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Hal LeFevre, Julia Richmond, Jeffrey LeFevre, Kelly LeFevre, Daniel LeFevre, Bryce LeFevre, and Cynthia C. L. Giles v. Leland Stout : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE ESTATE OF:

HAROLD ALMA LEFEVRE and
EDITH K. LEFEVRE

HAL LEFEVRE, JULIA RICHMOND,
JEFFREY LEFEVRE, KELLY LEFEVRE,
DANIEL LEFEVRE, BRYCE LEFEVRE,
AND CYNTHIA C. L. GILES,

Petitioners/Appellees/Cross-
Appellants,

v.

LELAND STOUT,

Respondent/Appellant/Cross-
Appellee.

**REPLY BRIEF OF
CROSS-APPELLANTS**

Case No. 20080234

District Court Case No. 933400210

Appeal from the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Gary D. Stott

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SUMMARY OF ARGUMENT

The trial court erred in failing to award Petitioners their attorneys' fees. The probate code permits (1) personal representatives to recover their costs and fees incurred in bringing or defending an action on behalf of the estate and (2) any party to a probate action to recoup costs. Petitioner Hal LeFevre has been nominated as the successor personal representative to Harold's estate. All of the Petitioners stood in the shoes of a personal representative and brought this action in good faith to correct Ellen's fraud and Respondent's deception. But for that fraud and deception, Petitioners would not have had to bring this costly and protracted action. Under either statute, Petitioners should be awarded their attorneys' fees.

In addition, the trial court erred in granting Respondent a stay pending appeal. The judgment in this case was self-executing, because it, on its face, granted title of the Property to Petitioners. Where, as in this case, a judgment is self-executing, a stay and bond are legally ineffective. In addition, Petitioners were damaged by the trial court's imposition of an improper stay. They had all of the responsibilities and liabilities of ownership, without the ability to properly protect their interest.

This Court should therefore reverse the trial court's holdings on the attorneys' fees and stay pending appeal issues and remand for further proceedings.

ARGUMENT

Petitioners appeal the trial's courts failure to award them their attorneys' fees and improper grant of a stay pending appeal.¹ Both of these issues involve questions of law and are therefore reviewed for correctness, granting no deference to the trial court.

Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998); *Loporto v Hoegemann*, 1999 UT App 175, ¶ 5, 982 P.2d 586.

I. THE TRIAL COURT ERRED IN FAILING TO AWARD PETITIONERS THEIR ATTORNEYS' FEES AS INCURRED IN THIS MATTER.

Petitioners should be awarded their attorneys' fees under Utah Code Ann. section 75-1-310. But for Ellen's fraud and Respondent's deception, Petitioners would not have been forced to bring this suit, which has been protracted and very costly. The trial court erred in failing to find that justice requires that Petitioners be awarded their attorneys' fees.

Petitioners should be awarded their attorneys' fees under Utah Code Ann. section 75-3-719. Petitioners have nominated Hal LeFevre to be the successor trustee. Though not officially designated as such, Petitioners stood in the place of a personal representative and brought this suit in good faith on behalf of the estate.

¹ Petitioners' reply brief is necessarily limited to these two issues. However, Petitioners feel that they are required to point out a case that is on point that was omitted from their initial brief. In *Butler v Wilkinson*, one of the parties appealed the trial court's implementation of a constructive trust "because that relief was not sought in the pleadings." 740 P.2d 1244, 1262 (Utah 1987). The Utah Supreme Court held that the pleading "argument is plainly without merit," and found that Rule 54(c)(1) of the Utah Rules of Civil Procedure can and should be used "to afford litigants appropriate relief, including relief that is different from the type demanded in the complaint." *Id* at 1263.

Since Harold's estate is still open and subject to the jurisdiction of the trial court, the trial court should have awarded Petitioner his attorneys' fees and costs. The matter should be remanded to the trial court to determine the amount of the fees and costs and how the fees and costs will be paid out of the estate.

II. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S REQUEST FOR A STAY PENDING APPEAL.

Respondent was not entitled to a stay pending appeal. Though, in some respects, the issue of the stay pending appeal is now moot, the question of the appropriateness of a stay pending appeal is always going to be moot on appeal. Thus, this issue should be heard and decided by this court because it is "capable of repetition yet evading review." *In re Johnson*, 2001 UT 110, ¶ 15, 48 P.3d 881.

As a matter of law, a stay and bond cannot operate on a self-executing judgment. As stated before, Utah law clearly states that "where . . . the judgment is self-executing, and no act of a ministerial officer is necessary to make it effective, an appeal does not suspend or otherwise stay the force and effect of the judgment." *In re Grant*, 44 Utah 386, 390, 140 P.2d 226, 228 (1914). Many other jurisdictions recognize this well-established rule. *See, e.g., Veyna v. Orange County Nursery, Inc.*, 170 Cal. App. 4th 146, 156 (Cal. App. 4th Dist. 2009); *Caminetti v. Guaranty Union Life Ins. Co.*, 22 Cal. 2d 759, 763 (Cal. 1943); *Suitts v. First Sec. Bank, N. A.*, 602 P.2d 53, 56-57 (Idaho 1979); *People ex rel. Harrison v. Kelly*, 62 N.E.2d 705, 706 (Ill. 1945); *State ex rel. Kaplan v. Lamb*, 154 N.E.2d 500, 503 (Ind. 1958); *Weston Builders & Developers, Inc. v. McBerry, LLC*, 891 A.2d 430, 444-45 (Md. Ct. Spec. App. 2006); *McKee v. Bd. of Elections*, 116

S.W.2d 1033, 1038 (Tenn. 1938).

Respondent's argument that he had to obtain a stay to protect his interest is clearly at odds with the law and the purpose behind the law. The "purpose and effect of supersedeas is to restrain the successful party and the lower court from taking affirmative action to *enforce* a judgment or decree." *Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244, 1248 (Utah 1979) (emphasis added). A self-executing judgment cannot be enforced.

In this case, Petitioners have title to the Property by virtue of the judgment. Yet, because of the inappropriate stay put in place by the trial court, they have no power to protect that interest. They cannot occupy or sell it; they cannot maintain it; they cannot put it to profitable use. In fact, they cannot prevent the deterioration of the property. Petitioners are incurring tax liabilities and liabilities for violations of Provo City ordinances. They have responsibilities of ownership but are powerless to fulfill those responsibilities.

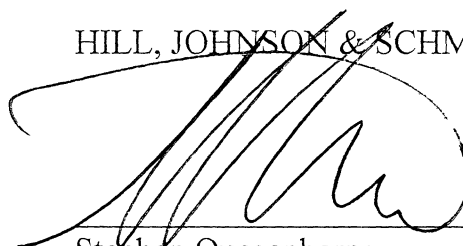
Because the trial court erroneously granted Respondent a stay pending appeal, Petitioners should be awarded damages incurred as a result, including but not limited to the rental value of the Property since the stay entered, the costs of repairing the home, unpaid taxes, and any assessments or fees levied by Provo City because of the condition of the Property.

CONCLUSION

Therefore, in light of the foregoing, this Court should reverse the trial court's failure to award Petitioners their attorneys' fees and remand for a determination of attorneys' fees in the trial court and on appeal. This Court should also reverse the trial court's improper stay pending appeal and remand for a determination of damages.

RESPECTFULLY SUBMITTED this 27th day of April 2009.

HILL, JOHNSON & SCHMUTZ, LC

A handwritten signature in black ink, appearing to read 'Stephen Quesenberry', is written over a horizontal line. The signature is stylized and cursive.

Stephen Quesenberry

Attorneys for Petitioners/Appellees

PROOF OF SERVICE

I hereby certify that, on the 27th day of April 2009, two true and correct copies of the foregoing **REPLY BRIEF OF CROSS-APPELLANTS** were hand-delivered to the following:

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A handwritten signature in black ink, appearing to read 'Leslie W. Slauch', is written over a horizontal line.