1954

In the Matter of the Estate of James John Latsis : Respondent Utah Savings & Trust Company's Petition for Rehearing

Utah Supreme Court

Mulliner, Prince & Mulliner; Attorneys for Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

In the Matter of the Estate of JAMES JOHN LATIS (sometimes known as "Latses") *Deceased.*

No. 7954

PETITION OF RESPONDENT VIRGINIA LATSIS ZAMBUKOS FOR REHEARING

MOSS & HYDE
Attorneys for Respondent
Virginia Latsis Zambukos

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WAS SCRUPULOUSLY OBSERVED, AND THE COURT'S OPINION IS INCORRECT AND UNFAIR IN STATING ". . . THERE IS NO INDICATION THAT THE STATUTORY PROCEDURES PROVIDED FOR WERE COMPLIED WITH, NOR THAT ANY ATTEMPT WAS MADE TO DO SO."

POINT I

THIS COURT HAS NOT DECIDED THE ONLY QUESTION PRESENTED ON APPEAL, TO-WIT: CAN APPELLANTS PROPERLY PROCEED BY PETITION IN A CLOSED PROBATE ACTION WHEREIN THERE HAS BEEN ENTERED A FINAL DECREE OF DISTRIBUTION AND DISCHARGE?

The court's opinion would appear to sanction procedure by petition in such a case as this, but the court never points out or clarifies what then becomes of the final decree of distribution and discharge. Is it set aside? It was not attacked. Is it ignored? It is not contended that the court lacked jurisdiction. A petition is simply a plea or request made to a court to take some action in a matter pending or being brought before it. In this case no matter was pending — it had been terminated and closed for eight years — and no new action was being brought before the court. There simply was and is, no legal basis for the procedure which was attempted by appellants. The lower court decided this point, but the Supreme Court has never answered yea or nay. With a final decree standing of record, how can further proceedings be had until the decree is set aside on some legal grounds? And to set the decree aside, there must be pleadings and allegations to enable the adverse party to meet said allegations at a hearing where evidence is presented and witnesses can be cross-

examined, and from which the trial court can find the facts. This court set forth these principles in the case of *In re Rice's Estate (Utah) 182 P. 2d 111.* In that case the Supreme Court sustained a lower Court judgment vacating a decree of final distribution, although the proceeding below was commenced by a petition in probate. This was because (p. 115) all the parties had been before the Court, and all issues had been pleaded, including the charge of extrinsic fraud, and all issues had been fully tried and the extrinsic fraud proved, so that no prejudice resulted, and no purpose would have been served by doing it over again.

This Court however affirmed its prior decisions, that when issues of fact arise in a probate, the Court should determine such issues according to the Code of Civil Procedure. And on the matter of our objection to the decision here before a hearing, the opinion says, in italics, for emphasis:

> "The statutes in question contemplate that when an issue of fact arises, as distinguished from a matter of judicial discretion, such issue of fact shall be tried in conformity with the requirements of the Code of Civil Procedure, to allow the edverse party to challenge the sufficiency of pleadings by motion or demurrer, to grant parties a hearing on the issues, including the right to present evidence, and to cross-examine witnesses produced by the other side."

Until the decree of final distribution is attacked in a proper proceeding and set aside, no petition wll lie in the probate matter.

POINT II

IN EFFECT THIS COURT SANCTIONS AND UPHOLDS A COLLATERAL ATTACK UPON A FINAL DECREE OF A PROBATE COURT WITHOUT ANY ALLEGATION OR PROOF OF EXTRINSIC FRAUD.

The law is so well and long settled that a final decree of distribution and discharge can be attacked and set aside only by direct attack under allegations and proof of extrinsic fraud that respondents may have neglected to stress this point.

> ". . . a court of equity will set aside or annul a judgment at law on the ground of fraud, only where the fraud is extrinsic or collateral to the matter tried in the original action, and not where the fraud was in the matter on which the judgment was rendered. This rule is based upon the underlying principles that there must be an end to litigation, and that an issue which has been tried and passed on by the first court should not be retired in an action for relief against the judgment, since otherwise, litigation would be interminable; whereas, in the case of extrinsic fraud, relief is granted on the theory that such fraud has prevented the unsuccessful party from fully presenting his case, and hence that there has never been a real contest before the court on the subject matter of the suit. 15 RCL Judgments Sec. 215."
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> Comment Note *88 ALR 1201.*

This court as late as February, 1953, has held that where an administrator did not locate absent heirs and where the court distributed the estate with no provision for the absent heirs, without proof of extrinsic fraud,

the decree must stand; and the absent heirs were forever barred and cut off from their patrimony. *Damnum absque injuria* applies.

See: *Tiller v. Norton* (Utah) 253 P. 2d 618.

> "Furthermore, the authorities impose on an administrator no particular duty of arduousness in seeking out heirs, but rather require only that he take possession of the assets, preserve and account for them, administer them and distribute them as trustee of the estate *under the supervision or direction of the court* to those distributees whom the court, at some time during the administration, has found from the evidence to be entitled thereto.
>
> . . . . . .
>
> The rule that leads us rather rarely to such unhappy result and which makes heriship an entitlement res judicata, once the court has *acquired jurisdiction,* followed by *distribution* not vulnerable to attack for fraud, mistake or the like, *is based nevertheless on sound principles which look to the early settlement of litigation, lest protraction create more frequently for others* the very kind of *injustice* visited upon the plaintiffs here."
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> *Tiller* v. *Norton, supra.* (Italics added).

In the case at bar the probate court had jurisdiction. No challenge to this. It made findings and actually *distributed* the estate. A final decree was entered. No allegation of fraud, mistake, or the like has been made or proved, so the decree stands.

In *Davis* v. *Seavey* (Wash.) 163 P. 35 the court held that one claiming under an unprobated codicil more than

one year after final decree of distribution, had failed to contest the will within the statutory period of one year after probate and therefore could attack the decree of distribution only by alleging and proving fraud in procuring the decree. The court held against claimant.

> "The question is then presented: When a decree of summary distribution has been procured in good faith and later additional property comes to attention which brings the estate above $1,500, should he decree be vacated and the whole estate subjected to general probate? We think not. As hereinabove stated, *decrees of the probate court can be assailed only in equity and upon the same grounds as other judgments.* In re Raleigh's Estate 48 Utah 128, 158 P 705; In re Brooks' Estate 83 Utah 506; 30 P. 2d 1065; and 4 Bancroft's Probate Practice, 2d Ed., Sec. 1011, et sequi."

In re Linford's Estate (Utah) 239 P. 2d 200.

> "We rule that the decree of summary distribution, having been procured in good faith, and no fraud having been proved, is conclusive against the petitioners as to the property included in the original inventory . . ."

In re Lindford's Estate, Supra

If the law now is in Utah that one need not allege and prove fraud to reopen or set aside a final decree in a probate proceeding, every real property title in Utah which has come through probate is in jeojardy. An orderly probate proceeding in a court of competent jurisdiction is meaningless.

POINT III

THE DECREE OF DISTRIBUTION OF THE PROBATE COURT WAS FINAL AND UNCONDITIONAL AND THEREFORE IS NOT OPEN TO MODIFICATION NOW.

Counsel for appellants have misled the court into believing that somehow the final decree of distribution was conditional. Nothing can be farther from the fact. A careful reading of that decree discloses:

> "The settlement, payments, and distribution, and provision for distribution, made pursuant to the order herein of February 27, 1945, and as hereinabove set forth, is approved and allowed.
>
> "It is further ordered that all of the remaining properties of the said estate . . . are hereby distributed to Virginia Latsis, the surviving wife of the said decedent."

First the court approved and allowed the "settlement, payments and distribution" as well as the provision for payment of the amount of the distribution fixed by the previous order. Then the court unequivocally "*distributed*" the remaining properties to the wife. There were no conditions recited. The distribution was final and was followed by the discharge of the administrators. And this was the act of the court. The idea seems to have crept in that somehow these administrators decided these things and made distribution. It was the court which decided and acted. The administrators simply executed the court's order.

As early as 1899 this court enunciated the rule of law which stands today that where nothing is reserved

for future determination in a decree or judgment, the same is final; and the remedy for one adversely affected is an appeal to the Supreme Court. *State* v. *Booth* (Utah) 59 P. 553. In the Latsis case everything was finally distributed, and the estate was closed. The administrators were discharged. No appeal was taken.

And although this Court said that the Probate Judge approved or adopted provisions of the stipulation referring to receipts and releases of the estate and said that this was done "advisedly and for the purpose of safeguarding the rights of these foreign heirs," yet the fact is that the Court did not adopt these at all and the same Judge who signed the order making different provisions for distribution and payment is the trial Judge who rejected this contention below and dismissed appellants petitions; furthermore, the Probate Court made final distribution and discharge although no receipts and releases had been obtained from Greece, therefore, what this Court says was the intent and purpose of the Probate Court is at total variance with the intent and purpose as shown by the trial Court's own acts.

On this, and on the point that no issue was raised as to the final decree being conditional, note that in the opinion some language was quoted from the decree by this Court, and after changes and insertions, this language was construed as an adoption of the prior stipulation. But, and on the other hand, the appellants themselves in their brief (p. 15) quote this same identical portion of the final decree (without the changes or inser-

tions of course) and there argue, that this language simply approved the arrangements made in paragraph 6 of the decree for the payment of appellants without any requirement of receipts or releases; and then appellants insist that this was an attempt on the part of the trial Court to change the prior stipulation and order, instead of adopting it. They simply contended that the appellants were entitled to a separate notice of this change in order for the Court to get jurisdiction to make it.

However, this Court has consistently held that any lack of notice as to this would not affect the jurisdiction to make this decree.

> "In other words, from what is there said it would seem that the notice which is given upon the filing of the petition for letters of administration is the jurisdictional notice, the giving of which, when given as required by the statute, brings not only the property, but the persons interested therein, within the jurisdiction of the Court." *Barrette* v. *Whitney* (Utah) 106 P. 522.

POINT IV

EVERY PROCEDURAL STEP REQUIRED BY STATUTE WAS SCRUPULOUSLY OBSERVED.

The court's opinion, without any explanation or substantiation, states that "there is no indication that the statutory procedures provided for were complied with, nor that any attempt was made to do so." This is a most shocking statement and is completely unfounded. What statutory procedure was not followed? The record

speaks for itself. A minute check will show that every required procedural step was taken, notices given, inventory and appraisal, etc., etc. The estate was carefully and fairly administered by an experienced coadministrator with the advice of learned and experienced counsel. Every step was supervised and ordered by the District Judge in probate—in part by the Justice who wrote the Supreme Court's opinion. The probate judge below found that all statutory procedures provided for were complied with, he found as to entitlement of distribution, and *he distributed the estate* in his *final decree.* That final and unconditonal decree stands unless and until it is successfully attacked in a proper proceeding alleging and proving fraud in its procurement.

CONCLUSION

For the reasons stated above and because of the manifest unanswered complications, it is respectfully urged that a rehearing be granted. The impact of this opinion on Utah probate law and the apparent overruling of many earlier Utah cases makes it imperative that the whole matter be carefully represented and reargued to the Court so that all aspects of the matter may be clarified and correlated with our Uah law as it now stands.

MOSS & HYDE
Attorneys for Respondent
Virginia Latsis Zambukos