

1979

In the Matter of the Estate of Joanne Ashley Walker, William M. Walsh, Harmon Smith Walker : Brief of Personal Represerntative-Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.T. Quentin Cannon; Attornes for RespondentJohn Walsh; Attorney for Appellant

Recommended Citation

Brief of Respondent, *In re Walker*, No. 16135 (Utah Supreme Court, 1979).
https://digitalcommons.law.byu.edu/uofu_sc2/1478

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT

OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF

JOANNE ASHLEY WALKER,

Deceased.

WILLIAM M. WALSH,

Petitioner-Appellant,

vs.

HARMON SMITH WALKER,

Personal Representative
Respondent.

BRIEF OF PERSONAL REPRESENTATIVE

Appeal from the

Third District Court, in and for the County of Salt Lake,

State of Utah.

John Walsh
2870 South State Street
Salt Lake City, Utah 84115
Attorney for Petitioner-
Appellant

IN THE SUPREME COURT
OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF

JOANNE ASHLEY WALKER,

Deceased.

Case No. 16135

WILLIAM M. WALSH,

Petitioner-Appellant,

vs.

HARMON SMITH WALKER,

Personal Representative-
Respondent.

BRIEF OF PERSONAL REPRESENTATIVE-RESPONDENT

Appeal from the Judgment of the
Third District Court, in and for Salt Lake County
State of Utah

T. Quentin Cannon
Ten Broadway Building, Suite 510
Third South and Main Streets
Salt Lake City, Utah 84101
Attorney for Personal Representative-
Respondent

John Walsh
2870 South State Street
Salt Lake City, Utah 84115
Attorney for Petitioner-
Appellant

TABLE OF CONTENTS

STATEMENT OF THE NAME OF CASE	viii
DISPOSITION IN LOWER COURT	i
RELIEF SOUGHT ON APPEAL	i
COURT PROCEEDINGS	i
LAW OF THE CASE	i
STATEMENT OF FACTS	i
ARGUMENT	ii
CONCLUSIONS	ii

STATUTES CITED

Utah Code Annotated	1953	{75-1-101	17
Utah Code Annotated	1953	{75-1-101	1
Utah Code Annotated	1953	{75-3-103	
Utah Code Annotated	1953	{75-3-601	1
Utah Code Annotated	1953	{75-3-611	1

IN THE SUPREME COURT
OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF
JOANNE ASHLEY WALKER,

Deceased.

Case No. 16135

WILLIAM M. WALSH

Petitioner-Appellant,

vs

ELWIN SMITH WALKER,

Personal Representative-
Respondent.

BRIEF OF PERSONAL REPRESENTATIVE-RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an appeal from an order of the District Court of Salt Lake County, State of Utah, denying a Petition for Removal of Personal Representative and Appointment of Successor in the matter of the Estate of Joanne Ashley Walker, deceased.

DISPOSITION IN LOWER COURT

Appellant filed a Petition for Removal of Personal Representative and Appointment of Successor in the Matter of the Estate of Joanne Ashley Walker, deceased. Case No. 64640, in the

District Court of Salt Lake County, State of Utah, and after having examined the files herein and in Case No. C78-1735, entitled Harmon Smith Walker, as Personal Representative of the Estate of Joanne Ashley Walker, deceased, and Harmon Smith Walker, vs. William Walsh; in the Case No. C78 98, in the Matter of the Estate of Joanne Ashley Walker, deceased, and having heard the arguments and representations of counsel made and entered an order denying said Petition on October 31, 1978.

RELIEF SOUGHT ON APPEAL

Petitioner-appellant seeks an order vacating the order of the District Court of Salt Lake County, State of Utah, denying said Petition and remanding the above-named case to said District Court with instructions to remove the personal representative and replace the same with an appropriate individual. Personal Representative-Respondent seeks an order denying said petition and authorizing respondent-personal representative to proceed with the probating of said estate and costs herein.

COURT PROCEEDINGS

<u>DATE OF EVENT</u>	<u>COURT PROCEEDINGS</u>	<u>PAGE</u>
9/1/32	Joanne Ashley Walker born	8
8/7/72	Joanne Ashley Walker gave birth to only child	8
8/8/72	Elizabeth Ann Matthies, only child, died	8
6/29/77	Joanne Ashley Walker married Harmon Smith Walker	7
9/29/77	Joanne Ashley Walker died leaving spouse surviving	8

DATE OF
EVENT

COURT PROCEEDINGS

PAGE

12/19/77	Harmon Smith Walker filed Petition for Adjudication of Intestacy and Formal Appointment of Personal Representative	8
	Notice of Publication - filed 12/19/77	7
	- hearing set for 1/18/78	
	- publication in Salt Lake Times 12/23/77, 12/30/77 and 1/6/78	
	Filing of Waiver of Bond by Walker	6
	Motion for Order for Notice of Publication in Salt Lake Times	5
	Order setting date for hearing 1/18/78 and for Notice	4
12/23/77	Proof of mailing of notice filed	3b
1/9/78	Affidavit of Publishing Notice by Salt Lake Times	11
1/17/78	Proof of posting of notice filed	2b
1/18/78	Hearing on Petition for Formal Appointment of Personal Representative	
1/29/78	Formal Appointment of Personal Representative	12
	<u>Underscore, Walsh's Petition for Letters (C78 98)</u>	
<u>1/31/78</u>	<u>Petition for Adjudication of Intestacy and Formal Appointment of Personal Representative by William M. Walsh - Probate No. P-78-98</u>	<u>5</u>
	<u>Affidavit of William M. Walsh</u>	<u>7</u>
2/3/78	Harmon Smith Walker acceptance of appointment as Personal Representative	14
	Letters of Administration issued to Walker	15
<u>2/6/78</u>	<u>Notice of Publication in Salt Lake Times</u> <u>Hearing set for March 8, 1978</u>	<u>9</u>

<u>DATE OF EVENT</u>	<u>COURT PROCEEDINGS</u>	<u>PAGE</u>
<u>1/31/78</u>	<u>Order setting date of hearing and for notice</u>	<u>4</u>
<u>2/10/78</u>	<u>Proof of Notice by Mailing</u>	<u>3b</u>
<u>2/27/78</u>	<u>Proof of Publication in Salt Lake Times</u>	<u>10</u>
<u>3/7/78</u>	<u>Affidavit of Notice of Posting</u>	<u>2b</u>
<u>3/8/78</u>	<u>Hearing on Walsh petition for Personal Rep- resentative, Petition denied</u>	<u>2b</u>
	(end of record in C-78-98)	
 3/17/78	 Complaint filed by Walker against Walsh, District Court, Case No. C-78-1735 praying for Order:	
	1. Set aside and cancel Quit-Claim Deed of 9/17/75 between Joanne Ashley and William Walsh as joint tenants	8
	2. Set aside and cancel Bill of Sale of 9/17/75 between Joanne Ashley and William Walsh as joint tenants	9
	3. Quieting title to properties in Harmon Smith Walker as Personal Representative of Estate of Joanne Ashley Walker, deceased	9
	4. Requiring Walsh to provide complete inventory and accounting of rents and profits from properties and pay Walker as Personal Representative sums due and owing upon accounting and interest	9
	5. Punitive damages in the sum of \$10,000	9
	6. Costs and such further relief as proper	9
	7. Declaring Walsh the owner of legal title in trust for benefit of heirs at law of Joanne Ashley Walker, deceased	9

DATE OF
EVENT

COURT PROCEEDINGS

PAGE

	8. Declaring Harmon Smith Walker the surviving spouse and only heir at law of deceased	9
	9. Requiring Walsh to convey legal title to properties to Walker as sole beneficiary of trust of Joanne Ashley Walker, deceased	9
	10. Requiring Walsh to provide Walker with complete inventory and account of rents and profits derived from properties and to pay Walker as beneficiary of trust sums due with interest	10
	11. Walkers costs	10
3/28/78	Summons and return	13
4/11/78	Answer and Counterclaim by Walsh	15
	Motion for Summary Judgment set for 4/26/78	18
	Affidavit in support by Walsh	19
4/26/78	Hearing on Summary Judgment motion	
4/28/78	Denial of Motion for Summary Judgment	21
5/1/78	Reply to Counterclaim	22
5/11/78	Order of Denial of Motion for Summary Judgment	25
5/16/78	Walsh's first set fo Interrogatories (15 pages)	27
	Walsh's first Request for the Production of Documents (5 pages)	48
6/23/78	Motion for Extention of Time and Order	54
	Stipulation for extension of time	57
7/17/78	Walker's response to admissions request	59
	Walker's answers to Walsh's Interrogatories	70

DATE OF
EVENT

EVENT

PAGE

	Walker's response to Walsh's Request for Production of Documents, (end of record in C-78-1735) (case No. 64640 continued)	95
8/7/78	Walsh's demand for Notice of all Matters	16
10/4/78	Walsh's Petition for Removal of Personal Representative and appointment of Successor Claims: 1. Walsh heir and creditor 2. . . . 3. Causes for removal a. past criminal record b. mismanagement - no effort to inventory assets - no effort to ascertain and pay creditors c. no notice to creditors 4. Deny qualifications and priority 5. LeRoy Nielsen nominated as personal representative	20
10/3/78	Walsh's affidavit in support of petition	22
10/4/78	Order setting date for hearing and notice	19
10/13/78	Proof of notice of hearing on petition	18b
10/24/78	Proof of notice by posting	17
10/25/78	Walker's Notice to Creditors, Salt Lake Times Hearing on petition to remove Order denying petition for Removal of Personal Representative and appointment of Successor	25 26
11/3/78	Designation of Record on Appeal Certificate re-ordering of transcript Notice of Appeal Undertaking on Appeal	28 29 30 31

<u>DATE OF EVENT</u>	<u>COURT PROCEEDINGS</u>	<u>PAGE</u>
11/15/78	Supplemental Designation of Record on Appeal by Walker	32
11/16/78	Proof of Publication of Notice to Creditors by Walker	33

LAW OF THE CASE

Utah Code Annotated, 1953, as amended states:

HEIRS:

§75-1-201 (17)

"Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of the decedent.

SHARE OF THE SPOUSE:

§75-2-102 (1)

"The intestate share of the surviving spouse is:

- (a) If there is no surviving issue or parent of the decedent, the entire intestate estate; . . ."

PRIORITY:

§75-3-203

- (1) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

- (a) The person with priority as determined by a probated will, including a person nominated by a power conferred in a will;
- (b) The surviving spouse of the decedent who is a devisee of the decedent;
- (c) Other devisees of the decedent;
- (d) The surviving spouse of the decedent;
- (e) Other heirs of the decedent;
- (f) Forty-five days after the death of the decedent, any creditor . . .

- "(6) No person is qualified to serve as a personal representative who is:

- (a) Under the age of 21;
- (b) A person whom the court finds unsuitable in formal proceedings;"

QUALIFICATIONS:

§75-3-601

"Prior to receiving letters, a personal representative shall qualify by filing with the appointing court any required bond and a statement of acceptance of the duties of the office."

CAUSE FOR REMOVAL:

§75-3-611

"(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 or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment.
- (c) If it is shown that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, has mismanaged the estate, or failed to perform any duty pertaining to the office."

STATEMENT OF FACTS

Joanne Ashley Walker having been born on September 1, 1932, married Harmon Smith Walker on June 29, 1977, and died intestate on September 29, 1977, in Salt Lake County, State of Utah, leaving an estate in said county at the time of her death.

The names and addresses of the spouse, and heirs of said decedent, and the ages of the same were:

<u>NAME</u>	<u>ADDRESS</u>	<u>AGE</u>	<u>RELATIONSHIP</u>
Harmon Smith Walker	264 University Street Salt Lake City, Utah 84102	56	Spouse
Elizabeth Ann Matthies	Born—August 7, 1972 Died—August 8, 1972		Daughter

On December 19, 1977, a Petition for Adjudication of Intestacy and Formal Appointment of Personal Representative was filed by Walker in the District Court of Salt Lake County, State of Utah, in the Matter of the Estate of Joanne Ashley Walker, deceased, and was given case No. 64640. Said Petition alleged:

"6. Petitioner has neither received nor is aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere."

Said Petition was filed eighty-one days after the death of decedent.

The petition requested that:

1. The Court fix a time and place of hearing;
2. Notice be given as required by law;
3. The court enter an order finding that the decedent died intestate and determining the decedent's heirs;
4. Harmon Smith Walker be formally appointed personal representative of the decedent, to act without bond.

Hearing was had on the Petition of Harmon Smith Walker on December 19, 1977, the Formal Appointment of Personal Representative was made and entered January 23, 1977, the Acceptance of the Appointment was executed February 2, 1978, and filed February 3, 1978, and

Letters of Administration were issued to Harmon Smith Walker, as personal representative, on February 3, 1978.

ARGUMENT

The foregoing events and court proceedings set forth in detail the actions taken by the personal representative-respondent. It would hardly seem that the personal representative was failing in his duty in trying to perform. Where the obstruction is, is obvious.

The petitioner-appellant has known for months who the personal representative appointed by court was and has failed to turn over the administration or the assets of the estate to the court-appointed personal representative. Counsel for the personal representative in the estate advised the court:

"Now, personally I wrote two letters to this applicant (petitioner) asking him about the assets of this estate. And to neither of them did I receive a reply. Because we were getting nowhere, I told Mr. Walker he better get an independent counsel to represent him and bring an action to marshall (sic) the assets of this estate which was filed in this court and this is the action which was filed in this court by this personal representative." (Harmon Smith Walker as personal representative of the estate of Joanne Ashley Walker, deceased, plaintiff vs. William Walsh, defendant. Civil No. C-78-1735) (T.p. 36 L 28)

It should be noted that Mr. Walker was issued letters of administration on February 3, 1978, and the action against petitioner-appellant to marshall the assets was filed March 17, 1978.

Oaths were taken and claims made that William M. Walsh, petitioner is an heir and creditor. He is an uncle, and an uncle with a surviving spouse is no heir. In the transcript of the record, counsel for the petitioner properly stated:

"We aren't an heir, but as a creditor we would have standing to bring this motion even if we weren't an heir." (p. 35 L. 7, 8, 9)

In the petition made and executed October 3, 1978, and filed with the court, the charges made against the personal representative, Harmon Smith Walker, are:

"3. Cause for removal of Harmon Smith Walker as personal representative exists because:

- (a) His past criminal record indicates that he is neither trustworthy nor competent to administer the estate.
- (b) Harmon Smith Walker has mismanaged the estate in that he has 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.
- (c) Harmon Smith Walker has failed in performance of duties pertaining to the office of personal representative by not so much as filing a Notice to Creditors, nor an Inventory, with the Clerk of the Court."

As to Criminal Record:

A search of the affidavits and records fails to reveal in any manner whatsoever what the nature of the criminal record of Harmon Smith Walker might be. Was it jaywalking, over-parking, speeding, when or how long ago it was, was it a misdemeanor and of what class, or was it a felony? Few in life could deny that they had ever violated the law. There is no claim Mr. Walker was ever found guilty or convicted of a crime. The bland charge is

that Mr. Walker had a "criminal record." It was with anticipation that Mr. Walker went to court to hear what the criminal record might be. When such statements and allegations are made they should be made with specificity. Mr. Walker was apprehended for drunken driving once in California, but was never convicted. The allegation is not sufficient to be cause for removal.

As to Mismanagement:

The record indicates that the petitioner, William M. Walsh, under oath states in an affidavit under date of October 3, 1978, filed with the court:

"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 of any and/or all of said assets and property.

"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 every-day needs for months before her death." (p.22)

On March 17, 1978, said Harmon Smith Walker, as personal representative of the Estate of Joanne Ashley Walker, deceased, and Harmon Smith Walker as plaintiff, filed a complaint in the District Court of Salt Lake County, State of Utah, Civil No. 78-1735, against this affiant, William Walsh, demanding judgment as follows:

"WHEREFORE, plaintiff demands judgment as follows:

a. On plaintiff's First, Second and Third Counts:

(1) For an order setting aside, cancelling and rescinding the Quit-Claim Deed dated September 17, 1975, from Joanne Ashley to Joanne Ashley and William Walsh as joint tenants with rights of survivorship and not as tenants in common, a copy of which is attached hereto as Exhibit "A" and is incorporated herewith by reference.

(2) For an order setting aside, cancelling and rescinding the Bill of Sale dated September 17, 1975, from Joanne Ashley to Joanne Ashley and William Walsh as joint tenants with rights of survivorship, a copy of which is attached hereto as Exhibit "B" and is incorporated herewith by reference.

(3) For an order quieting title to the properties described in the aforesaid Quit-Claim Deed and Bill of Sale in Harmon Smith Walker as personal representative of the Estate of Joanne Ashley Walker, deceased.

(4) For an order requiring defendant to provide to plaintiff a complete inventory and accounting of the rents and profits derived by defendant from the properties described in the aforesaid Quit-Claim Deed and Bill of Sale and further requiring defendant to pay to plaintiff as personal representative of the estate of Joanne Ashley Walker, deceased, such sums as shall be found due upon said accounting, together with interest thereon.

(5) For punitive damages in the sum of \$10,000.00.

(6) For plaintiff's costs herein and for such other and further relief as the court may deem proper in the premises.

b. On plaintiff's Fourth Count:

(1) For an order declaring that defendant is the owner of legal title to the properties described in the aforesaid Quit-Claim Deed and Bill of Sale in trust for the benefit of the heirs at law of Joanne Ashley Walker, deceased.

(2) For an order declaring that plaintiff, Harmon Smith Walker, is the surviving spouse and only heir at law of Joanne Ashley Walker, deceased.

(3) For an order requiring defendant to convey legal title to the properties described in the aforesaid Quit-Claim Deed and Bill of Sale to the plaintiff as sole beneficiary of the trust of Joanne Ashley Walker, deceased.

(4) For an order requiring defendant to provide to plaintiff a complete inventory and account of the rents and profits derived by defendant from the properties described in the aforesaid Quit-Claim Deed and Bill of Sale, and further requiring defendant to pay to plaintiff as beneficiary of the trust of Joanne Ashley Walker, deceased, such sums as shall be found due upon said accounting, together with interest thereon.

(5) For plaintiff's costs herein and for such other and further relief as the court may deem proper in the premises."

This was over six months before said affidavit was filed with the court. Could the petitioner and affiant have forgotten the lawsuit? Could they have forgotten the Answer and Counterclaim filed with the court under date of April 11, 1978? Could they have forgotten the Affidavit affiant executed and filed with the court on April 11, 1978, explaining how affiant came into the possession of the properties of Joanne Ashley Walker? Has affiant forgotten the purpose of the lawsuit, to pursue the assets of the Estate of Joanne Ashley Walker, deceased, and to try to recover them for the estate? The personal representative has not filed an inventory. How could the personal representative file an inventory when affiant and petitioner is refusing to make an accounting of the properties of the deceased? Affiant admits that affiant has taken control of all of the properties of the deceased even before her death and has handled the same exclusively. Suit had to be filed against the petitioner and to this day petitioner has never made any

accounting or showing of what the assets of the estate are to the personal representative.

Mr. Walker could not mismanage the estate with petitioner hanging onto all of the books, records, properties and refusing even to submit the same to the court. Suit was brought against the petitioner last March, 1978. Nothing has been surrendered or accounted for. What more drastic action could be taken than filing suit against the holder of the assets? The holder charges the personal representative with not doing his duty and asking this court to put the personal representative out and put his man in.

It is charged that the inventory was not filed within three months after his appointment. Suit was filed against the one making the charge within six weeks after the personal representative was appointed. Imagine making such an assertion when petitioner admits petitioner:

" . . . 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."

" . . . 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."

Walker has a suit against petitioner trying to get this information from him. C-78-1735 (p. 22)

The Notice to Creditors was filed belatedly because of counsel as admitted. (T. p. 28 L. 11) The Notice to Creditors was

filed October 25, 1978, and the Proof of Publication was filed November 16, 1978. (p.33) The first publication was made in the Salt Lake Times on October 27, 1978, and more than three months have expired. (p.35)

CONCLUSIONS

1. There is not one word of evidence or one fact alleged in support of the claim that the personal representative's "past criminal record indicates that he is neither trustworthy nor competent to administer the estate."

2. The personal representative filed suit in the District Court of Salt Lake County, State of Utah, in case No. C-78-1735 trying to get an inventory and accounting of the properties of the Estate of Joanne Ashley Walker, deceased, as petitioner-appellant has all of the assets of the estate in his "safe keeping" so what basis could there be to claim said personal representative "has mismanaged the estate in that he has made no effort to inventory the assets and personal property of the estate, and has made no effort in the ascertaining and paying creditors."

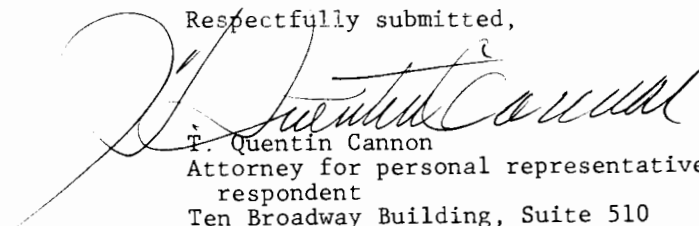
3. Harmon Smith Walker has failed to file an inventory because petitioner-appellant "is personally and first-hand aware of the state of being of the estate of Joanne Ashley Walker, in that he has exercised due care in the protection of the assets

and personal property of said estate". The Notice to Creditors has been published and the Proof of Publication has been filed.

Is there any foundation for the taking of such an appeal?

The Supreme Court is overloaded. Can one take an appeal such as this with impunity? The personal representative-respondent should be awarded his costs and attorney's fees.

Respectfully submitted,



T. Quentin Cannon
Attorney for personal representative-
respondent
Ten Broadway Building, Suite 510
Salt Lake City, Utah 84101

I hereby certify that I mailed a copy of the foregoing
to John Walsh, Attorney for Petitioner-Appellant, 2870 South State
Street, Salt Lake City, Utah 84115, postage prepaid, this _____
day of March, 1979.
