

1979

# In the Matter of the Estate of Joanne Ashley Walker, William M. Walsh, Harmon Smith Walker : Brief of Petitioner-Appellant

Utah Supreme Court

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## Recommended Citation

Brief of Appellant, *In re Walker*, No. 16135 (Utah Supreme Court, 1979).  
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IN THE SUPREME COURT OF THE STATE OF UTAH

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No. 16135

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IN THE MATTER OF THE ESTATE  
OF JOANNE ASHLEY WALKER,

Deceased.

WILLIAM M. WALSH,

Petitioner-Appellant,

HARMON SMITH WALKER,

Personal Representative-Respondent.

---

BRIEF OF PETITIONER-APPELLANT

---

PETITIONER APPEALS FROM AN ORDER  
DENYING PETITION FOR THE REMOVAL  
OF HARMON SMITH WALKER  
PERSONAL REPRESENTATIVE OF  
THE ESTATE OF JOANNE ASHLEY WALKER  
DECEASED

THIRD DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY,  
STATE OF UTAH  
HONORABLE G. HAL TAYLOR, DISTRICT JUDGE

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HARMON SMITH WALKER,

Personal Representative-Respondent.

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BRIEF OF PETITIONER-APPELLANT

---

STATEMENT OF KIND OF CASE

Action by the Petitioner to remove the Personal Representative of the Estate of Joanne Ashley Walker.

DISPOSITION IN LOWER COURT

The Court denied the petition of the Petitioner to remove the Personal Representative and appoint a successor.

RELIEF SOUGHT ON APPEAL

Petitioner seeks an order vacating the order of the District Court, and remanding the above-named case to the District Court to remove the Personal Representative and replacing the same with an appropriate individual.

## STATEMENT OF THE FACTS

The Decedent, JOANNE ASHLEY WALKER, died intestate on September 29, 1977. Harmon Smith Walker, her husband, filed his petition for the adjudication of intestacy and formal appointment of personal representative at or about December 19, 1977. Petitioner gave notice of his petition by publication and no one showed to object. His petition was granted and Letters of Intestacy were issued on or about February 3, 1978.

Appellant, William M. Walsh, the uncle of the Decedent, filed his petition for adjudication of intestacy and formal appointment of personal representative on or about January 31, 1978. Appellant had no actual notice of Harmon Smith Walker's petition.

Subsequent to the filing of the petition by Mr. Walsh, the Court granted the petition of Mr. Walker. Then on or about February 21, 1978, Mr. Walsh's petition came on for hearing before the Honorable Judge David Winder, at which time Mr. Walsh first learned of the petition and issuance of Letters of Intestacy to Harmon Smith Walker.

The Court having already appointed Mr. Walker, and finding that Notice by Publication complied with the Utah Uniform Probate Code, 75-1-401(1)(c) Utah Code Annotated, as amended in 1953, ruled that the original appointment of Harmon Smith Walker would stand.

Mr. Walsh has stood personally for the funeral expenses of the decedent and filed his Demand for Notice provided by the Utah Uniform Probate Code, 75-3-804(a) Utah Code Annotated, as amended in 1953 on or about August 7, 1978, to protect his claim as a creditor of the Estate.

On or about October 3, 1978, Appellant, Mr. Walsh, filed a Petition to Remove the Personal Representative and Appointment of a Successor and the same was heard before the Honorable Judge Hal Taylor on the 25th day of October 1978.

From the order denying the Petition, the Appellant appeals.

#### ARGUMENT

#### POINT -- I

THE APPELLANT HAS STANDING TO MAINTAIN THE PETITION FOR THE REMOVAL OF THE PERSONAL REPRESENTATIVE.

In the Utah Uniform Probate Code, 75-3-611(1), Utah Code Annotated, as amended in 1953, states as follows:

A person interested in the estate my petition for removal of a personal representative for cause at any time.

Mr. Walsh, who is the uncle of the Decedent, and a creditor of the Estate, is not only one interested in the



Estate, but has a number one priority, in the classification of claims against the Estate.

In the Utah Uniform Probate Code, 75-3-805(1)(a) Utah Code Annotated, as amended in 1953 is the following:

CLASSIFICATION OF CLAIMS. - (1) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(a) Reasonable funeral expenses;

. . .

The lower Court was informed of Mr. Walsh's interest in the Estate, as shown in the transcript at page 2:

MR. WALSH: Well, the statute specifically provides for people to be removed when it is in the best interests of the estate, and grant standing to anyone that is a creditor or heir. And as a creditor and arguably as an heir, we are entitled to bring this motion if we feel it is in the best interests of the estate as the statute specifically directs.

Also, in the verified petition of Mr. Walsh is the following:

PETITIONER, WILLIAM M. WALSH, STATES AND REPRESENTS TO THE COURT THAT:

1. Petitioner, as both heir and creditor is a person interested in the above estate.

In the affidavit filed with the Petition for the Removal of the Personal Representative is the following:

Affiant, WILLIAM M. WALSH, being first duly sworn, on his oath deposes and says that the following is true, on his own knowledge except that which is given on his information and belief:

4. That he is a creditor and heir of the estate of Joanne Ashley Walker, and knew the Deceased like a daughter, in that he cared for everyday needs for months before her death.

Therefore, the Petitioner does in fact have standing to maintain the petition for the removal of the Personal Representative.

## POINT II

CAUSE EXISTS FOR THE REMOVAL OF HARMON SMITH WALKER AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOANNE ASHLEY WALKER.

Cause for removal of the Personal Representative exists when:

1. Removal would be in the best interest of the estate;
2. The Personal Representative has mismanaged the estate; or
3. The Personal Representative has failed to perform any duty pertaining to the office.

In the Utah Uniform Probate Code, 75-3-611(2) Utah Code Annotated, as amended in 1953, is the following:

### TERMINATION OF APPOINTMENT BY REMOVAL - CAUSE PROCEDURE -

(2) Cause for removal exists:

(a) When removal would be in the best interest of the estate.

(b) If it is shown that a personal representative . . . has mismanaged the estate, or failed to perform any duty pertaining to the office.

In the District Court, the Petitioner in his verified petition states as follows:

Cause for removal of Harmon Smith Walker as personal representative exists because his past criminal record indicates that he is neither trustworthy nor competent to administer the estate.

While it may be true, that such an assertion is conclusionary and a legal opinion, still the same went unobjected to, and an objection raised now, would not be entertained on the appellate level when not asserted in the lower court.

More importantly however, is the fact that there is no contrary evidence, and there is no evidence, which is inconsistent with it either.

In the District Court proceeding the Petitioner in his verified petition states as follows:

Cause for removal of Harmon Smith Walker as Personal Representative exists because Harmon Smith Walker has mismanaged the estate in that he had made no effort to inventory the assets and personal property of the estate, and has made no effort in the ascertaining and paying of creditors.

Again, the assertion went unobjected to and again there was no evidence which is contrary or inconsistent therewith.

In the Affidavit of the Petitioner, filed with the Petition for Removal of Personal Representative and Appointment of a Successor, the Petitioner, when speaking about himself, stated the following:

That he is personally and first hand aware of the state of being of the Estate of Joanne Ashley Walker, in that he has exercised due care in the protection of the assets and personal property of said estate because no one else has sought or otherwise made any effort to his knowledge for the protection of said assets and personal property.

Continuing:

That no one has asked or otherwise even so much as inquired as to the location, safety or amounts as to the value of any and/or all of said assets and property.

Again, there was no evidence to the contrary and no evidence which is inconsistent therewith either.

In the transcript at page 2 is the following:

MR. WALSH: Well, the situation is such, Your Honor, is that no one is doing anything. The decedent died over a year ago. No one has even looked into the personal property of the estate. They haven't appraised it, haven't done any inventory, they don't even know what is in the estate -- absolutely done nothing for nine months since the petition was granted. The decedent has been dead over a year. The funeral expenses have not been paid. The last illness has not been paid. People who are creditors of the estate and debtors of the estate have not been satisfied. There has been absolutely nothing done on the estate. The statute specifically directs itself to those -- what is in the best interests of the estate that a new personal administrator would be appointed. According to the affidavit, Your Honor, even mere inquiry as to the well-being of the personal property of the estate has not been sought.

Then the transcript at page 6 is the following:

. . . The whole issue is, I submit, Your Honor, is that the personal property within the estate, the creditors within the estate are not being taken care of. If the personal representative wants to maintain a separate action against whoever, they are absolutely entitled to do that, but the estate, the debts, the credits, the assets, the personal property, no one is doing anything about it.

Again, there was no evidence to the contrary.

In Estate of Edward W. Sharp, 537 P.2d 1039, Utah Supreme Court, June 25, 1975, the court held on page 1038, as follows:

It is contrary to the duty of an administrator not to take measures to marshall the assets of an estate. This court in Re Burt's Estate, 58 Utah 353, 198 P. 1108, (1921) so held in conformity with 75-11-3; and an administrator's duty so succinctly set forth in Bankcroft's Probate Practice, Second Edition.

§349. - Duty of Representative -- One of the first duties of an executor or administrator is that of collecting the assets of the estate. Not only is it within his power to collect and reduce to possession such assets, but he is affirmatively required in most of the states to take into his possession all the estate, both real and personal, and to maintain and preserve it in as good condition as is reasonably possible during administration . . .

For an unwarranted failure to acquit this duty an administrator is subject to removal and liability for loss.

As another separate and succinct grounds for the removal of HARMON SMITH WALKER, as Personal Representative of the Estate of Joanne Ashley Walker, exists because he has totally neglected and failed in his fiduciary duty to

administer the estate.

In the Utah Uniform Probate Code, 75-3-704, Utah Code Annotated as amended in 1953, is the following:

PERSONAL REPRESENTATIVE TO PROCEED WITHOUT COURT ORDER -- EXCEPTION -- A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a restriction placed on the disposition of real property under subsection 75-3-710 (2), do so without adjudication, order, or direction of the court, but he may invoke the jurisdiction of the court in proceedings authorized by this code, to resolve questions concerning the estate or its administration.

Mr. Walker was appointed Personal Representative on February 3, 1978, and nine (9) months later he still had not filed his Notice to Creditors.

The apparent purpose of filing the Notice to Creditors is to open the estate. The estate is not opened for creditors to come forward with their claims until the same is filed, although they may file a document to protect their interest with the Clerk's Office. More importantly however, is the fact that the estate administration is begun with the Notice to Creditors, and the same should be filed upon the appointment of the Personal Representative.

In the Utah Uniform Probate Code, 75-3-801, Utah Code Annotated as amended in 1953, is the following:

NOTICE TO CREDITORS -- Unless notice has already been given under this section, a personal representative upon his appointment shall publish a notice once a week for three successive weeks

in a newspaper of general circulation in the county announcing his 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. (emphasis added)

In the District Court hearing, the Court was clearly informed of the fact that the Notice to Creditors was not filed because the Court expressly inquired, and Counsel for the Personal Representative Harmon Smith Walker admitted that it was not.

On page 5 of the transcript is the following:

THE COURT: Has the Notice to Creditors been published.

MR. WALSH: No, there has been nothing

The personal representative should file an Inventory as well as an Appraisement, and they should be filed within three months of his appointment. According to the facts, however, nine (9) months later these still were not filed.

In the Utah Uniform Probate Code, 75-3-705, Utah Code Annotated as amended in 1953 is the following:

DUTY OF PERSONAL REPRESENTATIVE - INVENTORY AND APPRAISEMENT -- Within three months after his appointment, a personal representative . . . shall prepare an inventory of property owned by the decedent at the time of her death, listing it with reasonable detail, and indicating as to each listed item its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item. (emphasis added)

The lower Court was informed of the fact that the Inventory and Appraisement were not filed.

In the Petition for Removal of Personal Representative and Appointment of Successor, the Petitioner, in his verified petition stated at paragraph (3)(b) and (3)(c) the following:

Harmon Smith Walker has mismanaged the estate in that he has made no effort to inventory the assets and personal property of the estate . . . (emphasis added)

Harmon Smith Walker has failed in his performance of duties pertaining to the office of personal representative by not so much as filing a Notice to Creditors, nor an inventory, . . . (emphasis added)

As stated above once before, in the Affidavit filed along with the Petition for the Removal of the Personal Representative and Appointment of Successor is the following:

Affiant, WILLIAM M. WALSH, being first duly sworn, on his oath deposes and says that the following is true, on his own knowledge except that which is given on his information and belief:

(2) That he is personally and first hand aware of the state of being of the estate of Joanne Ashley Walker, in that he has exercised due care in the protection of the assets and personal property of said estate because no one else has sought or otherwise made any effort to his knowledge for the protection of said assets and personal property.

(3) That no one has asked or otherwise even so much as inquired as to the location, safety or amounts as to value or any and/or all of said assets and property.



In the lower court proceeding the assertion was not denied nor was there any evidence which is inconsistent with the assertion.

On page 2 of the transcript is the following:

MR. WALSH: . . . The decedent died over a year ago. No one has even looked into the personal property of the estate. They haven't appraised it, haven't done any inventory, they don't even know what is in the estate -- absolutely done nothing for nine months since the petition was granted. (emphasis added)

Counsel for the Personal Representative did not even respond to this issue.

For still another and succinct ground for the removal of Harmon Smith Walker is that he has been negligent in the administration of the estate.

When a Personal Representative is appointed to administer the estate of a decedent, he becomes clothed with the highest duty recognizable in law, ie: a fiduciary duty.

The Personal Representative becomes as if a trustee of the estate and is given the same duty of care to expeditiously and efficiently administer the estate as is consistent with the best interests of the estate.

In the Utah Uniform Probate Code, 75-3-703(1), Utah Code Annotated as amended in 1953 is the following:

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 effect-will and this code and as expeditiously and efficiently as is consistent with the best interests of the estate. (emphasis added)

Then in the Utah Uniform Probate Code, 75-3-711 Utah Code Annotated as amended in 1953 is the following:

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 damages or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust . . . (emphasis added)

A trustee's duty to observe a trustee's standard of care and performance is defined in 75-7-302 Utah Uniform Probate Code, Utah Code Annotated as amended in 1953:

. . . the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills. (emphasis added)

#### C O N C L U S I O N

The Petitioner, William M. Walsh, has standing to bring the Petition for the Removal of the Personal Representative and Appointment of Successor.

Cause for the removal of Harmon Smith Walker exists because: (1) It would be in the best interests of the Estate; (2) He has mismanaged the Estate; and (3) Be-

cause he has failed to perform his duties as Personal Representative of the Estate.

There is no evidence which is contrary or inconsistent with:

(1) The assertion that he is not trustworthy nor competent to administer the Estate because of his past criminal record.

(2) The assertion that he has made no effort to inventory the assets and personal property.

(3) The assertion that he has made no effort in the ascertaining and paying of creditors.

(4) The assertion that he has not so much as inquired of the person safeguarding the personal assets as to their location, safety or amounts as to value.

(5) The assertion that Harmon Smith Walker has totally neglected and failed in his fiduciary duty to administer the Estate.

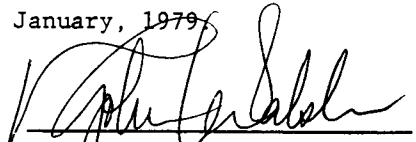
(6) The assertion that Harmon Smith Walker has not filed his Notice to Creditors, which should have been filed upon his appointment as Personal Representative of the Estate.

(7) The assertion that Harmon Smith Walker has not filed an Inventory nor Appraisement, which should be filed before the expiration of three months from his appointment.

(8) The assertion that Harmon Smith Walker, has breach his fiduciary duty in that he has not performed as would a prudent man dealing with the property of another, which is the standard placed on Personal Representatives by the Utah Uniform Probate Code.

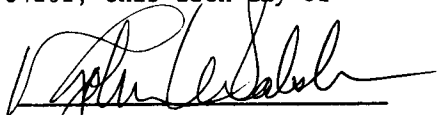
As a result, the Appellant respectfully submits that case be remanded to the Third District Court with instructions to remove Harmon Smith Walker as Personal Representative of the Estate of Joanne Ashley Walker, and replacing the representative with an appropriate individual.

Dated this 10th day of January, 1979.



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I hereby certify that I caused three copies of the foregoing to be mailed postage prepaid to T. QUENTIN CANNON, Attorney for the Estate, Ten Broadway Building, Suite 510, Salt Lake City, Utah, 84101, this 12th day of January 1979.

  
JOHN WALSH