1999

Don L. Haycock v. The Estate of Ellen S. Haycock; The Administrator of this Estate; Bonnie L. Kaufman, individually : Brief of Appellee

Utah Court of Appeals

Don H. Haycock and Associates; Ronald Ady; Attorneys for Appellant Don H. Haycock.
Thomas Christensen, Jr.; Douglas J. Payne; Fabian and Clendenin; Attorneys for Appellee Bonnie L. Kaufman, individually as personal representative of the Estate of Ellen S. Haycock, deceased.

UTAH COURT OF APPEALS

DON L. HAYCOCK, Plaintiff and Appellant, vs. THE ESTATE OF ELLEN S. HAYCOCK; THE ADMINISTRATOR OF THIS ESTATE; BONNIE L. KAUFMAN, individually; and DOES 1 THRU 10 INCLUSIVE, Defendants and Appellees.	)	Appeal No. 990833 CA Priority No. 15

BRIEF OF APPELLEES

Appeal from a Judgment of the Third Judicial District Court, Salt Lake County, Honorable Sandra Peuler, District Judge

Don H. Haycock
DON H. HAYCOCK & ASSOCIATES
7321 Westlawn Avenue
Los Angeles, California 90045
Telephone: (310) 641-3921

Ronald Ady
51 W. Center Street, Suite 172
Orem, Utah 84057
Telephone: (801) 915-7200

Attorneys for Appellant Don H. Haycock

Thomas Christensen, Jr., 0650
Douglas J. Payne, 4113
FABIAN & CLENDENIN,
A Professional Corporation
Twelfth Floor
215 South State Street
P.O. Box 510210
Salt Lake City, Utah 84151-0210
Telephone: (801) 531-8900

Attorneys for Appellee Bonnie L. Kaufman,
individually and as personal representative
of the Estate of Ellen S. Haycock,
deceased

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LIST OF PARTIES BELOW

Pursuant to Utah R. App. P. 24(a)(1), the following is a complete list of all parties to the proceeding in the district court below:

Don H. Haycock	Plaintiff/Appellant
Bonnie L. Kaufman, individually	Defendant/Appellee
Bonnie L. Kaufman, as the personal representative of the Estate of Ellen S. Haycock in Probate No. 993900051 pending in Third District Court for Salt Lake County	Defendant/Appellee
Ellen S. Haycock* (Ellen S. Haycock died on January 4, 1999).	Defendant

*A Statement of Death of Ellen S. Haycock was filed with the trial court and served on plaintiff Don Haycock on January 7, 1999 pursuant to Utah R. Civ. P. 25(a). Bonnie L. Kaufman as the personal representative of the Estate of Ellen S. Haycock in Probate No. 993900051 pending in the Third District Court for Salt Lake County, State of Utah was substituted as a party pursuant in the litigation below pursuant to a Stipulation to Substitute Party dated March 30, 1999. R. 142-148.

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STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 78-31a-19(3) and 78-2-2(3)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issues

1. Did the trial court abuse its discretion in granting summary judgment in favor of appellee Kaufman as a result of plaintiff Don Haycock failing to oppose Kaufman's Motion for Summary Judgment within the time allowed under Rule 4-501 of the Utah Rules of Judicial Administration?

2. Was there a contract between Obed and Ellen to make mutual wills and to not change their respective testamentary dispositions?

3. If there was such a contract between Obed and Ellen, was the contract unenforceable pursuant of Utah Code Ann. § 75-2-701 (1993), *amended and re-enacted as* Utah Code Ann. § 75-2-514 (Supp. 1999).

Standard of Review

The appellate court reviews the trial court's grant of summary judgment for correctness, and accords no deference to its conclusions of law. *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327, 337 (Utah 1997). In reviewing factual issues, the appellate court views the evidence in the light most favorable to the non-moving parties. *Id.*

DETERMINATIVE STATUTES AND RULES

Statutes: Utah Code Ann. § 75-2-701 (1993)(emphasis added), *amended and re-enacted as* Utah Code Ann. § 75-2-514 (Supp. 1999):

> A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this part, can be established *only by* a provision of a will stating the material provisions of the contract; an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

Court Rules:

Utah Rule of Civil Procedure, Rule 56(e):

> . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Utah Code of Judicial Administration, Rule 4-501(1)(B):

> Memorandum in opposition to motion. The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(D) of this rule.

STATEMENT OF CASE

Nature of the Case

In early 1983, plaintiff Don H. Haycock ("Don"), the son of Obed C. Haycock ("Obed") and the stepson of Obed's wife Ellen Haycock ("Ellen"), drafted proposed estate

planning documents for Obed and Ellen. Don, who is an attorney licensed in the state of California, included in those proposed documents a memorandum that would have contractually obligated Obed and Ellen to treat each others' children identically in any testamentary disposition of their assets. After Don sent them his proposed documents, Obed and Ellen decided not to use Don's planning documents, but instead, retained the services of an independent Utah attorney, Narrvel E. Hall of Ray, Quinney & Nebeker to draft their new estate planning documents. Obed and Ellen specifically discussed with Mr. Hall the concept of contractually limiting the rights of the survivor of them to dispose of their own assets as they saw fit and they rejected that concept. Obed died December 10, 1983. In 1998, Don brought the action below to enforce what he claims was a "covenant" between Obed and Ellen to treat each other's children equally in their respective wills which Don asserts was reflected in the draft Memorandum that Don himself prepared for them but which Obed and Ellen rejected.

Course of Proceedings

In the action below, appellant Don Haycock brought a lawsuit seeking to enforce against Ellen Haycock ("Ellen"), her testamentary estate[1], and her daughter, defendant Bonnie L. Kaufman what the complaint characterized as an oral "covenant" allegedly made by Obed and Ellen in early 1983 to bind the testamentary disposition of their respective estates. In June 1999, Defendant Kaufman moved for summary judgment on several grounds, including that there was no agreement between Obed and Ellen to bind each other's testamentary dispositions let alone a signed writing that would satisfy the requirements of Utah Code Ann. § 75-2-701 (1993), *amended and re-enacted as* Utah Code Ann. § 75-2-514 (Supp. 1999). Don

[1] Don prematurely named Ellen S. Haycock as a defendant when he filed his complaint. Ellen was alive at the time. Ellen's personal representative was substituted as a party by stipulation after Ellen's death in January

failed to file a timely opposition to the Motion for Summary Judgment. The trial court granted Kaufman's Motion for Summary Judgment and entered a final judgment based upon Don Haycock's failure to timely oppose the motion. Don Haycock filed a Rule 60 Motion to set aside the grant of summary judgment, alleging that his failure to timely file an opposition to the Motion for Summary Judgment was based upon excusable neglect. The trial court denied Don's Rule 60 Motion. Don appealed the order granting summary judgment to Defendant Kaufman. Don did not appeal the order denying his Rule 60 Motion.

Statement of Facts

1. Ellen Haycock ("Ellen") and Obed Haycock ("Obed") were married from 1964 through the time of Obed's death on December 10, 1983. R. 2-3.

2. Ellen Haycock died on January 4, 1999. Bonnie L. Kaufman as the personal representative of the estate of Ellen S. Haycock was substituted as a defendant in this action in place of Ellen S. Haycock. R. 142-148.

3. Plaintiff Don Haycock ("Plaintiff" or "Don") is the son of Obed Haycock. R. 5.

4. In approximately February 1983, Don mailed Obed and Ellen wills and other estate planning documents that Don, himself, had drafted. Don requested that Obed and Ellen sign the documents he had prepared. R. 84-85.

5. One of the estate planning documents proposed by Don was a Memorandum of Change in Testamentary Plan ("Memorandum"). The proposed Memorandum drafted by Don contained language that would have contractually bound Obed and Ellen's testamentary disposition of their own respective assets. R. 84-87; Appellant's Brief, Appendix at 16.

1999.

6. In February or March 1983, attorney Hal Swenson provided Ellen and Obed with an independent analysis of the estate planning documents proposed by Don. R. 85.

7. Following Hal Swenson's review of Don's proposed estate planning documents, Ellen and Obed retained attorney Narrvel Hall of Ray, Quinney & Nebeker to advise them in estate planning. R. 188-191.

8. On April 5, 1983, Ellen and Obed executed new estate planning documents that were drafted by Narrvel Hall. R. 188-191.

9. In connection with the April 1983 estate planning documents, Obed and Ellen discussed with Mr. Hall, and specifically rejected, the concept of contractually binding the survivor of them to not change the testamentary distribution of his or her own assets in the future. R. 187-192, 195-197, 223-225.

10. Ellen Haycock did not execute any writing in which she agreed that she would not change her estate planning documents concerning the treatment of Obed's children, nor did she execute any writing that would otherwise limit her ability to dispose of her own assets as she wished. R. 223-225.

11. Obed Haycock's will named defendant Bonnie Kaufman as a possible successor co-personal representative. Last Will and Testament of Obed C. Haycock dated April 5, 1983. R. 193-194, 213.

12. The trust created by Obed in April 1983 provided that Bonnie Kaufman could serve as a successor co-trustee in the event that both Ralph Haycock should die or resign and a corporate co-trustee should cease acting as trustee. R. 208.

13. Ralph Haycock, a son of Obed Haycock and brother of appellant Don Haycock, has been the court-appointed personal representative of the Estate of Obed C. Haycock since Obed Haycock's death in 1983. R. 227.

14. Bonnie Kaufman has never been appointed nor accepted appointment as the personal representative of the Estate of Obed C. Haycock or as trustee of any trust created by Obed Haycock. R. 160.

15. Bonnie Kaufman did not accept appointment as either trustee or successor trustee, nor did she act as a trustee or successor trustee under any trust executed by Ellen S. Haycock until the death of Ellen S. Haycock on January 4, 1999. Upon Ellen's death, Bonnie Kaufman accepted appointment as and commenced acting as successor trustee under the declaration of trust of Ellen S. Haycock dated March 12, 1985. R. 160.

16. Bonnie Kaufman was not appointed as and did not accept appointment as personal representative of the estate of Ellen S. Haycock until January 11, 1999. R. 160.

17. Kaufman filed and served a Motion for Summary Judgment on June 17, 1999. R. 156-158.

18. Kaufman's Motion for Summary Judgment was accompanied by a memorandum containing a statement of facts supported by references to affidavits, depositions, and other portions of the record. R. 159-232

19. When Don had not filed a response or contacted Kaufman's counsel three weeks after the filing of Kaufman's Motion for Summary Judgment, Kaufman filed and served a Notice to Submit for Decision on July 8, 1999. R. 233-235.

20. Don filed a memorandum opposing Kaufman's Motion for Summary Judgment on July 14, 1999. Don's opposition was part of a pleading that also contained Don's own cross-Motion for Summary Judgment. R. 238-249.

21. The Court issued a Minute Entry on August 6, 1999 granting Kaufman's Motion for Summary Judgment on the grounds that Don had failed to timely file any opposition to the motion. R. 312-314.

22. On August 13, 1999, Don filed a Motion Under Rule 60 to Set Aside Minute Entry of August 6, 1999 Granting Summary Judgment to Defendants ("Rule 60 Motion"). R. 349-353.

23. On September 1, 1999, the trial court entered a Final Judgment granting Kaufman's Motion for Summary Judgment. R. 374-379.

24. The trial court entered an order denying Don's Rule 60 Motion on November 12, 1999. R. 516-520.

25. Don did not appeal the order denying Plaintiff's Rule 60 Motion.

SUMMARY OF ARGUMENT

The stated basis for the trial court's ruling was Don's failure to timely file any opposition to the Motion for Summary Judgment. In his Appellant's Brief, Don fails to even address the issue upon which the court based its ruling. The ruling granting summary judgment based upon the lack of any timely response was consistent with the applicable rules and should be sustained. The trial court's ruling is also sustainable because Defendant Kaufman was entitled to summary judgment as a matter of law based upon the undisputed facts. By the time that Obed and Ellen executed their estate planning documents in April 1983, they had rejected Don's planning documents and had unequivocally expressed that they did not

wish to bind each other's right to make changes in the future. The agreement alleged by Don also fails to satisfy the Utah Uniform Probate Code provision dealing with contracts concerning wills. Don's other claims fail because they are dependent upon the existence of a contract between Obed and Ellen, and because there was no fiduciary relationship between Bonnie Kaufman and Don.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING SUMMARY JUDGMENT BASED UPON DON HAYCOCK'S FAILURE TO FILE ANY OPPOSITION WITHIN THE TIME ALLOWED BY RULE 4-501(1)(B)

The trial court granted summary judgment because of the failure of Don to file any opposition to the motion for two full weeks after expiration of the time allowed by Rule 4-501(1)(B) of the Utah Code of Judicial Administration. That rule requires any party opposing a Motion for Summary Judgment to file a memorandum in opposition within ten (10) days of being served with the motion. The scope of the review on appeal should therefore be limited to whether the trial court abused its discretion in granting the Motion for Summary Judgment based upon the lack of any timely opposition. The Appellant's Brief filed by Don does not contains no argument whatsoever concerning the real issue on appeal, which is whether Judge Peuler abused her discretion in granting summary judgment in favor of defendant Kaufman in light of Don's failure to timely file any response to the motion.

Defendant Kaufman served Don with her Motion for Summary Judgment by mail on June 17, 1999. R. 158. Kaufman's motion was properly supported by affidavits, depositions, and other references to facts in the record. R. 159-232. Any opposition to the motion by Don was due June 30, 1999 under Rule 4-501(1)(B) of the Utah Code of Judicial Administration

and Utah R.Civ.P. 6(a). When Don had not responded by July 8, 1999, Defendant Kaufman's counsel filed a Notice to Submit for Decision pursuant to Rule 4-501(1)(B) & (D). On July 14, 1999, fully two weeks after the deadline, Don finally filed a memorandum in opposition to Defendant Kaufman's motion as part of Don's own motion for summary judgment. R. 238. Don did not object to the Notice to Submit for Decision or seek any extension of time in which to file a memorandum opposing Defendant Kaufman's Motion for Summary Judgment. On August 6, 1999, the Court issued a Minute Entry granting Defendant Kaufman's motion on the grounds that no timely response had been filed. R. 312-314. Don filed a Rule 60 Motion asking the trial court to reconsider its ruling and the untimely papers that Don filed opposing Kaufman's Motion for Summary Judgment. The trial court denied Don's Rule 60 Motion, and Don has not appealed that denial.

Utah courts consistently ignore late-filed memoranda and grant summary judgment when a motion is unopposed or opposed late. *See e.g. Morse v. Packer*, 973 P.2d 422, 424 (Utah 1999) ("[t]he court granted [the motion for summary judgment] on August 18 because plaintiff's new counsel 'failed to respond to the Motion within 10 days as required by rule 4-501(1)(b).'"). Rule 56(e) allows a court to grant a properly supported motion for summary judgment if no opposition is timely filed, which is precisely what the trial court did. Judge Peuler granted the Motion for Summary Judgment pursuant to a Notice to Submit based upon the lack of any timely opposition. The trial court did not abuse its discretion in granting summary judgment based upon the lack of a response within the time allowed by Rule 4-501(1)(B). *See Farina v. Mission Investment Trust,* 615 F.2d 1068, 1076 (5th Cir. 1980) (not abuse of discretion to refuse to consider untimely affidavits opposing summary judgment). This court should affirm the order and judgment of the trial court.

II. APPELLANT'S BRIEF IMPROPERLY RELIES ON AND MISCHARACTERIZES NUMEROUS MATTERS OUTSIDE THE RECORD

The Statement of Facts in the Appellant's Brief violates the fundamental principle of appellate law that a decision of a lower court is reviewed based upon the record that was before the court at the time of its decision. *Chapman v. Chapman*, 728 P.2d 121, 123 (Utah 1986) (per curiam); *In re Estate of Cluff*, 587 P.2d 128, 129 n.1 (Utah 1978). The "facts" asserted in Appellant's Brief are replete both with numerous misstatements and also with matters that were not before the trial court. The majority of the subparagraphs in Don's Statement of Facts cite to matters outside the record.[2] Don repeatedly refers to a November 1999 deposition of Bonnie Kaufman that was conducted in a related lawsuit also brought by Don Haycock, even though the deposition did not occur until months after the order Don is appealing in this case. That deposition was obviously not before Judge Peuler when she granted Defendant Kaufman's Motion for Summary Judgment. Don also relies upon a deposition of Narrvel Hall conducted August 9, 1999 in the other proceeding that could not have been before Judge Peuler when she issued her August 6, 1999 minute entry.[3] The Deposition of Ralph Haycock and the Affidavit of Herbert C. Livsey in related Third District Court case no. 980910696PR were also not before Judge Peuler. Many, if not most of the citations to matters outside of the record either mischaracterize statements or take statements

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[2] Don's failure to refer to the pages of the original district court record as required by Utah R. App. P. 24(e) makes it difficult to discern at a glance which matters were part of the record before the court below and which were not. Don lists items that were not part of the record as support for the Appellant's Brief's factual paragraphs 8.1.2, 8.2.1, 8.2.2, 8.2.3, 8.2.4, 8.2.5, 8.4.1, 8.5.5, 8.5.6, 8.5.7, 8.5.8, 8.5.9, 8.5.10, 8.5.11, 8.5.13, 8.5.14, 8.5.15, 8.6.1, 8.6.2, 8.6.3, 8.7.1 & 8.7.2.

[3] An earlier deposition of Narrvel E. Hall was conducted in the case below on December 9, 1998. Portions of that earlier December 9, 1998 deposition were part of the record before Judge Peuler when she rendered her decision.

out of context. Defendant Kaufman will not refute each of the misleading statements in this brief from outside the record as they are immaterial to this court's review of the decision below.

However, Defendant Kaufman feels compelled to advise the court of the most egregious citation to a supposed fact outside the record, Don's reference to an April 20, 2000 Third District Court ruling granting summary judgment for defendants in another related lawsuit brought by Don. Not only was the April 2000 ruling not before Judge Peuler below, Don incredibly mischaracterizes it as including a finding of a conspiracy to cover-up between Narrvel Hall, Bonnie Kaufman, and Ellen Haycock! That statement is patently false. Don's appellate brief states:

> **Judge Homer Wilkinson found that Bonnie Kaufman, Ellen Haycock, and Attorney Narrvel Hall had conspired and "covered-up" from the plaintiffs, the children of Obed Haycock, and the personal representative of his estate the existence of the tenancy-in-common deed jointly executed by Obed and Ellen Haycock, and notarized by a representative at Ray, Quinney & Nebeker, that would convert their residence from joint tenancy to tenancy-in-common. (Order of Judge Wilkinson of April 20, 2000 pursuant to a summary judgment hearing on Case No. 980 910 696 PR).**

Appellant's Opening Brief at 22-23 (emphasis original). *See also id.* at 41-42. The court in the related case made no such finding. The words "conspired," "conspire," or "conspiracy" do not appear anywhere in the April 20, 2000 ruling. The portion of the April 20, 2000 ruling discussing the desire of Ellen Haycock that the deed "not be brought to light" does not even mention Narrvel Hall or Ray, Quinney & Nebeker, much less make a finding that Mr. Hall "conspired" with anyone. Moreover, the ruling specifically stated that a desire of Ellen Haycock to keep the deed quiet could have just as easily been a reflection of the fact that "Ellen Haycock and her husband

Obed decided not to record the deed, therefore she didn't want it to be an issue" rather than she was trying to hide something. The court also found that Ellen's desire to keep the deed quiet was not material given the lack of delivery of the deed. Partial transcript of the April 20, 2000 hearing, at 2-3. A copy of a transcript of the portion of the April 20, 2000 hearing containing the ruling is attached hereto as Appellee's Appendum A. The court made no finding of any conspiracy involving Narrvel Hall or anyone else. Don Haycock's blatantly false, self-serving misrepresentation that the court in the related proceeding made a finding of a conspiracy violates the fundamental standards of conduct of attorneys practicing before the courts of the State of Utah.[4]

The court should not consider the various unsupported, extraneous, and inaccurate factual allegations contained throughout Don's brief.

III. THE UNDISPUTED FACTS SUPPORT THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT

As discussed above, the trial court's ruling should be affirmed because its order granting summary judgment in favor of Defendant Kaufman based upon the lack of a timely response was consistent with Rule 56(e) and Rule 4-501. "[A]n appellate court may affirm a 'judgment, order, or decree appealed from if it is sustainable on any legal ground or theory apparent on the record,' even though that ground or theory was not identified by the lower court as the basis of its ruling." *Orton v. Carter,* 970 P.2d 1254, 1260 (Utah 1998).

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[4] Don Haycock further misleads this court by listing several alleged ethical violations by attorney Narrvel Hall. Appellate Brief at 41-42. Mr. Haycock fails to advise the court that Mr. Haycock filed a bar complaint against Ray, Quinney & Nebeker and Mr. Hall in 1985 regarding the alleged misconduct, that the bar complaint was dismissed as being without merit, and that Judge Wilkinson held that any claims relating to the allegations of ethical violations were barred by the statute of limitations. This is apparently the basis for Don Haycock's assertion (in bold print) earlier in the Appellate Brief that Ray, Quinney & Nebeker and Mr. Hall breached their fiduciary duties. Appellate Brief, at 23.

Therefore, even if Don Haycock had timely opposed the Motion for Summary Judgment, the trial court's ruling should still be affirmed because Defendant Kaufman was entitled to summary judgment as a matter of law based upon the undisputed material facts.

A. Obed and Ellen Rejected the Concept of a Contract Binding Their Respective Testamentary Dispositions

The undisputed evidence is that at the time Obed and Ellen finalized their estate planning documents prepared by Narrvel Hall in April 1983, neither Obed nor Ellen wished to bind the survivor to a particular disposition of assets. Narrvel Hall discussed in detail with Obed and Ellen the concept of possibly limiting the ability of the survivor to change the disposition of assets. R. 187-192, 195-197. Mr. Hall testified that both Obed and Ellen expressed an intent not to bind the survivor to a particular plan of disposition:

> I do recall that at the time that the will and trust were executed, we discussed the fact that at least Mr. Haycock had signed something prepared by his son Don and that the apparent intent of that, which – which document I had not seen at that point so I was simply going by their explanation of it, that the intent of it was to bind the survivor to some plan of disposition that theoretically they would have both agreed to. And at that time they clearly indicated to me that that was not what they wanted to do . . . .

R. 192. In a February 1984 letter to Ralph Haycock written less than one year after preparing Obed's and Ellen's estate planning documents, Mr. Hall stated that Obed and Ellen had considered the idea of binding the survivor to a plan of disposition, but that "[t]his idea was flatly and vehemently rejected." R.299-3-1, 303-304, 309-311. Mr. Hall accordingly advised Obed and Ellen to destroy whatever estate planning documents Don had prepared because neither Obed nor Ellen wanted to use Don's testamentary plan. R. 178-179, 192, 196-197.

B. Don Haycock's Claims For Breach of an Alleged Contract Are Barred by the Utah Uniform Probate Code

Even if the undisputed evidence did not clearly indicate that Obed and Ellen decided against having an agreement to bind the disposition of each other's testamentary estates, the trial court's order granting summary judgment should still be affirmed. The alleged contract would not satisfy the requirements of the Utah Uniform Probate Code limiting the circumstances under which a party may enforce a contract to make a will or devise. The statute in effect in 1983 provided:

> A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this part, can be established *only by* a provision of a will stating the material provisions of the contract; an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

Utah Code Ann. § 75-2-701 (1993)(emphasis added), *amended and re-enacted as* Utah Code Ann. § 75-2-514 (Supp. 1999).[5]

This special statute of frauds included in the Uniform Probate Code was intended to reduce the likelihood of litigation by persons seeking to enforce purported agreements regarding wills or devises: "It is the purpose of this section to *tighten* the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to much litigation in a number of states . . . ." Official Comment to Uniform Probate Code § 2-701 (emphasis added). *See also Jackson v. Jackson,* 122 Utah 507; 252 P.2d 214

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[5] Don Haycock's claims appear to be based upon rights that allegedly accrued prior to July 1, 1998. Former Section 75-2-701 would appear to govern. *See* Utah Code Ann. § 75-2-1301 (Supp. 1998) (1998 amendments do not affect rights that accrued prior to July 1, 1998). In any event, the substantive provisions of the 1998 re-enactment of the statute are essentially identical to those of former Section 75-2-701.

(Utah 1953) (holding that alleged oral contract to leave property equally to each of seven children was barred by California statute of frauds pertaining to contract to make will).

The Uniform Probate Code's statute of frauds concerning an agreement to make a will or other testamentary disposition is more rigid than other provisions of the statute of frauds. *Gonzalez v. Satrustegui,* 178 Ariz. 92, 870 P.2d 1188, 1196 (Ariz. App. 1993). The court in *Gonzalez* quoted with approval a treatise discussing the policy behind a very restrictive statute of frauds, and the particular need for a written contract:

> Written evidence is more necessary in contracts of this sort than in the classes of contracts covered by the ordinary provisions of the statute of frauds. . . . The death of the promisor makes it impossible to contradict the testimony to the effect that he made such promise; . . .

870 P.2d at 1196, *quoting* 1 Bowe-Parker, *Page on Wills* § 10.10, at 464 (3rd ed. 1960). The court refused to consider parole evidence in determining whether a husband and wife contracted to make testamentary dispositions of their property. *Id. See also Somogyi's Estate v. Marosites,* 389 So.2d 244 (Fla. App. 1980) (granting judgment on the pleadings where complaint did not allege written agreement to make will). The New Mexico Court of Appeals interpreted New Mexico's identical version of the Uniform Probate Code's statute of frauds as requiring that "[a] written document, or documents, must be produced which contain the essential terms of the contract." *Matter of Estate of Vincioni,* 102 N.M. 576, 698 P.2d 446, 452 (N.M. App. 1985).

Don argues that since Obed may have signed the Memorandum of Change of Testamentary Disposition prior to Obed meeting with Mr. Hall, the Memorandum satisfies the requirements of the existence of a writing "signed by the decedent" in the Utah Probate Code's statute of frauds. Appellant's Brief, at 25 & 34. Don's interpretation of the statute is

fundamentally flawed. The reference to "decedent" in the statute is clearly intended to apply to the person against whom the agreement to make a will or devise is sought to be enforced, whether or not that person is actually deceased at the time of enforcement. In *Dickie v. Dickie,* 95 Or. App. 310, 769 P.2d 225 (1989), the Oregon Court of appeals rejected the interpretation of Section 2-710 urged by Don in a case involving Oregon's virtually identical version of the Uniform Probate Code:

> The use of the word "decedent" instead of the word "testator," they argue, shows that the person to be held to the contract must have died. Even assuming that the contract here is merely a contract to make a will and nothing more, we disagree.

769 P.2d at 228. This is consistent with the requirement under the general statute of frauds that a contract be signed by the party to be charged. Any other interpretation of the statute would effectively gut the policy of statutes of fraud to require writing signed by the party to be charged.

In the instant case, there is no evidence of a written agreement signed by Ellen. The only copy of the Memorandum produced by Don is not signed by anyone. Appellant's Brief, Appendix at 16. While there is some indication that Obed may have signed a version of the Memorandum before Obed retained Narrvel Hall as his estate planning attorney, Don admits that Mr. Hall told Obed and Ellen to destroy the Memorandum and other estate planning documents that Don had prepared. R. 178-179. The purpose of the Utah Uniform Probate Code provision drastically limiting the means by which agreements to make wills may be established is to prevent contentious after-the-fact litigation such as the claims Don is asserting here. Don has failed to come forward with any writing that satisfies the Utah statute of frauds for contracts concerning testamentary disposition. Ellen Haycock did not execute any writing

evidencing a contract that her will and other estate planning documents would always treat the children of Obed equally with Ellen's own child. The testimony and contemporaneous notes and correspondence of Narrvel Hall, the attorney who drafted the April 1983 estate planning documents for Obed and Ellen, establish that by that point in time, Obed and Ellen did not wish to bind the survivor of them to a particular disposition of assets. As a matter of law, the contract alleged by Don does not satisfy the requirements of the Utah Uniform Probate Code for a contract to make a will or other testamentary devise.

The cases Don cites from other jurisdictions in support of his argument are for the most part older cases that do not involve the Uniform Probate Code's narrow limitation on contracts to make a will. Don cites to *Estate of Housley*, 56 Cal. App. 4th 342, 65 Cal. Rptr. 628 (Cal. App. 1997) as being a case enforcing an oral promise to make wills "under identical law and facts." Appellant's Brief at 35. The *Housley* court held under California law, equitable estoppel could take an oral agreement outside of the Uniform Probate Code's statute of frauds. There is no Utah case law adopting such an expansive exception to Utah's Uniform Probate Code's statute of frauds. *Housley* is also distinguishable because in the instant case, the uncontroverted evidence is that there was no reliance upon a promise of one party. Obed and Ellen jointly discussed with counsel the idea of adopting a contract along the lines Don had been pushing, but rejected the concept when preparing their April 1983 wills. The trial court's ruling granting summary judgment in favor of Defendant Kaufman should be affirmed.

C. The Undisputed Facts Do Not Support Estoppel

Don also argues that notwithstanding the Utah Probate Code's statute of frauds, Don can enforce what he alleges was a promise by Ellen Haycock through the application of

equitable or promissory estoppel. Equitable estoppel does not apply in this case as a matter of law. The elements of equitable estoppel in Utah are

> Equitable estoppel requires proof of three elements: (i) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act; and (iii) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Nunley v. Westates Casing Services, Inc., 1999 UT 100 ¶34, 989 P.2d 1077, 1088, (Utah 1999). Don cannot establish the first two elements of equitable estoppel. Although Don argues that Ellen promised Obed that she would not alter her testamentary scheme, Narrvel Hall unequivocally testified that Obed and Ellen discussed that concept at length and rejected it prior to signing their testamentary documents in April 1983.

> Q Okay. In that letter you appear to have discussed some discussions that you had with Obed and Ellen Haycock concerning the possibility of contractually binding one another to make certain dispositions of their respective assets by the survivor to their own and the other's children; is that correct?
>
> A Yes. That was a principal subject.

R. 300. The February 9, 1984 letter to which Mr. Hall referred to in his testimony stated in part:

> We did discuss with Obed and Ellen the possibility of their entering into a contractual arrangement, somewhat similar to that proposed by Don and discussed in Hal Swenson's letter, by which the survivor of them would agree not to revise their mutual plan of disposition following the death of the first of them to die. This idea was flatly and vehemently rejected by them for several reasons: *First, they both made it very clear that, while Ellen fully intended to treat her daughter, Bonnie, and Obed's children equally, her assets were her own and she was not to be under any legal disability with respect to their use, management or*

> *disposition. Obed stated that he was satisfied with an arrangement which protected only the residue of his own assets for the children and that he did not want the children to be in a position to interfer [sic] in any way with Ellen's use or management of those assets which were in her own name.* The implication clearly was that, if any of Obed's children should treat Ellen badly during the period she might survive Obed, she would be free to "disinherit" those children with respect to those assets which she separately owned and controlled. Second, we had the same misgivings expressed by Hal Swenson's letter with respect to possible unavailability of the marital deduction if contractual limitations were imposed on ostensible marital deduction gifts. We felt, therefore, that the QTIP Trust is the more appropriate vehicle since it is a means of providing such limitations which has been specifically authorized by law under the circumstances.

R. 310. (emphasis added).

The uncontroverted evidence is that Obed Haycock did not rely upon any promise or conduct by Ellen that she would be limited in her future ability to change her testamentary disposition of her own assets. To the contrary, the undisputed evidence is that when Obed and Ellen discussed the matter with Narrvel Hall, they specifically rejected such a notion. Ellen Haycock's response to Request for Admission No. 21 cited by Don (Appellant's Brief at 15-16 (¶ 8.1.6) & 36) does not support Don's assertion that Ellen engaged in conduct that would have led people to believe that she would be bound not to change her plan of disposition. Ellen's response indicates only that her 1983 estate planning documents were consistent with her intended plan of testamentary disposition at the time that she signed them. R. 276. It does not, as Don implies, indicate that Ellen had obligated herself to never change her will. Don's claims for equitable estoppel fail as a matter of law.

Don's claims also fail under the doctrine of promissory estoppel. Under Utah law, if a promise is within the statute of frauds, the doctrine of promissory estoppel cannot be used to

enforce the promise unless there has been an explicit and clear promise not to rely on the statute of frauds. *Stangl v. Ernst Home Center, Inc.,* 948 P.2d 356, 361 (Utah App. 1997); *Ravarino v. Price,* 260 P.2d 570, 578 (Utah 1953); *McKinnon v. Corporation of the President,* 529 P.2d 434, 436-437 (Utah 1974). Promissory estoppel will bar the defense of the statute of frauds only when "'the acts and conduct of the promisor . . . so clearly indicate that he does not intend to avail himself of the statute that to permit him to do so would be to work a fraud upon the other party.'" *Easton v. Wycoff,* 295 P.2d 332, 335 (Utah 1956) (citations omitted). Don has not alleged, much less presented evidence of, any promise by Ellen Haycock not to invoke the statute of frauds. Accordingly, Don's attempt to use promissory estoppel to circumvent the Utah Probate Code's statute of frauds fails as a matter of law. In addition, a party cannot utilize promissory estoppel or part performance to enforce a contract if there was no contract in the first instance. *Anderson v. KFBB Broadcasting Corp.,* 143 Mont. 423, 391 P.2d 2, 6 (Mont. 1964).

It is unclear whether Don may also be attempting to argue that alleged part performance by Obed Haycock signing his April 1983 estate planning documents takes the purported agreement outside of the Utah Probate Code's statute of frauds. As discussed above, the undisputed evidence is that there was no agreement. Even if there had been an oral agreement, Don would not be entitled to enforce it under the doctrine of part performance. Utah case law provides that part performance must be exclusively referable to the alleged contract for it to take an agreement out of the statute of frauds. "Part performance to be sufficient to take a case out of the statute must consist of clear, definite, and unequivocal acts of the party relying thereon, strictly referable to the contract . . . ." *Martin v. Scholl,* 678 P.2d 274 (Utah 1983). The requirement for exclusively referable reliance "is included to prevent unfounded and

fraudulent claims against a decedent's estate, which are inherent within such situations as this." *Randall v. Tracy Collins Trust Co.*, 6 Utah 2d 18, 305 P.2d 480, 484 (Utah 1956). The facts alleged by Don do not indicate exclusively referable reliance upon an alleged oral agreement. Narrvel Hall discussed with Obed and Ellen the possibility of entering into a contract to bind each other's testamentary disposition. Narrvel Hall drafted the 1983 testamentary documents for both Obed and Ellen with the understanding that there was no such contract and that Obed and Ellen had rejected all of the estate planning documents that Don had proposed for them. The provisions in Obed's will and trust, which Don alleges indicate reliance upon an alleged agreement, are, to the contrary, entirely consistent with Mr. Hall's testimony that Obed and Ellen wished to preserve flexibility for the survivor of them.

The actions of Obed some seventeen years ago were consistent with his expressed intent to allow Ellen Haycock the freedom to dispose of her own assets as she wished if she should survive him. Obed placed his own assets in a qualified terminable interest property ("QTIP") marital trust (R. 310), which assets are still being held by Ralph Haycock as trustee today and are the subject of one of Don's pending lawsuits in Third District Court. R. 227-232. There is no evidence of conduct of Obed Haycock that could be exclusively referable to part performance of an alleged agreement. The court should affirm the trial court's order granting summary judgment as a matter of law.

D. Don Haycock's Fraud Claim Fails as a Matter of Law

The Second Cause of Action in Don's complaint alleges that Ellen Haycock committed fraud by repeatedly assuring Obed that she had covenanted to treat Obed's children in her will the same as she would treat her daughter Bonnie Kaufman. Don's claim for fraud against Ellen

is founded upon an alleged understanding and misrepresentation that Ellen had bound herself to not change the disposition of her own assets in any future will:

> When [Ellen] repeatedly assured [Obed] that she had made a covenant with him and his children, which included a binding legal and moral obligation that she would treat his children equally with BONNIE in the distribution of the estate he left her, and the home they had purchased together.

R. 8-9. As discussed above, Obed and Ellen made it clear when preparing their April 1983 wills and other estate planning documents that they did not want any restrictions on the ability of the survivor of them to change to whom their own assets would pass if that survivor should decide to do so. R. 190-192, 195-196. Kaufman was entitled to summary judgment as to Don's Second Cause of Action fails because the fraud claim fails as a matter of law on the undisputed facts.

Don attempts to retroactively create an issue of fact regarding his fraud claim by selectively citing and characterizing numerous matters that were not before the trial court, by blatantly misrepresenting a recent ruling granting summary judgment against Don in another Third District Court lawsuit that was not before Judge Peuler in this case, and by shifting his argument to a claim for fraud that was not asserted in his complaint. *See* Appellant's Brief at 39-42. Don relies on excerpts of the November 29, 1999 deposition of Bonnie Kaufman taken in another of Don's lawsuits against Kaufman and Ellen's estate, and upon Don's mischaracterization of portions of the deposition taken out of context. Bonnie Kaufman's deposition occurred months after entry of the order Don is appealing. Don's attempt to spin selected excerpts of material outside of the record in such a way as infer fraud is improper and should not be considered in this appeal.

The fraud alleged in Appellant's Brief also differs significantly from the fraud alleged in Don's complaint. The complaint alleged that Ellen failed to disclose that she did not intend to honor the alleged "covenant" to not change her estate planning documents. R. 8-10. On appeal, Don now asserts that the fraudulent conduct was that Ellen told Obed that Don's estate planning documents were worthless, and that Ellen and Bonnie fraudulently induced Obed to change his mind about having a contract to bind his and Ellen's testamentary disposition. Appellant's brief at 40-41.

Even if the undisputed evidence did not establish that Obed and Ellen mutually decided that they would *not* restrict the ability of the survivor of them to change to whom the survivor's own assets could pass, Don's fraud claim would be barred. Don cannot use a claim for fraud to nullify the effect of the Utah Uniform Probate Code's statute of frauds on the alleged agreement upon which Don is basing his claims:

> Nor, as a general rule, can fraud be predicated upon the failure to perform a promise or contract which is unenforceable under the statute of frauds, since in such case the promisor has not, in a legal sense, made a contract, and hence has the right, both in law and in equity, to refuse to perform.
>
> . . .
>
> It would be an easy way to completely nullify the statute of frauds by claiming that an oral contract made void because not in writing, was made good by the fraudulent intent of the maker . . . .

Papanikolas v. Sampson, 73 Utah 404, 274 P. 856, 862 (1929) (citations omitted). Where the real basis for a fraud claim is an alleged contract that is unenforceable under the statute of frauds, a plaintiff cannot use a fraud claim to circumvent the statute. *Id.* Defendant Kaufman was entitled to summary judgment dismissing Plaintiff's Second Cause of Action.

Although labeled as a fraud claim, the Second Cause of Action in Don's complaint is clearly based upon an alleged agreement between Obed and Ellen. If there was such an

agreement, it is not enforceable under the Utah Uniform Probate Code's statute of frauds. Don cannot nullify the probate code's statute of frauds by recharacterizing his claim. The trial court properly granted summary judgment as to Plaintiff's Second Cause of Action.

E. The Breach of Fiduciary Duty Claims Fail as a Matter of Law

The Third Cause of Action in Don's complaint asserted that Don was entitled to recover from defendant Bonnie Kaufman on a theory of breach of fiduciary duty for conduct in 1984, 1985 and 1994 in which allegedly she encouraged Ellen to breach her supposed oral covenant with Obed. R. 10-12. Don's complaint based the breach of fiduciary duty claim upon four alleged relationships of Bonnie to wills or trusts of Obed or Ellen:

(1) Bonnie allegedly having accepted appointment as a successor executor of the Estate of Obed C. Haycock;

(2) Bonnie having allegedly accepted appointment as a successor trustee of a trust established by Obed;

(3) Bonnie having allegedly accepted appointment as executor of the Estate of Ellen Haycock; and

(4) Bonnie having allegedly accepted appointment as trustee of a trust established by Ellen.

R. 10-12. The undisputed facts established that Bonnie Kaufman had no fiduciary duty to Don at the time of the alleged breach of that duty.

It is axiomatic that for a personal representative or trustee to have a fiduciary duty, the personal representative must actually assume the responsibility for the estate or trust and be acting as the person in charge of such. *E.g., Callister v. Callister,* 15 Utah 2d 380, 393 P.2d 477, 480 n.3 (Utah 1964) ("Once appointed *and acting*, the representative *becomes* as to the

heirs and devisees, a fiduciary . . . .") (emphasis added, citation omitted). A trustee is a fiduciary because he or she has "exclusive control of the trust property . . . ." *Continental Bank & Trust Co. v. Country Club Mobile Estates,* 632 P.2d 869, 872 (Utah 1981).

1) **Bonnie Kaufman Has Never Acted As Executor of Obed Haycock's Estate or As Trustee of A Trust Created by Obed Haycock.**

Bonnie Kaufman has never served as personal representative of the Estate of Obed C. Haycock, or as trustee of any trust formed by Obed Haycock. R. 160. Ralph Haycock was duly appointed as personal representative of Obed's estate by the Third District Court in 1984. R. 227. Ralph Haycock is also the trustee under Obed Haycock's testamentary trust. In fact, Don Haycock is suing his brother Ralph Haycock in yet another lawsuit for alleged breach of fiduciary duty by Ralph as personal representative and trustee of Obed's probate estate and testamentary trust. R. 227.

Naming a person as a potential successor trustee or successor personal representative does not by itself impose upon them any duty or liability. *See* Utah Code Ann. § 75-3-103 (must be appointed by court " to acquire the powers and undertake the duties and liabilities of a personal representative"); Utah Code Ann. § 22-1-1 (fiduciary includes "trustee . . . or any other person *acting* in a fiduciary capacity" (emphasis added)). Bonnie Kaufman has never been appointed as personal representative of Obed's estate. She has never acted as trustee or as a personal representative in connection with Obed's estate or trust. Bonnie has not exercised any control over property of Obed's estate or trust. R. 160. There has been no fiduciary duty between Bonnie and Don in connection with Obed's estate or trust.

2) **There Was No Probate Estate of Ellen Haycock at the Time of the Alleged Conduct that Could Have Given Rise to a Fiduciary Duty.**

Don's complaint alleged a breach of fiduciary duty by Kaufman for conduct in 1984, 1985 and 1994. R. 10-12. The conduct upon which Don bases his claim occurred prior to Ellen's death and therefore prior to Bonnie Kaufman being appointed as personal representative of Ellen's estate. There was no probate estate of Ellen Haycock until her death in January 1999. Bonnie Kaufman was not appointed as the personal representative of the Estate of Ellen Haycock until January of 1999. Moreover, Don admits that he is not an heir or devisee of Ellen Haycock. R. 7, 9-10. Don's claims against Bonnie Kaufman for breach of fiduciary duty as personal representative of the estate of Ellen Haycock fail as a matter of law.

3) **Bonnie Kaufman Never Served as Trustee of Any Trust for Which Don Haycock Was A Beneficiary.**

For the same reasons that any breach of fiduciary duty claims based upon Bonnie Kaufman being the personal representative of the probate estate of Ellen Haycock fail, Don's claims based upon alleged breach of fiduciary duty of Bonnie as trustee of a trust also fail as a matter of law. Bonnie Kaufman did not become a trustee under Ellen Haycock's trust until January 1999, years after the conduct that Don alleges was a breach of a fiduciary duty. R. 160. Don admits that he was not an heir or beneficiary of any trust or will under which Bonnie Kaufman served as trustee or personal representative. R. 7 (paragraph 19 of the Complaint alleges that Ellen S. Haycock disinherited "all of Obed's children," including Don, on March 12, 1985 when she revoked her prior trust and will and executed new estate planning documents). Don ceased being an heir of Ellen or beneficiary under a trust of Ellen years prior to the time that Bonnie Kaufman became personal representative of Ellen's estate or trustee of Ellen's trust.

F. There Is No Basis upon which to Impose a Constructive Trust

Don argues that Bonnie Kaufman became a "constructive trustee and fiduciary of the Obed Haycock Estate that she received." Appellant's Brief, at 38.[6] The argument that there was a constructive trust as to Obed Haycock's probate estate fails as a matter of law. Utah law will not impose a constructive trust simply to placate a person disappointed under a will. Utah law generally requires the existence of a "confidential relationship" between the parties and a breach of an oral or implicit relationship. *Mattes v. Olearain,* 90 Utah Adv. Rep. 30, 759 P.2d 1177 (Utah Ct. App. 1988), *cert. denied,* 783 P.2d 45 (Utah 1989). *See also Nielson v. Rasmussen,* 2 Utah, 558 P.2d 511, 513 (1976). Although the Utah Supreme Court in *Parks v. Zion First National Bank,* 673 P.2d 590 (Utah 1983) recognized that other situations may warrant a constructive trust under exceptional circumstances, such as where one spouse completely dominates the financial affairs of a marriage and took advantage of pooled funds, no such circumstances are present or even alleged between Obed and Ellen Haycock. Moreover, the undisputed evidence is that Narrvel Hall advised both Obed and Ellen concerning their testamentary plans and that both Obed and Ellen knowingly decided not to bind the survivor to any particular disposition. The *Parks* decision made clear that disappointment of a relative under a will is not a basis for imposing a constructive trust. *Id.* at 600, quoting *Adams v. Jankouskas,* 452 A.2d 148, 153 (Del. Supr. 1982) ("It is important to note that this is not a case where a party was disappointed with what he received under a will.").

---

[6] The prayer for relief in the complaint asked for imposition of "[a] constructive trust on all third persons that have received money and other properties from the estate OBED left ELLEN." R. 14. The complaint did not contain a separate cause of action seeking imposition of a constructive trust. R. 1-14.

G. The Trial Court Properly Granted Summary Judgment on the Claims Alleging Inducement of Breach of Contract

Plaintiff's Fourth Cause of Action alleged that defendant Bonnie Kaufman induced Ellen to breach the alleged oral agreement with Obed regarding testamentary disposition. R. 12-13. A valid contract is a prerequisite to any claim for inducement of breach of contract. Don's claims for inducement for breach of contract fail because there was no contract between Ellen and Obed binding their testamentary disposition of assets.

IV. THE COURT SHOULD AWARD DEFENDANT KAUFMAN HER ATTORNEY'S FEES INCURRED AS A RESULT DON'S MISREPRESENTATIONS AND IMPROPER CITATION TO MATTERS OUTSIDE THE RECORD

The numerous references by Don Haycock in his brief to factual matters outside the record in this case include a serious misrepresentation of a recent ruling by a Third District Court judge in a related case. Bonnie Kaufman has been required to incur costs and attorney's fees to respond to this misrepresentation. Don Haycock is appearing before this court both as a *pro se* litigant and as an attorney *pro hac vice*. He is subject to all of the provisions governing conduct of attorneys admitted to appear before the court. Utah R. App. P. 40(d). Don Haycock's conduct of blatantly misrepresenting the recent ruling of the Third District Court is conduct unbecoming a person allowed to practice before this court.[7] Kaufman hereby requests that the Court award sanctions against Don Haycock under Rule 40(b) of the Utah Rules of Appellate Procedure to compensate Kaufman for her attorney's fees incurred in responding to

[7] Don Haycock has engaged in improper conduct as a litigant in other courts. The United States District Court for the Central District of California awarded attorneys' fees against Don Haycock as a party in a false claims act case in which Don was both plaintiff and attorney because he "should have stopped litigating after the disclosures which showed absence of fraud or false statement." *United States ex rel Haycock v. Hughes Aircraft Company,* 1996 U.S. App. LEXIS 27664 (9th Cir. 1996). The Ninth Circuit affirmed the award of attorney's fees against Don Haycock. *Id.*

the misrepresentation as well as her costs, including the cost of the transcript of the district court's ruling in the related case.

CONCLUSION

Plaintiff Don Haycock was clearly disappointed that his father Obed and Obed's wife rejected Don's proposed estate planning documents in early 1983 and instead obtained the services of independent attorney Narrvel Hall of Ray, Quinney & Nebeker. Such disappointment does not, however, give rise to actionable claims. Don's pursuit of the action below and this appeal are nothing more than an attempt to posthumously impose Don's rejected estate planning upon Obed and Ellen more than seventeen years later. Based on the foregoing, the Court should affirm the trial court's order and judgment granting summary judgment in favor of Kaufman.

RESPECTFULLY SUBMITTED this 27th day of June, 2000.

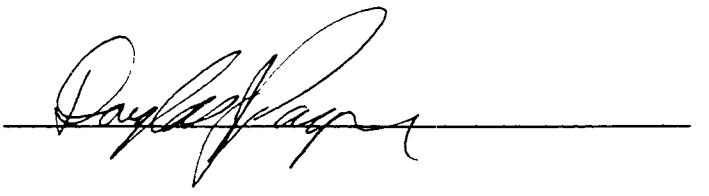
Thomas Christensen, Jr.
Douglas J. Payne
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Defendants and Appellees Bonnie L. Kaufman, individually and as personal representative of the estate of Ellen S. Haycock, deceased

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing BRIEF OF APPELLEE to be mailed, postage prepaid, this 12th day of June, 2000, to each of the following:

Don H. Haycock
7321 Westlawn Avenue
Los Angeles, California 90045

Ronald Ady
51 W. Center Street, Suite 172
Orem, Utah 84057



APPELLEE'S ADDENDUM

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

SALT LAKE COUNTY

* * * * * * * * * * *

Don H. Haycock	Transcript of:
Plaintiff.	JUDGE'S RULING
vs.	
Ellen S. Haycock	
Defendant.	Case No. 980910696

The above entitled cause of action came on regularly for hearing before the Honorable Homer F. Wilkinson, a judge of the Third District Court of the State of Utah, at Salt Lake County, on Thursday, April 20, 2000.

Appearances

For the Plaintiff: Don H. Haycock
Plaintiff
Salt Lake City, Utah

For the Defendant: Douglas Payne
FABIAN & CLENDENIN
215 South State
Salt Lake City, Utah

Thomas Christensen
FABIAN & CLENDENIN
215 South State
Salt Lake City, Utah

Thursday, April 20, 2000

P R O C E E D I N G S

THE COURT: Let me indicate to you, counsel, that I have spent considerable time in reading the memorandums, that are quite voluminous, number of motions, much of which is repetitive. I have gone over and looked at the exhibits and motions, along with the material in which you cited here today. I have had an opportunity to read and go over and to look at it. I've read your memorandums. It is not new to me as far as your arguments are concerned.

Now first of all, I want it understood that all, and I think both counsel addressed this, are procedural motions such as the Summary Judgment not being properly filed; the improper service upon Ray, Quinney and Mr. Hall, and also the reconsideration of 56(F) motion, all of those procedural matters the Court is denying those. And I am getting right down to the substantive matter and I want to cover all motions as far as it is concerned today.

The Court is of the opinion and it does find that there was a Quit Claim Deed which was prepared, transferred the property from all tenancy

in common to joint tenancy, with the grantors and the grantees being the same, meaning Mr. Haycock and his wife. They were named (inaudible). That this deed was delivered to the Haycocks. Whether to Obed or Ellen Haycock, it is not clear. I don't think anybody knows. I don't think it is material. That the deed has not been able to be discovered or found, although a copy of the deed, of course, was in the file of Mr. Hall and Ray, Quinney & Nebeker.

That the deed did not leave the possession of the Haycocks as far as being recorded or as delivery to any other individual for recording. In fact, the evidence is that Mr. Hall or Mr. (inaudible), I don't know which one. You know better than I do, delivered the deed to the Haycocks for them to record which apparently they chose not to do.

That evidence does show by the letters referred to by Mr. Haycock to his son Don and to notes to his attorney that even though it would be a tax advantage for them to change, he did not wish to change.

And yes, I think there is evidence also that the wife, Ellen Haycock, through her daughter, the Defendant Kaufman, that the deed was to be

covered over and not brought to light. And you can take that both ways. You can take it she is trying to hide something. You could also take it that Ellen Haycock and her husband Obed decided not to record the deed, therefore she didn't want it to be an issue. I don't think that is material.

The Court has ruled as a matter of law that the deed never left the possession of the grantor and that it was not a valid delivery of the deed. And that the Quit Claim Deed itself would be null and void as such.

The Court also finds that Amended Fourth Amended Complaint as filed by the plaintiffs, cites three causes of action: Conversion, breach of the judiciary, and fraud and deceit.

The Court is of the opinion that each one of those causes of action are barred by the Statute of Limitations of the State of Utah.

The Court would grant summary judgment. The bulk of summary judgment is filed by the Defendant Kaufman.

Also, there are amended motions to Summary Judgment. I am not sure why the Amended Motion is filed, but anyway it was.

I will also grant the Defendant Hall and

Ray, Quinney & Nebeker's motion to dismiss filed on November 4th, and would deny the plaintiff's Motion for Summary Judgment recently filed. That was the -- I don't know that I need to refer to that date.

Now there are also some other motions that I think become moot as a result of the Court's ruling in this fashion.

The Court would grant the motion of Defendant Kaufman or the order authorizing the release of the proceeds and the sale of the real property with this provision or modification: that it not be effective for a period of 30 days from the date that this Order is signed, or until, if the plaintiffs see fit to appeal this matter, that the necessary bonds are filed with the Court as far as this is concerned.

Counsel, I think that covers it all. Are there other motions that have not been covered. Please make it known cause I want everything to be disposed at this date. Any comments or questions?

VOICE: (Mr. Payne): Your Honor, I think that that covers it from our perspective. I just want to make it clear that the Statute of Limitations ruling applies to all of the claims in the estate against all defendants, including

Defendant Kaufman?

THE COURT: Yes.

VOICE: (Mr. Payne): And for clarification purposes, the reason for an amended motion for a summary judgment was we filed a Motion for Summary Judgment October 12th, and on October 13th the plaintiffs served their Fourth Amended Complaint. So the amended motion was filed the next day on the Fourth Amended Complaint.

THE COURT: I think there was a motion in there for something to do with the dismissal of the Fourth Amended Complaint, but that is also disposed of.

VOICE: (Mr. Christensen): Just for clarification, the Court granted our Motion to Dismiss, and though my comment may be somewhat duplicative, but we joined in the Motion for Summary Judgment, and may the ruling reflect the span with respect to us as well?

THE COURT: And that would be the ruling, for sure.

VOICE: (Mr. Christensen): Thank you.

THE COURT: Mr. Haycock, any questions?

VOICE: (Mr. Haycock) No, Your Honor.

THE COURT: Who is going to prepare the

pleadings?

VOICE: (Mr. Payne) I will prepare them, Your Honor.

THE COURT: Mr. Payne, submit them to Mr. Haycock. I appreciate your arguments this morning, counsel, thank you.

VOICE: Thank you, Your Honor.

(Whereupon court adjourned)

* * * * * *

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, DOROTHY L. TRIPP, C.S.R., do hereby certify:

That I am one of the official court reporters of the Third District Court of the State of Utah.

That on Thursday, April 20, 2000, I reported the testimony and proceedings, in the above entitled matter, presided over by the Honorable Homer F. Wilkinson in the Third District Court of Salt Lake County, State of Utah; and that the foregoing pages, numbered from 1 to 5, contain a full, true and correct account of the Judge's Ruling, to the best of my understanding, skill and ability on said date.

Dated at Salt Lake City, Utah, this Thursday, April 20, 2000.

Dorothy L. Tripp

Dorothy L. Tripp, CSR.
Official Court Reporter.
License No. 22-102239-7801