

2010

In the matter of the estate of Rosemary Cosby v. : Brief of Appellant

Utah Court of Appeals

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Rosalind Cazares, Ernest Walton.

David O. Parkinson, Shawn Turner, Julie Bryan, Stephen Cook.

Recommended Citation

Brief of Appellant, *Cosby v.*, No. 20100099 (Utah Court of Appeals, 2010).

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

IN THE MATTER OF THE ESTATE
OF ROSEMARY COSBY

BRIEF OF APPELLANTS'

Appeal No. 20100099

Civil No.: 973900220

Judge:

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FILED
UTAH APPELLATE COURTS
OCT 20 2010

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STATEMENT OF JURISDICTION

Jurisdiction is appropriate in this case pursuant to UCA §78A-4-103.

STATEMENT OF RELEVANT FACTS

1. Rosalind Cazares and Earnest Walton are heirs of the Estate of Rosemary Cosby
2. On February 11, 1997, Robert Cosby successfully obtained Letters of Administration in the Probate Proceeding.
3. On or about May 11, 1998, Rosalind filed a Petition requesting that Robert Cosby 1) be removed for cause as the Estate's personal representative; 2) be ordered to prepare an inventory of any and all property that Rosemary Cosby owned when she died; and 3) be ordered to prepare an inventory of any property acquired after Rosemary Cosby died but with her assets, listing with reasonable detail each such asset item and its fair market value when Rosemary Cosby died (R. 207.)
4. On August 11, 1998, following an evidentiary hearing at which both Robert Cosby and Johnson testified, the Court granted Plaintiff's motion to appoint a Special Administrator (R.168.)
5. In early January 1999, Plaintiff retained Salt Lake City resident and eminent handwriting expert George Throckmorton to evaluate the authenticity of Rosemary Cosby's purported signature on numerous deeds and mortgages.
6. On February 18, 1999, Plaintiff, through her attorneys, Campbell, Moxley & Campbell, filed a lawsuit on the Estate's behalf in the Third District Court (Case No. 990902004) ("the forgery litigation") against Cosby, personally, and Johnson, among others, alleging that they defrauded *the Estate* by forging Rosemary Cosby's name to certain deeds and mortgages.

7. In January 2005, a judgment was obtained against Mr. Cosby for violation of fiduciary duties, among other things.

8. Following that verdict, Lee McCullough was appointed to represent the Estate.

9. Mr. McCullough, settled in its entirety over Rosalind and Earnests' objections.

10. The Court never made an independent assessment of the lawsuit.

11. Rosalind had tried to consolidate the litigation matter with the estate matter, but the lower court denied the motion to consolidate. (R. 4901.)

12. The Comments of Special Administrator (R 6337- 6345) detail the distribution of the settlement.

13. Rosalind Cazares did not receive any portion of her \$63,000 claim.

14. Lee McCullough's firm received over \$300,000.00.

15. The Special Administrator did not make any independent valuation of the merits of the underlying lawsuit.

16. On December 1-3, 2008, at a hearing to determine the value of the estate's furniture, Cazares and Walton entered a mortgage loan application into evidence. (See, R. 5912).

17. The loan application contained the notarized signatures of both Rosemary and Robert Cosby and also listed furniture valued at \$900,000.00.

18. Despite this evidence, the court ruled that there was no evidence supporting this value. (R. 5922.) Instead, the court determined that the furniture was worth \$6,960.00.

ARGUMENT

I. THE COURT ERRED IN FAILING TO PAY ROSALIND CAZARES HER

FULL CLAIM OF \$43,000.00

Although the Court acknowledge that Rosalind Cazares was owed in excess of \$63,000 for her services as Personal Representative, the final distribution awarded her nothing.

Utah Code 75-3-805. Classification of claims, provides:

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

(a) reasonable funeral expenses;

(b) costs and expenses of administration;

(c) debts and taxes with preference under federal law;

(d) reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him, and medical assistance if Section 26-19-13.5 applies;

(e) debts and taxes with preference under other laws of this state; and

(f) all other claims.

(2) No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.

Rosalind Cazares should have shared in the distribution. The Special Administrator should be required to reimburse her out of his share.

II. THE COURT ERRED IN SETTLING THE COSBY CASE BECAUSE IT MADE NO INQUIRY INTO THE MERITS OF THE CLAIM

Throughout the Probate case, the lower court repeatedly indicated that he would not rule on the Kennedy case since it was not before him. Nevertheless, that is exactly what the court did when he approved the settlement proposal herein.

The issues in this case have not been properly litigated. During the December 2008 hearing, Cazares learned that Lois Johnson had testified falsely regarding Rosemary's handling of the mail prior to her death. Cazares had moved to intervene in

the Kennedy case at the time this proposal was accepted. (*See, Reply of Special Administrator to Objections to Settlement Proposal.*) Judge Kennedy never ruled on the motion and Cazares's claims were never heard. Again, this is because the trial court in the probate case settled the claim.

Cazares also sought to consolidate the litigation and probate cases. Judge Dever denied that motion too, despite then approving the settlement of a case about which he know nothing. If the lower court had granted the motion to consolidate, it would have been in a position to examine and evaluate the case before approving the settlement.

The settlement proposal was nothing more than Lee McCullough's refusal to recognize his own conflict of interest. He recommended a settlement where his firm received almost all of the money. He obtained nothing for the heirs.

The court should have allowed the motion to consolidate or allow the motion to intervene to be decided first. In that way, Cazares could have pursued her portion of the Kennedy claim on her own. By approving a global settlement over her objection and before the motion to intervene had been granted, the lower court deprived Rosalind Cazares and Earnest Walton of their claims. As such, the matter should be remanded for an evidentiary hearing to determine whether the settlement was fair and reasonable. This can only be accomplished by an evidentiary hearing before the probate court.

Since the claims against Robert Cosby arise in his capacity as fiduciary of the estate, the matters can be addressed in the probate court.

It is respectfully requested that the court remand the case and order an evidentiary hearing to determine if the settlement is appropriate under the circumstances.

III. THE COURT ERRED IN VALUING ROSEMARY COSBY'S PERSONAL PROPERTY

At the December 1-3, 2008 hearing regarding the value of Rosemary's furniture, the lower court ignored an affidavit (loan application) which was executed on 9/26/96 – just a few months before Rosemary's death. In that loan application, both Rosemary and Robert Cosby value the furniture at \$900,000.00. Despite this sworn statement from both the decedent and her widower, the lower court indicated that “no evidence has been presented to establish that sum.” The court went on to say that the furniture should have been appraised. The court missed the point on this issue.

Throughout the case Cazares and Walton argued that Robert Cosby took all of the property. It was not available for appraisal as the court suggests because Robert Cosby claimed it did not exist.

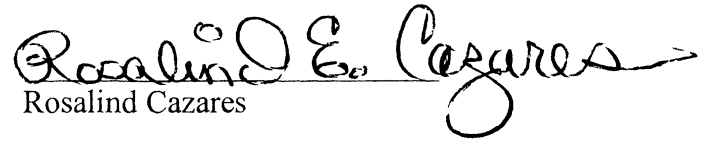
The affidavit is the proof which establishes the value of the personal property. It was plain error and an abuse of discretion to find otherwise. The lower court's decision was against the weight of the evidence in that it stated that the application was not evidence itself.

The case should be remanded to address the furniture valuation issue. The lower court should be directed to give the application proper consideration regarding value since it was signed by both Robert and Rosemary and is inherently reliable.

CONCLUSION

This matter should be reversed and remanded for the reasons set forth herein.

DATED this 18 day of October, 2010.


Rosalind Cazares

DATED this 18 day of October, 2010.


Ernest Walton

CERTIFICATE OF MAILING

I hereby certify that on this 18 day of October, 2010, I caused to be mailed via first class U.S. mail, postage pre-paid, a true and correct copy of the foregoing **Brief of Appellants** to the following:

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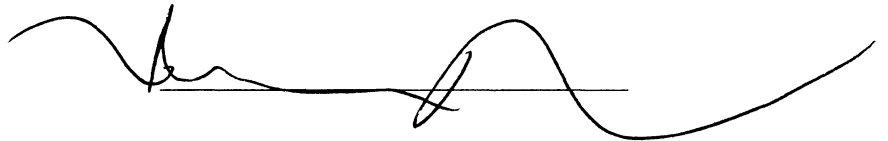
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A handwritten signature in black ink, appearing to be 'Stephen Cook', written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.