

1988

# Eugene L. Perry v. Kent and Carol McLaughlin : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

88-0084-CA

\* \* \* \* \*

IN THE MATTER OF THE ESTATE OF )  
DIANE LAURA MCLAUGHLIN )

Deceased )

88-0084-CA

APPELLANT'S BRIEF

EUGENE L. PERRY, PERSONAL )  
REPRESENTATIVE, )

Appellant )

Case No. 860436  
(Dist. Ct. Case No.  
P-85-893)

vs. )

KENT and CAROL MCLAUGHLIN, )

Respondents )

Priority Category 13(b)

\* \* \* \* \*

ON APPEAL FROM THE  
THIRD JUDICIAL DISTRICT COURT, PROBATE DIVISION

\* \* \* \* \*

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DEC 28 1986

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ISSUE ON APPEAL

Eugene L. Perry, as personal representative of the Estate of Diane Laura McLaughlin, petitioned the Third Judicial District Probate Court for an order vacating the court's earlier December 3, 1985 Order on the ground that it was void for lack of subject matter jurisdiction. Was the court's refusal to grant this petition reversible error where:

A. Mr. Perry petitioned the probate court in October 1985 for an order approving the sale of estate property to Albert and Susan Arnaud;

B. Utah Code Ann. § 75-3-710(3), which previously provided that, when a personal representative petitioned the court for the approval of the sale of estate property, "any person may appear and bid for the property," was repealed in 1983;

C. Kent and Carol McLaughlin appeared and bid on the home and furnishings at the November 6, 1985 hearing;

D. Neither Kent nor Carol McLaughlin is an "interested person" as that term is defined by Utah Code Ann. § 75-1-201(20) (1978);

E. The probate court ordered Mr. Perry to sell the home and furnishings to the McLaughlins (The December 3, 1985 Order);

F. The Utah Supreme Court has held that a party must have standing as an "interested person" to intervene in a probate court proceeding;

G. Utah law provides that a probate court's authority is statutory and that an order entered without statutory authority is void and should be vacated;

H. Federal decisions uniformly hold that it is reversible error for a federal court to refuse to vacate an order under F.R.C.P. Rule 60(b)(4) if the order is void; and

I. F.R.C.P. Rule 60(b)(4) is identical to U.R.C.P. Rule 60(b)(5)?

#### STATEMENT OF THE CASE AND FACTS

##### The Death of Diane McLaughlin and her Survivors

Diane Laura McLaughlin ("Diane") died on August 2, 1985 as a result of the crash of Delta Air Lines Flight 191 at Dallas/Fort Worth Airport. (R.24). She was survived by her two sons, Shaun and Dustin McLaughlin ("Shaun" and "Dustin") and her father, Eugene L. Perry ("Mr. Perry"). (R.7, 238). Diane was the legal custodian of Shaun and Dustin at the time of her death. (R.41).

Diane was also survived by her former husband, Kent McLaughlin, the father of Shaun and Dustin. (R.40-41). After his divorce from Diane, Mr. McLaughlin had remarried. His wife's name is Carol McLaughlin. (R.168).

The Appointment of a Conservator for Shaun and Dustin  
And a Personal Representative for Diane's Estate

After Diane's death, her father, Mr. Perry, petitioned the Third Judicial District Probate Court for an order appointing Commercial Security Bank conservator for Shaun and Dustin. The probate court granted that petition on September 4, 1985, in Probate No. P-85-837.

After its appointment, Commercial Security Bank nominated Mr. Perry to act as personal representative of the Estate of Diane Laura McLaughlin. (R.5). The probate court granted Mr. Perry's petition for appointment as personal representative of Diane's intestate estate on September 25, 1985, in Probate No. P-85-893. (R.13-15).

Mr. Perry Acts to Sell Diane's Home

Other than a wrongful death claim against Delta Air Lines and others, the single most valuable asset in Diane's estate was her home and her personal property located in the home. (R.39). After his appointment, Mr. Perry listed the home for sale with a real estate agent. (R.376).

Kent McLaughlin's Offer to Waive his Equitable  
Interest in Diane's Home

Shortly after Diane's death, Kent McLaughlin told Mr. Perry that Mr. McLaughlin was willing to waive his equitable lien against Diane's home (approximating \$2,500.00). (R.41). Mr. McLaughlin obtained the equitable lien as part of the decree of divorce from Diane. (R.40). The amount of the lien had been reduced pursuant to a written agreement between Mr. McLaughlin and Diane in January 1984. (R.40, 50-53).

Mr. Perry Petitions the Court for Approval  
of the Sale of the Home to the Arnauds

In October, 1985, Albert and Susan Arnaud presented an offer to purchase Diane's home and certain furnishings located in the home. (R.46-49, 54). Mr. Perry determined that the offer was reasonable. (R.38-44). However, Mr. McLaughlin's oral waiver of his equitable lien was not of record. As a result, Mr. Perry could not pass clear title without court approval of the oral waiver. Thus, Mr. Perry accepted the Arnaud's offer subject to probate court approval. (R.47).

On October 15, 1985, Mr. Perry filed a petition for approval of the sale of the home and the furnishings to the Arnauds and for the approval of Mr. McLaughlin's oral waiver of his lien. (R.38-54). However, prior to the hearing Mr. McLaughlin filed a written objection to Mr. Perry's petition, withdrawing his oral waiver. (R.55-56).

At the hearing, the Court Opened the Proceedings  
For Bids on Diane's Home and Furnishings

The probate court heard Mr. Perry's petition on November 6, 1985, the Honorable Timothy R. Hanson presiding. (R.62). E. H. Fankhauser appeared at the hearing as attorney for Kent and Carol McLaughlin. (R.62) When the matter was called, the court, mistakenly acting pursuant to Utah Code Ann. § 75-3-710(3) (repealed 1983), asked for higher and better bids with regard to the home and the furnishings located within the home. (R.77-78). The McLaughlins moved the court to order Mr. Perry to sell the home and furnishings to them at the price they offered. (R.77-78). The court determined that Kent and Carol McLaughlin's offer for the home and the furnishings was a better offer and ordered the home and the furnishings sold to

the McLaughlins. (R.369-386). While Mr. Perry objected to the court's actions on other grounds, he did not object to the granting of the petition on the basis that Subsection 75-3-710(3) had been repealed. (R.369-386). Counsel for Mr. Perry was not aware of the repeal at the hearing. (R.241).

The December 3, 1985 Order Required the McLaughlins  
To Purchase the Home and Furnishings on or before  
December 1, 1985

The court entered its written order on December 3, 1985. (R.77-81). Counsel for Mr. Perry participated in the drafting of the order. (R.66-81). The December 3, 1985 Order required the McLaughlins to purchase the home and furnishings on or before December 1, 1985. (R.80). The McLaughlins tendered a check for the furnishings prior to December 1, 1985. (R.267). However, the McLaughlins were unable to close on the home. (R.187, 265-266). On the advice of counsel, Mr. Perry took the position that the court's order required the McLaughlins to purchase both the home and the furnishings as a package. (R.208, 233). When the McLaughlins were unable to close on the home, pursuant to the advice of counsel, Mr. Perry sold the home and the furnishings to Albert and Susan Arnaud on December 13, 1985. (R.208, 232).

The McLaughlins Obtain an Order to Show Cause

Thereafter, on December 27, 1985, the McLaughlins obtained ex parte an order to show cause why the personal representative should not be required to deliver the furnishings to Kent and Carol McLaughlin. (R.122-123, 126-127). The McLaughlins scheduled a hearing on their Order to Show Cause for January 15, 1986 before the Honorable Kenneth Rigtrup. (R.126). Judge Hanson was reassigned from the Third District's probate calendar as of January 1, 1986 and Judge Rigtrup replaced him. (R.126).

Mr. Perry Seeks to Amend or Vacate the  
December 3, 1985 Order; Judge Rigtrup  
Refuses to Hear his Petition

Prior to the hearing date, Mr. Perry filed a petition with the probate court requesting that the court amend the December 3, 1985 Order pursuant to Rule 60(b) of the Utah Rules of Civil Procedure (1983). (R.100-103). At the hearing on January 15, 1986, Judge Rigtrup advised Mr. Perry that he would not hear the Rule 60(b) petition because the order it sought to

amend or vacate was entered by another district court judge. (R.241). As a result, Mr. Perry requested a continuance in order to attempt to consolidate before Judge Hanson his Rule 60(b) petition with the McLaughlins' order to show cause. (R.241, 109-114). Judge Rigtrup granted Mr. Perry's request for a continuance but entered an unsigned minute entry in which he stated that the December 3, 1985 Order entitled the McLaughlins to the furnishings and that the furnishings should be delivered to Kent and Carol McLaughlin. (R.131-132).

The Amended Petition to Amend or Vacate the  
December 3, 1985 Order; the Court Hears the Petition

On January 20, 1986, Mr. Perry filed an amended petition for a Rule 60(b) order and noticed the petition to be heard before Judge Hanson. (R.179-184). On the day of the hearing, E. H. Fankhauser, counsel for the McLaughlins, filed his own affidavit with the court in which he made various allegations of misfeasance on the part of Mr. Perry and his counsel. (R.168-175).

The matter was argued to the court on February 10, 1986. (R.154). At the hearing, Mr. Perry moved to strike the



affidavit from Mr. Fankhauser on the basis that, among other reasons, it was untimely under the Rules of Civil Procedure. (R.154). Mr. Perry also moved the court to certify under Rule 54(b) of the Utah Rules of Civil Procedure (1983) the order entered as a final order in the event the court did not amend or vacate the December 3, 1985 Order. (R.165-166). The court denied the petition in so far as it sought to amend the December 3, 1985 Order, but it reserved judgment on all other matters (including the prayer that the order be vacated as void) and took those matters under advisement. (R.154). On February 25, 1986, Judge Hanson entered his Memorandum Decision. (R.156-167).

The Court's Memorandum Decision Denies Mr. Perry's  
Petition

In the Memorandum Decision, Judge Hanson ruled that, notwithstanding the repeal of Subsection 75-3-710(3) in 1983, the court had general authority under the probate code to follow the procedure which had been followed at the November 6, 1985 hearing. (R.163). Therefore, Judge Hanson ruled the December 3, 1985 Order was not void because of the repeal of

Subsection 75-3-710(3). (R.165). He further weighed the equities between the parties based only on the allegations contained in Mr. Fankhauser's affidavit and decided that Mr. Perry was not entitled to equitable relief under Rule 60(b). (R.164-165). Based on the Memorandum Decision, the court entered a written order on March 12, 1986 denying Mr. Perry's Rule 60(b) Petition. (R.190-192). The court also denied Mr. Perry's oral motion to certify the order under Rule 54(b). (R.191).

Mr. Perry Petitions the Court to Amend its Order  
and Certify the Order under Rule 54(b)

On March 24, 1986, Mr. Perry filed a petition under Rule 59(a) asking the court to amend its March 12, 1986 Order as a manifest error of law. (R.200-204). In addition, Mr. Perry again asked the court to strike Mr. Fankhauser's affidavit and filed counter affidavits disputing his allegations. (R.193-194, 229-247). The two principal points raised in the Rule 59(a) petition were first, Kent and Carol McLaughlin were not "interested persons", and as such did not have standing to move the court for an order at the November 6, 1985 hearing. (R.201). Second, Mr. Perry asked the court to certify the Order under Rule 54(b). (R.202). The court heard

Mr. Perry's petition on April 7. (R.251). The court agreed to certify the March 12th order under Rule 54(b). (R.251). However, the court otherwise confirmed the original order. (R.251). The court entered the amending order on July 9, 1986. (R.293-294). Mr. Perry now appeals the March 12th Order, as amended. (R.298-299).

#### SUMMARY OF ARGUMENT

The probate court entered its December 3, 1985 Order pursuant to the motion of persons who are not "interested persons" under the Utah Uniform Probate Code. When it did so, the probate court exceeded its subject matter jurisdictional authority. An order outside the jurisdictional authority of the probate court is void and should be vacated. When the probate court refused to vacate the December 3, 1985 Order pursuant to Mr. Perry's Rule 60(b)(5) motion, the probate court committed reversible error. Thus, the Court should reverse the probate court's decision and remand the case to the probate court with directions to enter an order vacating the December 3, 1985 Order.

## STANDARD OF REVIEW

Ordinarily, in order to reverse a district court judge's decision made pursuant to a Rule 60(b) motion, the appellant must show that the judge abused his discretion. Laub v. South Central Utah Telephone Association, 657 P.2d 1304, 1306 (Utah 1982). However, the federal courts have consistently held that a trial judge's refusal to vacate a void order pursuant to a Rule 60(b)(4) motion under the Federal Rules of Civil Procedure (1985) is reversible error. There is no need to show an abuse of discretion:

There is no question of discretion on the part of the court when a motion is [made] under Rule 60(b)(4) [of the Federal Rules of Civil Procedure]. . . . Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.

C. Wright and A. Miller, Federal Practice and Procedure, § 2862 (1973) (emphasis added). Rule 60(b)(4) of the Federal Rules of Civil Procedure (1985) is identical to Rule 60(b)(5) of the Utah Rules of Civil Procedure (1983). Accordingly, if Mr. Perry can show that the order of December 3, 1985 was void, the Court should reverse the March 12, 1986 Order and direct Judge Hanson to enter an order vacating his December 3, 1985 Order.

ARGUMENT

I. THE PROBATE COURT EXCEEDED ITS JURISDICTIONAL AUTHORITY BY GRANTING AFFIRMATIVE RELIEF TO KENT AND CAROL MCLAUGHLIN; NEITHER KENT NOR CAROL MCLAUGHLIN HAD STANDING TO MOVE THE PROBATE COURT FOR AFFIRMATIVE RELIEF AT THE NOVEMBER 6, 1985 HEARING.

A. The Utah Uniform Probate Code Requires that a Person have Standing as an "Interested Person" in order to Participate in Probate Proceedings.

It is axiomatic under Utah law that "a party must demonstrate standing to raise an issue in order to secure a ruling thereon." Redwood Gym v. Salt Lake City Commission, 624 P.2d 1138, 1145 (Utah 1981); accord, Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983). The Utah Uniform Probate Code codified this principle. Subsection 75-3-105(1) limits those who may seek formal orders to "persons interested in the decedent's estate." Utah Code Ann. § 75-3-105 (1978).

The Supreme Court has recently considered whether a person who was not an "interested person" could intervene in a probate

proceeding. Matter of the Estate of Peterson, 716 P.2d 801 (Utah 1986). In Peterson, the Court stated: "When a statute creates a cause of action and designates those who may sue under it, none except those designated may sue." Peterson, 716 P.2d at 803. Thus, the Court held that the party seeking to intervene in Peterson was precluded from doing so because that party did not come within the definition of "interested person" under the Utah Uniform Probate Code. Peterson, 716 P.2d at 803.

Accordingly, the definition of "interested person" is crucial to determine whether a person has a right to participate in probate proceedings. An "interested person" is defined to include:

heirs, devisees, children, spouses, creditors, beneficiaries, and others having a property right in or a claim against a trust estate or the estate of a decedent . . . . It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matters involved in, any proceeding.

Utah Code Ann. § 75-1-201(20) (1978).

B. Neither Kent nor Carol McLaughlin is an "Interested Person"; thus, the McLaughlins did not have Standing to Move the Probate Court for Affirmative Relief.

Carol McLaughlin is the present wife of Kent McLaughlin, Diane's former husband. (R.168). As a result, Carol McLaughlin is not an "interested person." She does not come within any part of the definition.

Kent McLaughlin is an interested person with regard to his claim against Diane's house for his \$2,500.00 equitable interest. (R.55). However, the Utah Uniform Probate Code specifies that a person's status as an "interested person" can "vary from time to time and must be determined according to the particular purposes of . . . any proceeding." Utah Code Ann. § 75-1-201(20) (1978). The purpose of the November 6, 1985 hearing was to consider Mr. Perry's petition for approval of the sale of Diane's home to the Arnauds. (R.38-54, 62). Mr. McLaughlin's interest in that proceeding was limited to insuring that his equitable interest in Diane's home was fully paid. Kent McLaughlin had no interest with regard to the personal property items located in the home. Moreover, it was not necessary for him to bid on the home in order to protect his equitable interest. The proposed purchase price (\$62,000)

was far in excess of Mr. McLaughlin's equitable lien (approximately \$2,500). (Compare R.39 with R.384). When the home was sold in December 1985 to the Arnauds, his equitable interest was fully paid. (R.241). Thus, Kent McLaughlin was not an "interested person" for purposes of bidding on Diane's home and furniture at the November 6, 1985 hearing.

Finally, both Kent and Carol McLaughlin bid as joint purchasers. (R.78). Even if Kent McLaughlin were an "interested person" for purposes of bidding on Diane's home and furnishings, the court still permitted a non interested person (Carol McLaughlin) to intervene in the probate proceedings, to move the court for affirmative relief and the court granted affirmative relief to the non interested person. In doing so, the court exceeded its jurisdictional authority.

C. The Repeal of Subsection 75-3-710(3) in 1983 Removed the Probate Court's Authority to Permit a Person who is not an "Interested Person" to Bid for the Purchase of Estate Property.

Prior to its repeal in 1983, Subsection 75-3-710(3) provided the sole exception to the rule that only "interested persons" may participate in probate proceedings. Utah Code Ann. § 75-3-710(3) (1978; repealed 1983 - - L. 1983, ch. 226,



§ 9). Subsection 75-3-710(3) provided that if the personal representative seeks approval of the sale of estate property, "any person may appear and bid for the property being sold . . . ." Utah Code Ann. § 75-3-710(3) (1978; repealed 1983 -- L. 1983, ch. 226, § 9)(emphasis added). This subsection was not a part of the Uniform Probate Code. Compare, Uniform Probate Code § 3-710 with Utah Code Ann. § 75-3-710(3) (1978; repealed 1983 -- L. 1983, ch. 226, § 9).

The repeal of Subsection 75-3-710(3) removed the only grounds for allowing non interested persons to participate in probate proceedings. A statement made by the Supreme Court in its recent decision in Peterson shows the importance of this repeal to the present case:

(Claimant's) reliance on In Re Miles' Estate, 63 U. 144, 223 P. 337 (1924), is misplaced. Comp. Laws Utah 1917, § 7869 gave any person the right to be heard on any question affecting a probate matter. By comparison only personal representatives or interested persons, as defined above, may petition for an order of complete settlement of the Estate. U.C.A., 1953, § 75-3-1001(1) (1978 ed.).

Peterson, 716 P.2d at 802 - 803; emphasis in Supreme Court's opinion. Similarly, Subsection 75-3-710(3) gave any person the right to bid on the sale of estate property at a hearing to approve the sale of the property. With its repeal in 1983, only interested persons have the right to move the probate

court for affirmative relief at hearings concerning petitions for the approval of the sale of real property. Utah Code Ann. § 75-3-105 (1978).

D. The Probate Court Is a Statutory Creation and Derives its Power Solely from the Statutes; Orders which Exceed its Statutory Authority are Void.

Under the prior probate code, the Supreme Court has stated that the probate court's authority is entirely statutory. In Re Cloward's Estate, 82 P.2d 336, 339 (Utah 1938). In addition, the Supreme Court has stated that an order entered by the probate court without specific statutory authority was void and should be vacated, In Re Harris' Estate, 105 P.2d 461, 464 (Utah 1940). The adoption of the Utah Uniform Probate Code has not vitiated the reasoning behind these cases. The probate court has limited jurisdictional powers and when it exceeds those powers, its order is void.

II. IN THIS CASE, THE PROBATE COURT FAILED TO UNDERSTAND THE IMPORTANCE AND IMPACT OF THE REPEAL OF SUBSECTION 75-3-710(3).

A. While Most of Subsection 75-3-710(3) was Duplicative of Grants of Power Found elsewhere in the Utah Uniform Probate Code, the Power of Non Interested Persons to Bid on the Sale of Estate Property was Unique to Subsection 75-3-710(3).

Normally, when a statute is repealed, the courts of that jurisdiction are immediately divested of all authority granted to them under the repealed statute. See, 73 Am. Jur. 2d Statutes § 385 (1974). However, the repeal of Subsection 75-3-710(3) in 1983 created a problem in this regard because part of the powers granted pursuant to that subsection were also granted elsewhere in the probate code. The reason for this duplication was that when Utah adopted the Uniform Probate Code in 1977, the legislature added Subsection 75-3-710(3) which was not a part of the Uniform Probate Code. Compare § 3-710 of the Uniform Probate Code with Utah Code Ann.

§ 75-3-710 (1978; repealed 1983 -- L. 1983, ch. 226, § 9). When the legislature added Subsection 75-3-710(3) to the Utah version of the Uniform Probate Code, it duplicated grants of power which already were part of the Utah Uniform Probate Code.

The problem with the probate court's decision in this case was that the probate court ruled as if Subsection 75-3-710(3) were entirely duplicative of other sections of the Utah Uniform Probate Code. (R.163). A careful review of that subsection

with the other provisions of the Utah Uniform Probate Code shows that this is wrong. While parts of Subsection 75-3-710(3) were duplicative, there was one part that not only was unique to Subsection 75-3-710(3) but was also contrary to the entire philosophy behind the Utah Uniform Probate Code.

Subsection 75-3-710(3) provided as follows:

The personal representative may petition the court for an order approving any sale or other matter affecting any property of the estate which is made subject to court approval. After notice to all interested persons and the hearing, at which if the transaction is a sale, any person may appear and bid for the property being sold, the court shall enter such order as appears to be in the best interest of the estate. If a person interested in the estate bids for such property, he may request that his interest in the estate be offset against the purchase price.

Utah Code Ann. § 75-3-710(3) (1978; repealed 1983 -- L. 1983, ch. 226, § 9). As will be shown, the first, third and (possibly) part of the second sentences are duplicative of grants of power in other sections of the Utah Uniform Probate Code; however, the remainder of the second sentence is unique to Subsection 75-3-710(3).

#### The First Sentence

Section 75-3-704 provides in part: "A personal representative . . . may invoke the jurisdiction of the court

in proceedings authorized by this code, to resolve questions concerning the estate or its administration." Utah Code Ann. § 75-3-704 (1978). The Editorial Board Comment to this section of the Uniform Probate Code (§ 3-704) states: "This section is intended to confer authority on the personal representative to initiate a proceeding at any time when it is necessary to resolve a question relating to administration." Editorial Board Comment to Utah Code Ann. § 75-3-704 (1978). Thus, the personal representative already had the authority to seek court approval of actions with regard to estate property (including the approval of sales) without the addition of the first sentence of Subsection 75-3-710(3).

#### The Third Sentence

Similarly, Subsection 75-3-105(1) provides that any interested person "may petition the court for orders in formal proceedings . . . including, but not limited to those described in this chapter [Chapter 3 of Title 75, Probate of Wills and Administration]." Utah Code Ann. § 75-3-105(1) (1978). Thus, if a personal representative sought approval of the sale of estate property to a third party, an interested person did not need the grant of authority in the last sentence of Subsection 75-3-710(3) to petition the probate court for an order

requiring the property be sold to the interested person and requesting that the interested person's interest in the estate offset the purchase price. The interested person already had the authority to file that petition under Subsection 75-3-105(1). Utah Code Ann. § 75-3-105(1) (1978).

#### The Second Sentence

However, the second sentence of Subsection 75-3-710(3) is a different situation. The general direction that the probate court view any petition regarding the sale of estate property from the perspective of "the best interests of the estate" was probably already implicit in the probate court's general grant of jurisdiction under Subsection 75-1-302(2). Compare Utah Code Ann. § 75-3-710(3) (1978; repealed 1983 -- L. 1983, ch. 226, § 9) with Utah Code Ann. § 75-1-302(2) (1978). But regardless of how this provision is interpreted, what really sets the second sentence apart from the rest of the Utah Uniform Probate Code is the provision that, when the personal representative files a petition for the approval of the sale of estate property, "anyone may appear and bid for the property being sold . . ." Utah Code Ann. § 75-3-710(3) (1978; repealed 1983 -- L. 1983, ch. 226, § 9); emphasis added. This provision is not duplicative of any other grant of authority

under the Utah Uniform Probate Code. Rather, it is entirely contrary to the rest of the Code. See, I, A, B and C above; Utah Code Ann. § 75-3-105 (1978); Peterson, 716 P.2d at 803.

As succinctly expressed in the Editorial Board Comments:

This section (section 75-3-106) and others in Chapter 3 describe a system of administration of decedents' estates which gives interested persons control of whether matter relating to estates will become occasions for judicial orders.

Editorial Board Comment to Utah Code Ann. § 75-3-106 (1978); emphasis added. As Peterson shows, a non interested person has no right to "control" what "matters . . . will become occasions for judicial orders." Peterson, 716 P.2d at 803.

B. Unless Specific Statutory Authority is Provided to the Contrary, the Scope of Any Proceeding Before the Probate Court Depends upon the Prayer for Relief in the Petition before the Court.

The Editorial Board Comment to Section 75-3-106 also establishes the scope of any proceeding before the probate court:

Nothing except self interest will compel resort to the judge. When resort to the judge is necessary or desirable to resolve a dispute or to gain protection, the scope of the proceeding if not otherwise prescribed by the Code is framed by the petition.

Editorial Board Comment to Utah Code Ann. § 75-3-106 (1978); emphasis added. Prior to its repeal, Subsection 75-3-710(3) provided the only exception to the Utah Uniform Probate Code's rule that only an "interested person" could seek affirmative relief from the probate court. Utah Code Ann. § 75-3-105(1) (1978); Peterson, 716 P.2d at 803. Subsection 75-3-710(3) did this by "otherwise providing" that the "scope" of a proceeding on a personal representative's petition for approval of the sale of estate property would be enlarged to permit "any person (to) appear" and seek affirmative relief from the court (an order requiring the personal representative to sell the estate property to the non interested person). But when Subsection 75-3-710(3) was repealed in 1983, the "scope" of the proceeding was again restricted to how the personal representative framed the prayer for relief.

In the present case, Mr. Perry prayed that the Court enter an order approving the sale of the estate's property to the Arnauuds. (R.42-43). Thus, the scope of the proceeding was limited to determining whether that prayer should be granted. The probate court did not have the authority to entertain the motion of a non interested party and to grant affirmative relief to that party.



C. The Probate Court Misconstrued the Consequence of Holding that the December 3, 1985 Order was Void.

The probate court's failure to appreciate the significance of the second sentence of Subsection 75-3-710(3) caused the court to erroneously rule that the court could continue to entertain bids from non interested persons notwithstanding the repeal of Subsection 75-3-710(3). Moreover, the court totally misconstrued the consequences that would result from a contrary holding (that the repeal of this subsection limited the probate court's authority over petitions for the approval of the sale of real property):

When the personal representative comes to Court intentionally, or mistakenly under the statute, and says, Judge, approve this sale for this third party, you're seeking approval of the Court. . . . And I'm telling you right now that as far as this Court's concerned, and I suspect many of my colleagues would feel the same way, and this is a matter I'll take up in the Judges' meeting Wednesday next, that if a personal representative seeks the approval, and all the protections that run with it from this Court on a sale of real, or personal, or any other kind of property, and comes in with the proposition that inquiry as to whether or not this is a good thing for the estate. Don't find out whether there is something that has more money to offer, whether or not it's a good bargain or not. Then be advised that I will never approve any personal representative sale of any property under any circumstances, if those are the limitations that are imposed upon me as a probate judge.

Judge Hanson's comments, Transcript of April 7th hearing (R.362-363).

Contrary to Judge Hanson's comments, the repeal of Subsection 75-3-710(3) does not prevent the probate court from inquiring into the substance of the personal representative's petition for approval. Utah Code Ann. § 75-1-302(2) (1978). The probate court can inquire as to whether anyone is willing to offer a better price for the property. If a non interested party offers a better price, the probate court should consider that offer in determining whether to grant or deny the personal representative's petition. Moreover, an interested person could actually bid for the property, and the court could require the personal representative to sell the property to that person. Utah Code Ann. § 75-3-105(1) (1978). The only limitation on the court, after the repeal of Subsection 75-3-710(3), is that the court is without authority to both deny the personal representative's petition and require the personal representative to sell the estate's property to a non interested party. Otherwise, the court continues to have full power to investigate the personal representative's petition and deny it if the court determines that it is not in the best interest of the estate.

III. MR. PERRY IS ENTITLED TO AN ORDER VACATING THE  
DECEMBER 3, 1985 ORDER NOTWITHSTANDING THE FACT THAT MR. PERRY  
FAILED TO OBJECT TO THE PROCEDURE FOLLOWED BY THE COURT AT THE  
TIME THE HEARING WAS HELD.

When the petition of Mr. Perry for approval of the sale of Diane's home to the Arnauds was called on November 6, 1985 and Kent and Carol McLaughlin made their bids for the property, Mr. Perry did not raise any objection on the basis that the McLaughlins were not interested persons. (R.369-386). In addition, Mr. Perry participated in the drafting of the December 3, 1985 Order. (R.66-82). Judge Hanson weighed the equities between the parties and held that Mr. Perry waived any jurisdictional defect because he failed to object at the time of the November 6, 1985 Order or when the Order was executed. (R.162-164).<sup>1</sup>

This is an erroneous view of the law. Parties to a lawsuit cannot consent to grant a court subject matter jurisdiction it

---

<sup>1</sup> Counsel for Mr. Perry filed an affidavit with the court in which he averred that he advised Judge Hanson of the repeal of U.C.A. § 75-3-710(3) prior to the entry of the December 3, 1985 Order. (R.240).

does not have. Werner v. Ill. Cent. R.R., 379 Ill. 559, 42 N.E.2d 82 (1942); see also, 28 U.S.C.A. § 1359 ("A [federal] district court shall not have jurisdiction of a civil action in which any party . . . has been . . . collusively . . . joined to invoke the jurisdiction of such court.") It follows, a fortiori, that one party's failure to object can never grant subject matter jurisdiction to a court that the court otherwise would not have. Indeed,

Even the party which [sought and] obtained the void judgment may collaterally attack it. . . .

A party attacking a judgment as void need show no meritorious claim or defense or other equities on his behalf; he is entitled to have the judgment treated for what it is, a legal nullity, but he must establish that the judgment is void.

7 J. Moore and J. Lucas, Moore's Federal Practice ¶ 60.25(2) (2d. ed. 1985) (interpreting F.R.C.P. Rule 60(b)(4) -- identical to U.R.C.P. Rule 60(b)(5)) (emphasis added).

Thus, Mr. Perry's failure to raise the objection of lack of subject matter jurisdiction to hear the motion of Kent and Carol McLaughlin cannot waive the subject matter jurisdictional defect. Since the December 3, 1985 Order was entered pursuant to the motion of non interested persons and since the court's jurisdiction is limited to hearing the motions of interested persons, the order entered is void. The order is a legal

nullity and Mr. Perry is entitled to have it vacated. 7 J. Moore and J. Lucas, Moore's Federal Practice ¶ 60.25(2) (2d. ed. 1985).

CONCLUSION

Mr. Perry respectfully requests that the Court reverse the probate court's decision and remand the case to the probate court with directions to enter an order vacating the December 3, 1985 Order.

Dated this 23 day of December, 1986.

CALLISTER, DUNCAN & NEBEKER



Charles M. Bennett  
Attorneys for Eugene L. Perry  
Personal Representative of  
the Estate of Diane Laura  
McLaughlin

CDN4402B

FILED IN CLERK'S OFFICE  
Salt Lake County, Utah

DEC - 3 1985

CALLISTER, DUNCAN & NEBEKER  
W. Waldan Lloyd (A1985)  
Charles M. Bennett (A0283)  
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Salt Lake City, Utah 84133  
Telephone: (801) 530-7300

H. Dixon Hindley, Clerk 3rd Dist. Court  
By Quellen Thompson  
Deputy Clerk

Attorneys for Eugene L. Perry,  
Personal Representative

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

\* \* \* \* \*

In the Matter of the Estate Of )	ORDER GRANTING SALE OF
DIANE LAURA McLAUGHLIN, )	REAL PROPERTY
)	
Deceased. )	Probate No. P-85-893

\* \* \* \* \*

Hearing on the Petition for Approval of Sale of Home and Sale of Furnishings filed by Eugene L. Perry, personal Representative, on October 15, 1985, came on for hearing before the above entitled Court, the Honorable Timothy R. Hanson, Probate Judge, on November 6, 1985, pursuant to notice. Petitioner was represented by his attorney, Charles M. Bennett, of the firm of Callister, Duncan & Nebeker; the former spouse of the decedent and his spouse, Kent G. and Carol McLaughlin, were present in person and represented by their attorney, E.H. Fankhauser; and the Court, after review of the offer to purchase the real property located at 902 East 8530 South,

Sandy, Utah, submitted with the Petition of the Personal Representative, called for higher and better bids; and Kent G. and Carol McLaughlin, having submitted to the Court their offer to purchase the real property and the furnishings which offer was considered by the Court and compared with the offer submitted with the Petition of the Personal Representative; and the Court having made inquiry and having made comparison of the offer submitted, being duly advised in the premises determined that the offer of Kent G. and Carol McLaughlin is a better offer than the offer submitted by the Personal Representative, pursuant to Petition; now, therefore,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The offer of Kent G. McLaughlin and Carol McLaughlin to purchase the real property located at 902 East 8530 South, Sandy, Utah, pursuant to Earnest Money Sales Agreement dated October 30, 1985 is approved and accepted by the Court.
2. The offer of Kent G. McLaughlin and Carol McLaughlin to purchase personal property consisting of furniture and furnishings as set forth in the Schedule of Personal property

on file herein, be and the same is hereby approved and accepted by the Court.

3. Kent G. McLaughlin and Carol McLaughlin are to pay to the personal Representative the offered purchase price of \$63,000.00 for the real property described as,

All of Lot 305, FAIR OAKS NO. 3 SUBDIVISION according to the official Plat on file in the office of the Salt Lake County Recorder, State of Utah

as follows:

(a) \$500.00 which represents the Earnest Money deposit;

(b) \$18,500.00 representing the approximate balance of an existing mortgage to be assumed by the Buyer;

(c) \$2,561.61 representing the approximate balance of Buyer's equity due to the buyer under a Decree of Divorce of the Third District Court, Salt Lake County, State of Utah; (this sum to be determined exactly and adjusted at the time of closing, pursuant to agreement dated January 10, 1984);



(d) \$41,438.33 representing the approximate balance to be paid on closing on or before December 1, 1985 from loan proceeds to be obtained by the Buyers.

As a part of the offer of Buyers, approved by the Court, Buyers agree to be responsible to pay all financing costs and the cost of a Title Insurance Policy, should a policy of insurance be requested and issue.

4. Buyers are to pay to the Personal Representative, on or before December 1, 1985, in cash, the sum of \$1,100.00 representing the purchase price for the personal property (household furnishings).

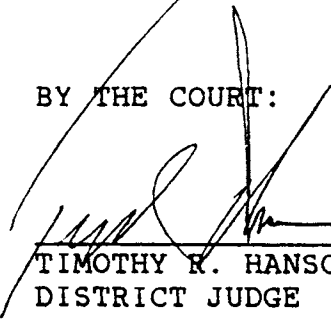
5. The equitable interest in and to the real property of the Buyer, Kent G. McLaughlin, is to be determined exactly and adjusted as to the amount at the time of closing.

6. In the event the Buyers, Kent G. McLaughlin and Carol McLaughlin, and Seller, Eugene Perry as Personal Representative, are unable to agree to the amount of Mr.

McLaughlin's lien against the home (paragraph 3(c) above),  
further hearing on the lien issue is hereby reserved by the  
Court.

Dated this 3 day of DECEMBER, 1985.

BY THE COURT:

  
TIMOTHY R. HANSON  
DISTRICT JUDGE

ATTEST  
H. DIXON HINDLEY

  
Clerk

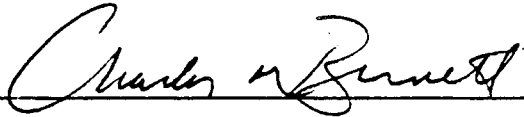
By \_\_\_\_\_  
Deputy Clerk

CDN6248M

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing ORDER GRANTING SALE OF REAL PROPERTY and MEMORANDUM IN SUPPORT OF THE ORDER were mailed, postage fully prepaid this 27th day of November, 1985, to the following:

E. H. Fankhauser  
660 South 200 East, Suite 100  
Salt Lake City, Utah 84111

  
\_\_\_\_\_



IT IS HEREBY ORDERED AND ADJUDGED that the Personal Representatives Amended Petition to Amend Order Granting Sale of Real Property dated December 3, 1985, pursuant to Rule 60B of the Utah Rules of Civil Procedure, be and the same is hereby denied in accordance with the Memorandum Decision of this Court.


The oral Motion of the Personal Representative to enter an Order, should the Court disallow the relief requested, in conformance with Rule 54(b) of the Utah Rules of Civil Procedure and to certify this matter under Rule 54(b) Utah Rules of Civil Procedure, be and the same is hereby denied in accordance with the Memorandum Decision of this Court, without prejudice to the Personal Representative to seek such an Order from the current Probate Judge, should the Personal Representative chose to do so.

DONE IN OPEN COURT this 12 day of March, 1986.

BY THE COURT:


  
TIMOTHY R. HANSON  
DISTRICT JUDGE

ATTEST  
H. DIXON HINDLEY

  
Evelyn Thompson  
Clerk  
Deputy Clerk

MAILING CERTIFICATE

I certify a true and correct copy of the foregoing was mailed to Charles M. Bennett, Attorney for Personal Representative, in accordance with Rule 2.9 of Rules of Practice, addressed to him at Suite 800, Kennecott Building, Salt Lake City, Utah 84133 postage prepaid, on this 4<sup>th</sup> day of March, 1986.

  
\_\_\_\_\_

JUL - 9 1986

H. Dixon Hindley, Clerk 3rd Dist. Court  
By William Thompson  
Deputy Clerk

CALLISTER, DUNCAN & NEBEKER  
CHARLES M. BENNETT (A0283)  
Suite 800 - Kennecott Building  
Salt Lake City, Utah 84133  
Telephone: (801) 530-7300

Attorneys for Eugene L. Perry,  
Personal Representative

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

\* \* \* \* \*

IN THE MATTER OF THE ESTATE OF )	ORDER DENYING PERSONAL
DIANE LAURA MCLAUGHLIN, )	REPRESENTATIVE'S RULE
)	RULE 59(a) PETITION
Deceased )	EXCEPT AS TO RULE 54(b)
)	CERTIFICATION
)	Probate No. P - 85 - 893

\* \* \* \* \*

The Petition of the Personal Representative to amend the Court Order of March 12, 1986, pursuant to U.R.C.P. Rule 59(a) came before the above entitled Court, pursuant to notice, on April 7, 1986, the Honorable Timothy R. Hanson presiding. The Personal Representative was represented by his attorney, Charles M. Bennett. Kent McLaughlin and Carol McLaughlin appeared in person and were represented by their attorney, E. H. Fankhauser. The Court heard the arguments of counsel, reviewed the memoranda and affidavits submitted by the respective parties, and otherwise was fully advised in the premises. As a result, the Court determined that the Court's

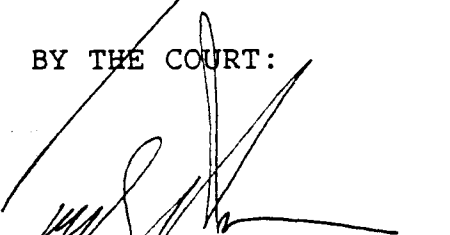
Order of March 12, 1986 was proper. The Court further determined that there is no just cause for delaying the finality of the March 12, 1986 Order, that the elements of the Pate v. Marathon Steel case have been met by the Personal Representative's Rule 54(b) Motion and that the Court's March 12, 1986 Order should be supplemented accordingly. Now, therefore,

IT IS HEREBY ORDERED that the Rule 54(b) Petition of the Personal Representative be and the same is hereby granted and the March 12, 1986 Order is hereby certified as a final order under Rule 54(b) of the Utah Rules of Civil Procedure.

IT IS FURTHER ORDERED that, except for the Rule 54(b) certification, the Rule 59(a) Petition of the Personal Representative be and the same is hereby denied.

Dated this 9 day of July, 1986.

BY THE COURT:

  
TIMOTHY R. HANSON  
DISTRICT COURT JUDGE

CDN3743B

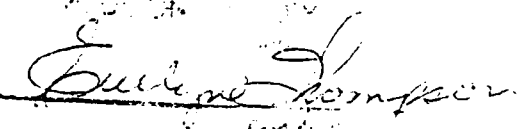
By   
Eugene Kompan  
Clerk of Court



Exhibit No. 4  
Utah Code Ann. § 75-1-201(20) (1978)

75-1-201. General Definitions -- . . .

(20) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matters involved in, any proceeding.

Exhibit No. 5  
Utah Code Ann. § 75-1-302(2) (1978)

75-1-302. Subject Matter Jurisdiction -- . . .

(2) The court has full power to make orders, judgments, and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

Exhibit No. 6  
Utah Code Ann. § 75-3-105 (1978)

75-3-105. Proceedings affecting devolution and administration--Jurisdiction of subject matter. -- (1) Persons interested in decedents' estates may apply to the registrar for determination in the informal proceedings provided in this chapter and may petition the court for orders in formal proceedings within the court's jurisdiction, including, but not limited to those described in this chapter. The court may hear and determine formal proceedings involving administration and distribution of decedent's estates after notice to interested persons in conformity with section 75-1-401. Persons notified are bound though less than all interested persons may have been given notice.

Exhibit No. 7  
Utah Code Ann. § 75-3-704 (1978)

75-3-704. 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 supervised personal representative or 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.

Exhibit No. 8

Utah Code Ann. § 75-3-710(3) (1978; repealed 1983)

75-3-710. Powers of personal representatives--In general--Exceptions--Hearings. -- . . .

(3) The personal representative may petition the court for an order approving any sale or other matter affecting any property of the estate which is made subject to court approval. After notice to all interested persons and the hearing, at which if the transaction is a sale, any person may appear and bid for the property being sold, the court shall enter such order as appears to be in the best interests of the estate. If a person interested in the estate bids for such property, he may request that his interest in the estate be offset against the purchase price.

Exhibit No. 9  
Rule 60(b) of the Utah Rules of Civil Procedure (1983)

Rule 60. Relief From Judgment or Order. . . .

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Exhibit No. 10  
Rule 60(b) of the Federal Rules of Civil Procedure (1985)

Rule 60. Relief from Judgment or Order . . .

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons, (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Exhibit No. 11  
Editorial Board Comment to U.C.A. §75-3-106

This section and others in Chapter 3 describe a system of administration of decedents' estates which gives interested persons control of whether matters relating to estates will become occasions for judicial orders. Sections 75-3-501 through 75-3-505 describe supervised administration, a judicial proceeding which is continuous throughout administration. It corresponds with the theory of administration of decedents' estates which prevails in many states. See, section 62, Model Probate Code. If supervised administration is not requested, persons interested in an estate may use combinations of the formal proceedings (order by judge after notice to persons concerned with the relief sought), informal proceedings (request for the limited response that nonjudicial personnel of the probate court are authorized to make in response to verified application) and filings provided in the remaining parts of Chapter 3 to secure authority and protection needed to administer the estate. Nothing except self-interest will compel resort to the judge. When resort to the judge is necessary or desirable to resolve a dispute or to gain protection, the scope of the proceeding if not otherwise prescribed by the Code is framed by the petition. The securing of necessary jurisdiction over interested persons in a formal proceeding is facilitated by sections 75-3-105 and 75-3-602. Section 75-3-201 locates venue for all proceedings at the place where the first proceeding occurred.



Exhibit No. 12  
Editorial Board Comment to U.C.A. §75-3-704

This section is intended to confer authority on the personal representative to initiate a proceeding at any time when it is necessary to resolve a question relating to administration. Section 75-3-105 grants broad subject matter jurisdiction to the probate court which covers a proceeding initiated for any purpose other than those covered by more explicit provisions dealing with testacy proceedings, proceedings for supervised administration, proceedings concerning disputed claims and proceedings to close estates.

(The Utah version omits section 3-705 of the official text pertaining to the duty of a personal representative to give information of his appointment to heirs and devisees.)

CERTIFICATE OF MAILING

I hereby certify that four (4) true and correct copies of the foregoing APPELLANT'S BRIEF were mailed, postage fully prepaid this 23rd day of December, 1986, to the following:

E. H. Fankhauser  
660 South 200 East  
Suite 100  
Salt Lake City, Utah 84111

*Jane Hubbard*

---

CDN4483B