

1954

In the Matter of the Estate of James John Latsis : Respondent's Reply to Answer Brief on Petition for Rehearing

Utah Supreme Court

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Recommended Citation

Reply to Response to Petition for Rehearing, *Latsis*, No. 7954 (Utah Supreme Court, 1954).
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IN THE SUPREME COURT
of the
STATE OF UTAH

In the Matter of the Estate of
JAMES JOHN LATSIS (sometimes } Case No. 7954
known as "Latses"), Deceased. }

RESPONDENTS
REPLY TO ANSWER BRIEF ON PETITION
FOR REHEARING

Respectfully submitted,

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FILED

NOV 22 1954

Clark, Supreme Court, Utah

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STATEMENT

A short reply brief by respondents is required because new matters are presented in appellants' answer brief; and, since there are no pleadings defining the issues here is a large and involved probate record, more confusion may arise.

Appellant's answer brief takes some scattered shots at a few matters considered answerable, but it ignores most of the fundamental matters raised by the petitioners and by Amici Curiae. New matters are argued without any reference to the order of the Court appealed from, or to the grounds of our motion upon which the Court's order was based.

We will follow their points I and II in the order presented.

ARGUMENT

I.

The equivocal claim is now made that the decree of October 9, 1945, is "either conditional or void as to its distributive clause."

This goes beyond what the opinion of this Court said, and is a different point from any heretofore presented. This Court's opinion said the "decree of distribution and order of discharge * * * was conditional * * *." This was because of a misunderstanding as to the decree. The appellants, as pointed out in Mrs. Latsis' petition (p. 8) had, in fact, complained in their brief because the final decree *did not* adopt the conditions which they claimed were in the stipulation and which this Court's opinion said the final decree *did* adopt. And while the Court's opinion did in effect destroy the decree, it did not say, nor was this done, on the theory that it was void because of anything within itself or in the probate record here, or at all. So that if this theory were now adopted, it would seemingly require a rehearing and argument on the point of voidness.

True, the appellants also made a statement in their former brief which they now (p. 7) refer to and quote and which statement is exactly contrary to their contention above referred to. This quote (p. 7) contains two false statements by which this Court was misled. It does, however, mention a sort of qualified "nullity." Their petitions and assignments didn't present, and their brief didn't argue the point now argued, nor can

judgments be vacated on off-hand assertions of disputed facts made in a brief. Anyway, this reference is the only basis claimed for bringing up this point now.

And then on the assumption that the decree is absolutely void, authority is now cited that, "A void decree can be * * * attacked at any time." The assumption that it is void is supported by no authority, and only two things are hinted at for this claim:

(1) That Section 74-4-5 on "Succession" says that under certain conditions the estate must be distributed to the heirs therein defined unless otherwise "provided in this title or in the probate code, * * *." So it is assumed that if any decree does not distribute the estate or any of it to the heirs entitled hereto, it is void and can be vacated by petition at any time.

The Amici Curiae brief (p. 5-12) cites several Utah cases in which decrees of the lower Courts have failed to distribute to the heirs entitled under this statute and which decrees were nevertheless upheld by this Court as not only not void and not subject to collateral attack, but subject only to direct attack within the statutory time and for extrinsic fraud. The general rule to this effect is also cited there, and other cases and authorities are cited (p. 4-6) in the petition of Mrs. Latsis here. While the matter was not presented so as to be required to be directly and exhaustively briefed, these cases and authorities completely refute appellants' claim that this decree is void.

Appellants mention only one of these cases, *Tiller v. Norton*, 253 P. 2d 618. There the decree gave nothing to two direct heirs, while here the degree gave these collateral heirs what the trial Court determined to be their share of the estate. Appellants attempt to distinguish this case by merely saying "there is no analogy between the Tiller case and this case. Here the Court lacks the power to vary from the statutory rule of distribution and any such variance constitutes a void judgment." If this judgment is void because of variance from this statute, then this Court has been wrong in all these prior decisions cited, where there has been plain variance. This ipsedixitism is an easy, if somewhat arbitrary, disposal by appellants of the Tiller case and these other cases and authorities all holding contrary to this statement.

Since the second hint of a basis of claim that the decree is void refers to the attorney appointment under 75-14-25, we will discuss this under their point II.

II.

This hint at voidness is supported (p. 6) by a quotation from one of their petitions. This is under the assertion that the "power and authority" for Mr. Cotro-Manes to act on behalf of these heirs was challenged in the petition. Nothing in the quotation does challenge this however. The petition filed more than seven years after probate was commenced merely makes these three incorrect assertions of fact:

- (a) That appellants were unaware of the pendency of these probate proceedings.
- (b) That they were not advised of such by their attorney.
- (c) That he did not consult with them concerning affairs of the estate.

On these *irrelevant* statements and the reference (p. 4) to the fact that the decree refers to his appointment and mentions the allowance of his fee and the amount to be distributed to the heirs, it is claimed the decree is void.

So, the contention comes to this: If the Court had appointed no representative for these parties at all and nothing had been done on their behalf, a final decree of distribution which didn't give them what they claim they are entitled to might be upheld; but because the attorney was appointed and because he failed to advise them as above recited, the final decree is void, and the Court should now hold it void without proof of these assertions. This not only would emasculate the statute as to the appointment and representation of minors and absent heirs, but would make it a menace to any final decree if the trial Court did anything under it at all.

Point II repeats that an attorney appointed under this section "cannot compromise a claim without consent of the heir."

In the first place, the attorney did not compromise the claim, and this term has been repeatedly and wrong-

fully used by appellants, and the Court has been misled thereby. We have quoted (Banks's petition, p. 8) the record which shows that on the hearing it was determined that this was not a "compromise" at all, and the trial Court made a finding and determination (R. 95) that the amount fixed and distributed was the share of these heirs.

In the second place, there is no good reason to believe, and certainly no authority has been cited, that the attorney representing these heirs could not compromise at least by agreeing on a division, if the Court approved. Their claim is not compromised when all the heirs here, including a brother, and the representative of the foreign ones, consent to a division found by the Court to be correct.

In the third place, the statute plainly gives the representative and the Court complete authority to act for and bind these heirs in "settlements, partitions and distributions of estates." (See appellants' reply brief, p. 2-3, for definition of "settlement without any notice.") This is the very heart and purpose of this statute, and no authority has been cited that they do not have this power in this matter, and if they do not, the statute is meaningless.

In the fourth place, if the Court and the attorney both erred to appellants damage, it would not affect the finality of this decree or make it void, and no authority has been cited indicating that it would. The brief of *Amici Curiae* shows this conclusively, and also (p. 13-14)

establishes that there can't be asserted as "conditions" something a "party is bound" to do, as are appellants here.

It is asserted that our statute was taken verbatim from California. This is not literally true, but as to the portions of the statue here involved, the statutes are identical. But the statement that this statute has ever been construed by the Courts of California in respect to the power of dealing with "settlements, partitions and distributions" here involved, is completely false. This was refuted in the answer brief of respondents at pages 5 and 6 where it was shown that all these California cases related to things entirely foreign to the matters here involved. The two cases which it is claimed interpreted this statute before Utah enacted it, interpreted nothing under consideration here, and nothing that is in our statute at all.

The first case related only to an appointed attorney's authority to withdraw a pending action brought to contest a will. The second related only to fees of an appointed attorney holding that he could recover such, but that he claimed too much.

The Lux case quoted from in the opinion indicates that their statute had then been amended at different times so that there is no indication that this statute was in effect when these first two cases were decided. This Lux case also related solely to fees, and, in addition to holding that a Court appointed attorney could be replaced by an attorney of an adult heir's own selection,

said that fees were claimed (60 P. at 32) for services rendered “almost two years before the appointment was made” and that the Court could not fix the amount of fees before any services had been rendered or appraised. That is all.

The Court, then apparently incensed at the exorbitant claim of the appointed attorney, who “had already received \$93,000,” said in the dicta quoted in the opinion of the Court here that the Court could do nothing with this statute that it couldn’t do without it, which, if so as to fees, is not so as to the authority conferred by the statute; but even in the speculative illustrations there made, and here quoted, the authority expressly given by our statute and exercised, is not referred to. It was said that the Court couldn’t give the appointed attorney authority “to bind a person who is *sui juris* to waive his rights, or concede claims against him, or to institute proceedings for him or to incur costs chargeable to him.” Here, the Court didn’t do, and the attorney didn’t attempt to do, any of these. There is in fact no justification for giving this Lux case the unwarranted application given it, or any application, to the case at bar.

We can’t get away from the fact that the Court determined what appellants’ rights were here; nobody waived them. The objection is to the correctness of that determination and distribution, for if they received their share they can’t complain, and even if both the attorney and the Court had erred as to that determination, this

final judgment would certainly not thereby be rendered void.

Respectfully submitted,

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