting on his rights for over three years.

CONCLUSION

For the reasons stated above, the Personal Representative move to dismiss the Complaint on the grounds that it was not timely filed.

Dated: July 27, 2007



Alan R. Andersen, Attorney for Personal Representative

Douglas L. Stowell, Personal Representative
307 East Stanton Avenue
Salt Lake City, UT 84111

CERTIFICATE OF SERVICE

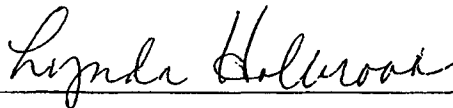
I hereby certify that on July 27, 2007, I caused a true and correct copy of the foregoing **MOTION TO DISMISS COMPLAINT** to be mailed, postage prepaid, to:

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5
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FILED
DISTRICT COURT
07 JUN 29 PM 4:35
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY _____
DEPUTY CLERK

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

IN THE MATTER OF THE

: COMPLAINT
:
:

GARY WAYNE OSTLER,

: Probate No. 033901263
:

Deceased.

: Judge L. A. Dever
:

GENERAL ALLEGATIONS

1. ADAM KUNIC MOSES WALKER, a minor, by and through his Guardian, MELISSA M. WALKER, constitutes all of the heirs at law of ADAM WOODRUFF MOSES, deceased.

2. Defendants DOES 1 through 100, inclusive, are sued herein under fictitious names because their true names and capacities, whether individual, associate, corporate, governmental, or otherwise are unknown to Plaintiff.

Plaintiff will ask leave of this court to amend this Complaint to assert their true names and capacities when the same are ascertained.

2. Plaintiff is informed and believes and thereon alleges that each of the defendants designated herein as a DOE or named are negligently, carelessly, recklessly, strictly or otherwise responsible in some manner for the events and happenings herein referred to and caused damages directly and proximately thereby to Plaintiff. The Defendants are sued as principals and/or agents, servants and employees of said principals and all of the acts performed as agents and employees were performed within the course and scope of their authority and employment and/or agency and with the consent of each of the Defendants.

3. Plaintiff brings this action in that his decedent father, Adam Woodruff Moses, was killed in a crash of a Cessna 401 airplane on a personal flight to Gustavus, Alaska on July 13, 2003. Said airplane was owned and flown by Gary Wayne Ostler, deceased. Mr. Ostler was the only licensed pilot in the aircraft, and as such owed a duty to his invited guests to do all within his power to ensure safe passage of his passengers to the appointed destination.

4. At all times herein mentioned, Defendant GARY WAYNE OSTLER (deceased), was a resident of Salt Lake County, Utah.

5. At all times herein mentioned, Defendant ESTATE OF SHIP OF GARY WAYNE OSTLER, and DOES 1 through 50, is a probate estate filed in the Third Judicial District Court in and for Salt Lake County, Utah.

6. At all times herein mentioned each Defendant was the agent of each and all of the other defendants herein and was acting within the course and scope of its agency and with consent.

7. The conduct of each defendant herein combined and cooperated with the conduct of other defendants herein so as to cause the above described air crash and resulting damages to Plaintiff.

8. On July 13, 2003, Gary Wayne Ostler was piloting his Cessna 401 airplane on a personal flight to Gustavus, Alaska. Mr. Ostler was operating as an instrument flight rules (IFR) cross county personal flight under Part 91. In contravention of the flight plan filed by Mr. Ostler, in which he scheduled a refueling stop in Ketchikan, Alaska, Mr. Ostler negligently failed to refuel his aircraft, causing it to crash into the waters of the Pacific Ocean. That crash resulted in the death of Mr. Ostler and three of his passengers, including Adam Woodruff Moses, the father of Adam Kunic Moses Walker.

9. Gary Wayne Ostler was the only pilot in the airplane and his passenger, decedent Adam Woodruff Moses, had no aviation experience. Accordingly, Ostler owed a non-delegable duty of safe passage to his invited guest, Adam Woodruff Moses. As pilot in command Ostler was in charge of the safe operation of his aircraft, and as such, breached his duty of care owed to decedent Adam Woodruff Moses by failing to refuel the aircraft. Defendant further failed to impose measures to ensure the safety of decedent Adam Woodruff Moses and the other passengers in the aircraft, including Adam Woodruff Moses.

Gary Wayne Ostler reported to the ARTCC Specialist that "both engines were out of gas". Oster was approximately 12 miles short of his destination of Gustavus, Alaska.

10. A subsequent investigation conducted by the National Transportation Safety Board determined that the cause of the crash and the resulting deaths was "(t)he pilot's inadequate in-flight decision making process, and failure to refuel the airplane prior to fuel exhaustion, which resulted in a total loss of engine power." Thus, Defendant's conduct was the sole and proximate cause of the accident and the sole and proximate cause of the untimely and violent death of decedent Adam Woodruff Moses. Prior to his death, decedent Adam Woodruff Moses suffered extreme fear and emotional distress, as well as pain and injuries.

FIRST CAUSE OF ACTION

(Negligence – Wrongful Death)

11. Plaintiff re-alleges each and every allegation contained in those paragraphs of this Complaint and designed 1 through 11 with the same force and effect as if hereinafter set forth in full and at length.

12. At all times relevant hereto each defendant failed to skillfully, properly and in a workmanlike manner perform all undertakings pursuant to common law, federal regulations, state regulations or other law.

13. At the time and place previously described the Defendants and/or all or any one of them in violation of their duty to the Plaintiff and his decedent were negligent as set forth above and further in the following particulars, among others:

- (a) In failing to take such remedial measures, to correct defects that were actually or constructively known, as the law and safe practice required;
- (b) In failing to refuel the aircraft;
- (c) In failing to impose measures to ensure the safety of decedent and the other passengers in the aircraft;
- (c) In failing to comply with the regulations and standards of the Federal Aviation Agency and/or of other federal and state regulatory agencies;
- (d) In failing to safely and adequately own, operate, maintain, service, without being limited thereto, to the aircraft, and the engine components thereof.

14. Prior to the crash, the airplane's engine failed, whole or in part, due to the lack of fuel, thereby failing to give the pilot enough power to extricate him from the circumstances in which he found himself, without being limited thereto, and was thereby caused and/or contributed to the crash herein.

15. Defendants, and each of them, knew or in the exercise of reasonable care should have known and discovered that said aircraft was dangerously low on fuel and that it was unsafe for the use and purpose for which it was intended when

used as recommended by said defendants, and each of them. The decedent herein ADAM WOODRUFF MOSES, was unaware of the dangerous nature of said aircraft nor was it made known to him.

16. As a direct and legal result of the negligence, carelessness and other tortious, unlawful and wrongful acts and conduct of the Defendants, and each of them, and of their respective agents, servants, employees and authorized representatives as aforesaid, Plaintiff's decedent was killed, and, as a result, the Plaintiff has suffered loss of financial support, have been deprived of the support and contributions from past and future earnings, accumulations, and inheritance, and loss of services, love, comfort affection, companionship, guidance, society, care, solace, grief and sorrow, and moral support of a kind and loving father, all to his general damages in a sum well in excess of the jurisdictional minimum of this Court.

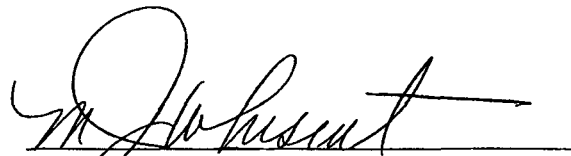
17. As a result of such negligence and in consequence of the death of ADAM WOODRUFF MOSES, the Plaintiff was caused and continues to suffer from grief, sorrow and mental anguish, from the psychological and physical affects of psychic shock and from and the loss of moral support, among other things. The general damages suffered by the Plaintiff exceed the jurisdictional minimum of this Court.

18. As a result of the foregoing, the Plaintiff has suffered damages, general and special, economic and pecuniary, and injuries, intangible and psychic, in amounts to be determined upon proof at the time of trial.

WHEREFORE, Plaintiff prays for judgment against the Defendants, and each of them on the First Cause of Action as follows:

1. For general damages for the death of ADAM WOODRUFF MOSES, the loss of his support and contributions from future earnings, accumulations, inheritance, etc. for the loss of love, affection, services, comfort, protection, care, society, advice, counsel, grief and sorrow, and mental anguish, psychological and physical effects of psychic shock, and guidance in an amount well in excess of the jurisdictional minimum of this Court;
2. For damages for the wrongful death of ADAM WOODRUFF MOSES as alleged herein, in accordance with the evidence, proof and the law;
3. For other damages that may be proper and allowable under the law;
4. For costs of suit incurred herein and prejudgment interest;
5. For such other and further relief as the Court may deem just and proper in this premises.

DATED this 29 day of June, 2007.


Mary Jane Whisenant
Attorney for Claimant

LEXSTAT UTAH CODE ANN. 75-3-803

UTAH CODE ANNOTATED

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*** This document reflects changes received through the 2008 General Session ***

*** Annotations current through 2008 UT 32 (4/25/2008); 2008 UT APP 144 ***

*** (4/25/2008) and May 15, 2008 (Federal Cases) ***

TITLE 75. UTAH UNIFORM PROBATE CODE
CHAPTER 3. PROBATE OF WILLS AND ADMINISTRATION
PART 8. CREDITORS' CLAIMS

Go to the Utah Code Archive Directory

Utah Code Ann. § 75-3-803 (2008)

§ 75-3-803. Limitations on presentation of claims

(1) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision of it, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:

(a) one year after the decedent's death; or

(b) within the time provided by *Subsection 75-3-801(2)* for creditors who are given actual notice, and where notice is published, within the time provided in *Subsection 75-3-801(1)* for all claims barred by publication.

(2) In all events, claims barred by the nonclaim statute at the decedent's domicile are also barred in this state.

(3) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any of its subdivisions, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(a) a claim based on a contract with the personal representative within three months after performance by the personal representative is due; or

(b) any other claim within the later of three months after it arises, or the time specified in *Subsection (1)(a)*.

(4) Nothing in this section affects or prevents:

(a) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;

(b) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance; or

(c) collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

HISTORY: C. 1953, 75-3-803, enacted by L. 1975, ch. 150, § 4; 1992, ch. 179, § 7.

NOTES:

EDITORIAL BOARD COMMENT. --There was some disagreement among the reporters over whether a short period of limitations, or of nonclaim, should be provided for claims arising at or after death. Subsection (2) [now (3)] was finally inserted because most felt it was desirable to accelerate the time when unadjudicated distributions would be final. The time limits stated would not, of course, affect any personal liability in contract, tort, or by statute, of the personal representative. Under § 75-3-808 a personal representative is not liable on transactions entered into on behalf of the estate unless he agrees to be personally liable or unless he breaches a duty by making the contract. Creditors of the estate and not of the personal representative thus face a special limitation that runs four months after performance is due from the personal representative. Tort claims normally will involve casualty insurance of the decedent or of the personal representative, and so will fall within the exception of subsection (3)[now (4)]. If a personal representative is personally at fault in respect to a tort claim arising after the decedent's death, his personal liability would not be affected by the running of the special short period provided here.

The limitation stated in subdivision (1)(b) [before the 1992 amendment] dovetails with the three-year limitation provided in § 75-3-107 to eliminate most questions of succession that are controlled by state law after three years from death have elapsed. Questions of interpretation of any will probated within such period, or of the identity of heirs in intestacy are not barred, however.

COORDINATING CLAUSE. --Laws 1992, ch. 179, § 18 provides: "The amendments to Sections 75-3-801, 75-3-803, 75-3-806, 75-3-807, 75-3-1003, and 75-3-1006 shall apply only to the estates of decedents who die on or after the effective date of this act [July 1, 1992]. All other amendments shall be effective for all estates upon the effective date of this act."

CROSS-REFERENCES. --Death of party after verdict or decision and before judgment, Rules of Civil Procedure, Rule 58A (e).

NOTES TO DECISIONS

ANALYSIS

Construction.
Contingent claims.
Filing of claim.
Liens.
Minor claimants.
Specific performance.
Sufficiency of claim.
Summary distribution.
Time for presentation.
Cited.

CONSTRUCTION.

This section and § 75-3-804 should be applied to facilitate settlement of estates without unduly restricting the rights of timely claimants who in good faith endeavor to comply with the requirements of the statute. *Quinn v. Quinn*, 772 P.2d 979 (Utah Ct. App. 1989).

CONTINGENT CLAIMS.

Contingent claims of surviving members of unsettled partnership business could not be presented against estate of deceased partners without accounting. *Sharp v. Sharp*, 54 Utah 262, 180 P. 580 (1919) (decided under former statute).

The term "contingent claim," as employed and used in former statute which provided for payment of claims contingent or not due, was not intended to have any application in case of dissolution of partnership by death of one of its members in winding up and settlement of its affairs. *Sharp v. Sharp*, 54 Utah 262, 180 P. 580 (1919).

Claim arising from deceased's contract to allow plaintiff to manage building owned by deceased, and refusal by executors to allow such management, was contingent claim required by former statute to be presented within time stated in notice; fact that claim did not arise until executors refused to allow plaintiff to perform contract which was after time for presentation had passed did not excuse late presentation. *Halloran-Judge Trust Co. v. Heath*, 70 Utah 124, 258 P. 342, 64 A.L.R. 368 (1927).

FILING OF CLAIM.

Plaintiff claiming alleged rentals due from estate of decedent was not entitled to have decree of distribution set aside on ground that executrix of decedent's will misrepresented the facts in her petition when she alleged that "all claims filed in time or at all" had been paid, where plaintiff not only had statutory notice of the petition for distribution, its contents, and the appraisal, but had filed its claim long before, reflecting an acquaintance with the pendency of the probate. *In re Beck's Estate*, 13 Utah 2d 222, 371 P.2d 551 (1962) (decided under former statutes).

LIENS.

Attorney employed by decedent on contingent fee basis to sue on insurance contract had lien on sums recovered in such action in hands of administrator; former probate provisions relating to presentment of unsecured claims were inapplicable. *In re Agee's Estate*, 69 Utah 130, 252 P. 891, 50 A.L.R. 641 (1927).

MINOR CLAIMANTS.

A claim presented two days before the end of the three-month period allowed for the presentment of claims after publication of notice to creditors but more than three years after the death of the decedent was timely where the claimants were minors and, since the two-year statute of limitation was tolled during their minority, their claim was "not barred earlier by other statute of limitations." *In re Estate of Garza*, 725 P.2d 1328 (Utah 1986).

SPECIFIC PERFORMANCE.

Since an action against the estate for specific performance of decedent's agreement to sell real estate is not a "claim" subject to the requirements of this section, claim for attorney fees incident to such action for specific performance is not subject to the requirements of this section. *In re Estate of Shepley*, 645 P.2d 605 (Utah 1982).

The term "claims," under this section, does not include claims for specific performance; therefore, the statute of limitations of this section is not applicable to an action for specific performance. *Bradshaw v. McBride*, 649 P.2d 74 (Utah 1982).

Demand against decedent's estate asserting that property was sold to claimant by deceased and asking the court to order the administrator to make a suitable conveyance was a petition for specific performance of a contract to convey property and was not subject to the limitation for presenting claims against an estate. *In re Estate of Sharp*, 537 P.2d 1034 (Utah 1975).

SUFFICIENCY OF CLAIM.

Claim against estate was sufficient that gave the personal representative all the information he needed to investigate the claim and decide whether to pay it, fight it, or settle it. *Quinn v. Quinn*, 772 P.2d 979 (Utah Ct. App. 1989).

Surviving wife's claim as a creditor under an antenuptial agreement was barred by her failure to make the claim within one year. Merely providing the estate representative with a copy of the agreement, without explaining how the agreement had been breached or the amount the wife was claiming as a creditor under the agreement, did not satisfy the requirements of § 75-3-804. *In re Estate of Uzelac*, 2005 UT App 234, 526 Utah Adv. Rep. 33, 114 P.3d 1164.

SUMMARY DISTRIBUTION.

Although widow had claim against estate of deceased husband for voluntary payment of deceased's obligations, funeral expense and expense of last illness, she could not claim amounts of such payments to reduce the value of the property of the estate so as to entitle her to summary distribution of the estate under the exemptions allowed by former statute. *Columbia Trust Co. v. Anglum*, 63 Utah 353, 225 P. 1089 (1924).

TIME FOR PRESENTATION.

In suit by executors of deceased partner against legal representatives of surviving partners for partition of partnership mining property, wherein personal representatives of surviving partners sought to counterclaim for money paid out by surviving partners for partnership debts and obligations, representatives of surviving partners were not barred by laches from presenting claim in partition suit for failure to file claim against deceased partner, where plaintiffs suffered no prejudice by lapse of time. *Sharp v. Sharp*, 54 Utah 262, 180 P. 580 (1919).

Where claims were barred for failure to file on time under former Probate Code, administratrix was without power to pay them, and any money paid thereon would be considered to come from her personal funds, and could not be considered as deduction from inheritance tax. *Jones v. State Tax Comm'n*, 99 Utah 373, 104 P.2d 210 (1940).

Claims had to be filed, after proper notice, within time limit of former statute, or be forever barred. *Jones v. State Tax Comm'n*, 99 Utah 373, 104 P.2d 210 (1940).

Purpose of former statute requiring presentation of claims within time stated in notice was to require publication of notice to creditors so as to shorten limitation period, and not to lengthen it because of neglect on part of personal representative or delay on part of creditor. *Gray Realty Co. v. Robinson*, 111 Utah 521, 184 P.2d 237 (1947).

Notice to creditors by administratrix, indicating that claims against estate could be filed before certain date did not constitute waiver or abandonment of defense of general statute of limitations available to administratrix in action by creditor. *Gray Realty Co. v. Robinson*, 111 Utah 521, 184 P.2d 237 (1947).

Former statute requiring presentation of claims within time stated in notice was not a bar to action to impress judgment lien on property, where complaint alleged that property had been transferred to defraud creditors, and that property was held in trust for defendant. *Moulton v. Morgan*, 115 Utah 119, 202 P.2d 723 (1949).

CITED in *In re Estate of Larson*, 750 P.2d 604 (Utah 1988); *DeMentas v. Estate of Tallas*, 764 P.2d 628 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

AM. JUR. 2D. --31 *Am. Jur. 2d Executors and Administrators* §§ 633 to 640.

C.J.S. --34 C.J.S. *Executors and Administrators* §§ 405 to 408.

A.L.R. --Relation back of appointment of administrator, running of statute of limitations as affected by doctrine of, 3 A.L.R.3d 1234.

Tort claim as within nonclaim statutes, 22 A.L.R.3d 493.

Delay in appointing administrator or other representative, effect on cause of action accruing at or after death of person in whose favor it would have accrued, 28 A.L.R.3d 1141.

Counterclaim or setoff, presentation of claim to executor or administrator as prerequisite of its availability as, 36 A.L.R.3d 693.

Limitations of actions applicable to action by trustees of employee benefit plan to enforce delinquent employer contributions under ERISA (29 USCS § 1132 (a)), 90 A.L.R. Fed. 374.

USER NOTE: For more generally applicable notes, see notes under the first section of this article, part, chapter, subtitle, or title.

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78-12-36 — Effect of disability.

☒ Utah Code ☐ All US State Codes

78-12-36. Effect of disability.

If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either under the age of majority or mentally incompetent and without a legal guardian, the time of the disability is not a part of the time limited for the commencement of the action.

Amended by Chapter 19, 1987 General Session

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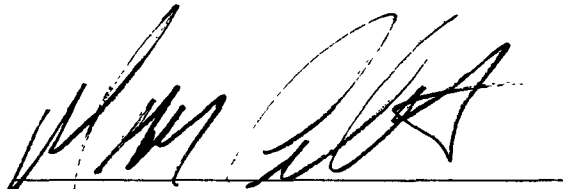
CERTIFICATE OF SERVICE

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I, Moses Lebovits, certify that on October 10, 2008, I served a copy of the attached Appellant's Amended Addendum upon Alan R. Andersen, the counsel for the appellee in this matter and Mary Jane Whisenant, local counsel for the appellant in this matter by mailing to them by Federal Express mail to the following addresses:

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