

1948

In the Matter of the Estate of James W. Linford : Brief of Appellant

Utah Supreme Court

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Leon Fannesbeck; Attorney for Appellants;

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IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate
of
JAMES W. LINFORD,
Deceased

Appellant's
Brief

Appeal from the District Court of the First Judicial
District of the State of Utah, in and for the
County of Cache

Hon. Marriner M. Morrison, Judge

FILED

DEC 27 1948

LEON FONNESBECK,

Attorney for Appellants.

CLERK, SUPREME COURT, UTAH

In the Supreme Court of the State of Utah

In the Matter of the Estate
of
JAMES W. LINFORD,
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} Appellant's
Brief

STATEMENT OF FACTS

In this case the heirs seek to have all of the estate of James W. Linford, deceased, properly inventoried, appraised, accounted for and distributed as provided by law. Beatrice E. Linford, widow of intestate, was on her own petition, appointed administratrix of the above estate, and Letters of Administration were issued to her, December 9, 1942.

In her petition she states the value of the property as follows: "equity" in certain described business property, \$500.00; Ariel A. Larsen mortgage \$600.00; 1935 Model Chevrolet Sedan, \$200.00; tools and equipment of Linford Upholstering Company, \$150.00 — total \$1450.

A purported Inventory and Appraisement was filed December 14, 1942, four days after letters were issued,

in which the properties and values of the estate are stated as follows: "Equity in the following described real property under contract of purchase (describing). Said contract is in escrow with the Cache Valley Banking Company. Value of property \$1800.00 less \$1477.60 owing \$322.40," Ariel Larsen mortgage \$500.00; 1935 Chevrolet car \$200.00; tools and equipment at Linford Upholstering Co. \$50.00, total \$1072.40.

The next day, December 15, 1942, the administratrix filed her Final Account and also her petition for summary distribution. In that petition she alleged, and the court in its Decree of Summary Distribution found:

1. That decedent died October 20, 1942, and left real and personal property in Cache County, Utah.
2. That on November 28, 1942, petitioner was appointed administratrix of the estate of the decedent, and thereupon qualified.
3. That on December 14, 1942, the administratrix caused to be filed with the clerk of this court an Inventory and Appraisement of all of the property of decedent which has come into her possession or knowledge.
4. That the total value of decedent's estate does not exceed \$1500.00, therefore no order for publication of notice to creditors has been given.
5. That all expenses of last illness, funeral, probate, have been paid.

6. That decedent died intestate and left him surviving as his sole and only heirs at law the following, all of whom are over the age of 21 years:

Beatrice E. Linford, wife

Gene H. Linford, son, General Hospital, Camp McCoy, Wisconsin.

Phoebe L. Bingham, daughter, Manti, Utah.

(The name of James Stephen Linford, grandson, and only child of Leo H. Linford, a deceased son of decedent, is omitted.)

7. and 8. That the residue of the estate consists of real and personal property hereafter described, and "being less than \$1500.00, the widow, Beatrice E. Linford, is entitled to have set apart and distributed to her all of the said estate. And the Court so decreed, December 26, 1942, describing said property more in detail than it had theretofore been described in the Inventory and Appraisal or in the Petition of Letters.

On April 22, 1948, Appellants (son and daughter of decedent) filed "PETITION FOR CITATION TO BE ISSUED TO THE ADMINISTRATRIX TO SHOW CAUSE WHY THE SUMMARY DISTRIBUTION OF THE ESTATE TO HER SHOULD NOT BE VACATED, AND WHY SHE SHOULD NOT BE COMPELLED TO FILE A TRUE AND CORRECT INVENTORY IN SAID ESTATE AND THE PROPERTY REAPPRAISED AND DISTRIBUTED AS PROVIDED BY LAW." A citation

was duly issued as prayed for. To that petition, respondent Beatrice E. Linford Sorenson, filed her general and special demurrer, which was sustained by the trial court. Petitioners electing to stand on their petition, the court below, on July 1, 1948, entered its Judgment of Dismissal, dismissing said Petition for Citation and the Citation theretofore issued.

On September 15, 1948, appellants filed Notice of Appeal to this court appealing from the Judgment of Dismissal of their Petition for Citation and from the order sustaining demurrer to said Petition for Citation.

In order that this court may have in mind all the facts, as alleged in the petition, which facts are admitted by the demurrer, we ask that the court read the said Petition for Citation at this point. At least two important questions are presented on this appeal:

Can the administratrix falsely depreciate and represent the property in the estate to be below \$1500.00 (much less than its real value), so as to have all of the estate distributed to her by summary distribution Is a proceeding by the heirs to have the estate properly appraised and distributed, barred by the statute of limitations?

ASSIGNMENTS OF ERROR

1. The court erred in sustaining respondent's demurrer to said Petition for Citation.
2. The court erred in holding that the statute of limitations was a bar to the present proceedings by the heirs.

3. The Court erred in making and intering its Judgment of Dismissal, dismissing the said Petition for Citation and also the Citation theretofore issued against the administratrix, who has never been discharged.

ARGUMENT

It will thus be seen that although the said Petition for Citation alleged that respondent was and is the duly appointed administratrix, that one of the heirs was omitted and received no notice in said probate proceedings (part 3); that the purported Inventory and Appraisment was "defective, incorrect, *false and fradulent* in several particulars and thus misled the court and gave the court an incorrect and false idea as to the amount and value of said estate, stating property items omitted and the false values par. 4 (a) and (b), (b 1) to (b 7; to which reference is here made.

Although said petition for citation further alleged that the Order Fixing Time for hearing petition for summary distribution, and the notices given in pursuance thereof, are defective for the reason that the same did not state nor give notice that the widow proposed to distribute the whole estate to herself by means of summary distribution; that said order fixing time and notices are further defective, and the court failed to acquire jurisdiction to enter its order and decree of summary distribution, for the reason that no notice whatsoever was ordered, given, or mailed to the grandchild, and heir at law, James Stephen Linford. (par. 5). That the inventory filed by the administratrix is not verified under oath as required by statute. (4a).

Although said Petition for Citation also further alleged that the petition for summary distribution was defective, because: (a) It did not set forth all of the property belonging to the estate nor the value of the same; (b) did not allege that the widow is entitled to have all of the property in the estate distributed to her by summary distribution; and (c) did not set forth all of the heirs of intestate, but specifically omits James Stephen Linford a minor grandson. (par. 6).

Although said petition further also alleged that said decree of summary distribution was improperly drawn and prepared, and therefore ineffective, because: (a) There is no finding by the court as of what the property of said estate consists, nor its value; (b) the court makes an erroneous finding as to the heirs of the intestate, and in effect finds that said grandchild James Stephen Linford was not an heir and entered a decree of summary distribution of the estate without notice to him. All of these facts were set out in the petition for citation, yet the court nevertheless sustained the demurrer filed by the administratrix and entered its judgment dismissing said petition and said citation theretofore duly issued to the administratrix.

1. The first point we raise is: Did the court below, sitting in probate, acquire jurisdiction to enter its Decree of *Summary Distribtuion when no notice was given to one of the heirs?* Section 102-8-2 of our statute reads, "After the return of the inventory the court may, on petition and *after notice*, set apart and distribute etc." Appellants contend that the court acquired no jurisdiction to enter its decree of summary distribution until due notice

had been given to *all* the heirs; that it is not sufficient to give notice to some of the heirs. That this statutory requirement is jurisdictional, "The court may on petition and after notice set apart and distribute." Petition and notice are conditions precedent. James Stephen Linford is an heir of decedent and was entitled to notice. No notice having been given to him, the court acquired no jurisdiction to enter its decree of summary distribution, and said decree is therefore a nullity.

2. Counsel for respondent cited section 102-11-37 to the effect that the account of the administratrix was conclusive and not subject to attack. This proceeding is not necessarily an attack on the account of the administratrix. *It is a proceeding by citation to compel her "to file a true and correct inventory in said estate and have all of the property in the estate properly appraised and distributed to the heirs as provided by law,"* and to further show cause "why she should not be required to act as trustee to the estate for all of the money she realized from any sales made by her of the said estate property." Besides, we submit that sec. 102-11-37 does not preclude an attack on an administrator's account if fraud is alleged, as it is here.

In case at bar the principal complaint is in regard to the incomplete and false inventory and appraisement and the summary distribution procured thereby.

Appellant's charge, in their petition for citation, that the Inventory is defective, incorrect, false and fraudulent in several particulars to-wit: (a) There is no oath by the administratrix that the the inventory contains a statement

“of all just claims of decedent against affiant,” as required by sec. 102-7-4, of our statute; (b) The petition further charged that the purported inventory did not list or contain all of the property of decedent, that there is omitted from the inventory: (1) one Ford V8 Pickup, of the value of \$650.00; (2) Contract by decedent for sale of real estate, \$550.00; (3) \$100.00 in mortgage by Ariel A. Larsen; (4) insurance \$450.00; (5) Tools and equipment, stock and merchandise (as listed in petition) \$1435.00; (6) Furniture in apartment (as listed in petition) \$550.00; (7) Improper and false statement of appraised value of equity in certain real estate (business property) where the equity was listed at \$322.40, when the equity was in fact in excess of \$2,000.00. (The petition states that she sold that real estate and equipment shortly after distribution for \$6,000.00).

It is appellant's contention that an administrator is an agent or representative of the court in administering an estate, and may be cited in at any time by the court if malfeasance is charged against him by interested parties. 33 C.J.S. Sec. 142, pg. 1099-1103.

Counsel also demurred and argued to the court below, “defect of parties to this action”; that the minor should appear by guardian ad litem etc. The only parties to this proceeding is the court on one side and the administratrix on the other. The citation which the court issued is directed to the administratrix. By that citation the court merely directed the administratrix to appear and show cause why she should not do her duty as administratrix and properly administer and account to the court for all of said estate.

This is not a suit by petitioners (appellants) nor by the minor child against the administratrix. By their petition for citation, petitioners merely called some grave irregularities and fraudulent acts on the part of the administratrix to the court's attention. There is no more reason or necessity for the minor to have a guardian appointed now than there was when the probate proceedings were first started. The court acts as the guardian of all minors in an estate. 23 C.J.S. Sec. 147, pg. 1105-7.

An executor or administrator is not generally relieved from being called to account in the probate court by the mere lapse of time without any action by the court. Even after the lapse of many years, the beneficiaries are entitled to an accounting. Statutes of limitations do not ordinarily run in favor of a personal representative so as to bar an action for an accounting. Before he can claim the benefit of the statute, the continuance or continuity of his office must in some way be interrupted, — 21 Am Jur pg 658. In case at bar there is no interruption in the office of respondent as administratrix of the James W. Linford estate.

Sec. 102-7-1 of our statute states that every administrator "must make and return to the court *a true inventory and appraisal of all of the estate* of decedent which has come to his possession or knowledge." In the case of Robinson's Estate 204p.321, this court strongly indicated that the statute means just what it says.

An administrator is a trustee of the heirs in the limited sense that he is their trustee for the purpose of making

a distribution after payment of debts and expenses. 21
Am. Jur. 375.

It is therefore respectfully submitted that the trial
court's order sustaining respondent's demurrer to Petition
for Citation and its order dismissing said petition and the
citation, should be vacated and set aside and the citation
reinstated.

Respectfully submitted,

LEON FONNESBECK,
Attorney for Appellants.

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