

2000

Helena Waters v. Darla Jorgenson, Jeanna Scott,
Barbara D. Reynolds, Theordora Ann (Teddi)
Brown, Sherrie M. Allan, and Frederick L. Waters :
Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Waters v. Jorgenson*, No. 20000017 (Utah Court of Appeals, 2000).
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**IN THE COURT OF APPEALS IN AND FOR
THE STATE OF UTAH**

IN THE MATTER OF THE ESTATE OF:

LEONARD D. WATERS,
Deceased.

HELENA WATERS, personal
representative of the Estate of Leonard D.
Waters,

Petitioner/Appellant,

vs.

DARLA JORGENSEN, JEANNA
SCOTT, BARBARA D. REYNOLDS,
THEORDORA ANN (TEDDI) BROWN,
SHERRIE M. ALLAN, and FREDERICK
L. WATERS,

Respondents/Appellees.

BRIEF OF APPELLANT

Case No. 20000017-CA

APPEAL FROM TWO INTERLOCUTORY ORDERS
ENTERED DECEMBER 13, 1999 AND MARCH 16, 2000
THIRD DISTRICT COURT, TOOELE COUNTY, STATE OF UTAH
HONORABLE DAVID YOUNG

ARGUMENT PRIORITY CLASSIFICATION 15

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FILED
Utah Court of Appeals

AUG 02 2000

Julia D'Alessandro
Clerk of the Court

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BRIEF OF APPELLANT

Case No. 20000017-CA

STATEMENT OF JURISDICTION

Jurisdiction over this appeal lies with the Utah Court of Appeals pursuant to Utah Code Ann. §78-2a-3(2)(j) and the Orders of the Utah Supreme Court dated March 28, 2000 (Addendum 1) and the Utah Court of Appeals dated April 24, 2000 (Addendum 2).

STATEMENT OF ISSUES

1. The Trial Court abused its discretion and violated the “law of the case” doctrine in disregarding the prior Order entered June 22, 1999 directing the proceeds from a settlement of the Nevada action be paid to the Decedent’s estate.

2. The December 13, 1999 (Addendum 3) Order contains numerous findings of fact and conclusions of law that are clearly erroneous or constitute legal error, and are not supported by any evidence.

3. The Trial Court abused its discretion by contravening the written agreement and stipulation of the parties in the December 13, 1999 Order.

4. The Trial Court further abused its discretion in ordering the filing of an interpleader action between the parties.

5. The Trial Court abused its discretion in ruling that the Petitioner was not entitled to a statutory homestead allowance and that the statutory exempt personal property allowance could not be granted without an evidentiary hearing.

STANDARDS OF REVIEW

The appropriate standard of review for challenging a finding of fact is a clearly erroneous standard. State v. Pena, 869 P.2d 932, 935-36 (Utah 1994). The appropriate standard of review for challenging conclusions of law is legal error or correctness. State v. Pena, 69 P.2d 932, 936 (Utah 1994); AMS Salt Industries v. Mag. Corp. of America, 942 P.2d 315, 319 (Utah 1997). The appropriate standard of review for challenging a discretionary ruling is abuse of discretion or arbitrary and capricious action by the Court.

Crookston v. Fire Ins. Exchange, 860 P.2d 937, 938 (Utah 1993); Kunzler v. O'Dell, 855 P.2d 270, 275 (Utah Ct. App. 1993).

STATUTORY PROVISIONS

The following statutes are submitted as determinative:

Utah Code Ann. §75-2-401

Utah Code Ann. §75-2-402

Utah Code Ann. §75-2-403

Utah Code Ann. §75-2-404

Uniform Probate Code Practice Manual, Vol. I, pg. 110-114

These statutes are included in their entirety at Addendum 4.

STATEMENT OF THE CASE

This appeal is from two interlocutory Orders entered by the Third District Court, Tooele County, State of Utah, in the administration of the estate of the Decedent, Leonard Waters, who died in Tooele County on December 14, 1996. The two interlocutory Orders were entered on December 13, 1999 (Addendum 3) and March 16, 2000 (Addendum 5), respectively. Petitioner filed a Petition to appeal the December 13, 1999 interlocutory order on January 3, 2000. Prior to the entry of the December 13, 1999 order, Petitioner had filed an Objection to the proposed Order submitted by the Respondents and a Rule 59 Motion for Reconsideration on December 1, 1999. Since the District Court did not rule on said Objection and Motion for Reconsideration prior to the December 13, 1999 order, the trial court ruled on those matters in the March 16, 2000 Order which denied Petitioner's

Objection and Motion for Reconsideration and clarified the December 13, 1999 Order adding new findings of fact and conclusions of law. The Utah Supreme Court granted Petitioner's Petition to Appeal an Interlocutory Order on March 28, 2000 and the Court of Appeals granted Petitioner's Amended Petition to Appeal an Interlocutory Order in an Order dated April 24, 2000.

The essence of this appeal is that the trial court violated the "law of the case" doctrine and abused its discretion in overruling a prior order of the Court on the same issue and wrongfully denied Petitioner a statutorily-mandated homestead allowance and exempt personal property allowance as set forth in Utah Code Ann. §75-2-401 and 402.

STATEMENT OF FACTS

1. Decedent, Leonard D. Waters, died intestate on December 14, 1996 at the age of 61 years. (R.1-4; R.8-10).

2. Petitioner, Helena Waters, was the Decedent's spouse and was informally appointed personal representative of Decedent's estate by the Third District Court for Tooele County on December 29 1997, and later formally appointed on June 22, 1999. (R. 8-10; R.70-73).

3. Prior to his death, Decedent had been injured in an auto-pedestrian accident in Clark County, Nevada on January 18, 1996. Petitioner filed an action in Clark County, State of Nevada, entitled Helena Waters, et al. v. Michelle Dennison, Civil No. A382762. Pursuant to the Complaint, that action consisted of three causes of action, to wit: (1) an action for personal injuries, medical expenses, pain and suffering, and other damages

sustained by Decedent and his estate; (2) an action for loss of consortium filed on behalf of the Decedent's spouse; and (3) an action for wrongful death filed by the Decedent's spouse and the Decedent's adult children from a prior marriage (hereinafter "Respondents"). (R. 19-24 Exhibit "A"; R.172-177 Exhibit "B").

4. Settlement for policy limits of \$100,000.00 was reached with the insurer of Michelle Dennison in early 1999. The Decedent had sustained medical expenses from his injuries in excess of \$100,000.00. The holder of medical lien for \$93,000.00 compromised and reduced its claim to \$30,000.00. After a deduction for attorney's fees, costs, and expenses, the sum of \$30,839.94 remained payable to the plaintiffs in the Nevada action. Neither the settlement agreement nor the Nevada Court made any allocation of the settlement proceeds between the Nevada plaintiffs [Petitioner and Respondents] or the causes of action in the Complaint. (R. 32-34 Exhibit "C"; R. 35-37 Exhibit "D"; R.40-42 Exhibit "F"; R. 66-69).

5. The attorney for the Nevada plaintiffs, Bob Benton, advised the parties of a potential conflict of interest as to the distribution of the settlement proceeds in a letter dated April 13, 1999. (R.178-180 Exhibit "C"). After consulting with each of the Nevada plaintiffs prior to obtaining their consent, each plaintiff executed a stipulation and agreement that the entire proceeds from the settlement should be paid to the Decedent's estate to be administered by the Third District Court in Tooele County, State of Utah under the laws of intestate distribution as adopted in the State of Utah. (R. 38-39 Exhibit "E"; R. 181-184 Exhibit "D").

6. Petitioner filed a Petition for Approval of Settlement in the Third District Court on April 7, 1999. A hearing on said Petitioner was held on May 24, 1999. Several of the Respondents of the hearing and did not make any objection to the proposed Order when the Order was mailed to all parties. (R. 14-42; R. 62).

7. On June 22, 1999, Judge Leon Dever of the Third District Court signed and entered an Order Approving Wrongful Death Settlement (Addendum 6). Said Order directed that the proceeds of the settlement were to paid to the Decedent's estate and further specifically found that the Nevada plaintiffs had stipulated and agreed that the settlement proceeds should be considered an asset of Decedent's estate. (R.66-69)

8. On July 8, 1999, Petitioner filed Petitions for Homestead and Exempt Personal Property Allowance (R. 86-88), and for Family Allowance (R.74-85) as authorized by Utah Code Ann. §25-2-401, 402, 403, and 404. Respondents thereafter filed objections to the Petition for Homestead and Exempt Personal Property Allowance. (R. 91-93).

9. On September 22, 1999, the Court directed Petitioner to file a memorandum in support of her Petition for Homestead and Exempt Personal Property Allowance. (R. 108-120). Respondents filed a memorandum in opposition (R. 126-136) and Petitioner filed a reply memorandum. (R. 137-159).

10. On November 15, 1999, a hearing for oral argument was scheduled on Petitioner's Petitions and Respondents' objections thereto. However, the Court *sui sponte* on its on motion and without any reason or suggestion by any party, directed that the settlement proceeds from the Nevada case be withdrawn from the estate and that an action

in interpleader be filed so that an appropriate division of the settlement proceeds could be determined. Neither party was given an opportunity to address the Court's order. The Court did not receive evidence nor hear argument on Petitioner's Petitions at that time and did not make any ruling thereon. (R. 160; R. 198-200).

11. On December 13, 1999, the Court entered the first Order which is the subject of this appeal memorializing the rulings at the November 15, 1999 hearing. (R. 198-200).

12. On December 1, 1999, Petitioner filed an Objection to the Proposed Order as drafted by Respondents and a Motion for Reconsideration. (R. 161-186). The Court had not considered Petitioner's Objection or Rule 59 Motion for Reconsideration prior to the Order. On January 11, 2000, the Court entered an Order staying the December 13, 1999 Order pending further hearing. (R. 213-214). The Objection and the Motion for Reconsideration were not ruled upon until after Petitioner commenced her interlocutory appeal proceeding. (R. 216).

13. A hearing was held on January 31, 2000 on Petitioner's Objection, Motion for Reconsideration, and the Motion for Approval of Homestead and Exempt Personal Property Allowances filed July 8, 1999. At said hearing, the Court denied Petitioner's Objection, Motion for Reconsideration, and further denied Petitioner's Motion for Homestead Allowance and indicated that the Petition for Exempt Personal Property Allowance would be predicated on a subsequent evidentiary proceeding. (R. 216).

14. On March 16, 2000, the Court entered the second interlocutory Order which is the subject of this Appeal. Said Order clarified the December 13, 1999 Order and added

new findings of fact and conclusions of law. The Court further refused to certify the two Orders as final pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. (R. 210-221).

SUMMARY OF ARGUMENTS

The trial court abused its discretion in entering the December 13, 1999 Order and violated the “law of the case” doctrine in disregarding the prior order of the same Court entered June 22, 1999 directing the proceeds from a settlement of the Nevada action be paid to the Decedent’s estate. The Trial Court further abused its discretion in overruling a further specific finding that the Nevada plaintiffs had stipulated and consented that the settlement proceeds should be considered an asset of the Decedent’s estate. Without any evidentiary hearing or consideration of sworn affidavits, the trial court abused its discretion in ordering that said proceeds be withdrawn from Decedent’s estate and that a Rule 22 interpleader action be filed between the Petitioner and Respondents to determine the distribution of the settlement proceeds. Furthermore, numerous findings of fact and conclusions of law in said Order are clearly erroneous or constitute legal error. Finally, the trial court abused its discretion in ruling on March 13, 2000 that the Petitioner, as Decedent’s spouse, was not entitled to a statutory homestead allowance as set forth in Utah Code Ann. §75-2-401 and 404 and that the exempt personal property allowance set forth in Utah Code Ann. §75-2-402 was not absolute and could not be granted without an evidentiary hearing.

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED THE "LAW OF THE CASE" DOCTRINE IN DISREGARDING THE PRIOR ORDER ENTERED JUNE 22, 1999 DIRECTING THE PROCEEDS FROM A SETTLEMENT OF THE NEVADA ACTION BE PAID TO THE DECEDENT'S ESTATE.

The December 13, 1999 Order (R. 198-200) entered by Judge David Young of the Third District Court is in direct contravention and opposition to the June 22, 1999 Order (R. 66-69) entered by Judge Leon Dever of the Third District Court. The June 22, 1999 Order was entered after full notice to all parties and a scheduled hearing at which certain of the Respondents were present and at which no objection was raised. The June 22, 1999 Order specifically found as a finding of fact that:

8. Since the aforementioned settlement did not differentiate between the various claims of the estate and those of the individual Plaintiffs, the Plaintiffs stipulated and agreed that the net proceeds from the settlement of the aforementioned lawsuit shall be considered an asset of the Decedent's estate and shall be distributed to the heirs of Decedent's estate according to the laws of intestate succession for the State of Utah. (R. 198-200).

Judge Young in his December 13, 1999 Order completely ignored this finding of fact and without any evidentiary hearing or other factual ruling whatsoever entered the following finding of fact:

6. The proceeds of this wrongful death action are not property of the State [sic], but are property of the heirs. The estate holds the proceeds for the benefit thereof. (R. 198-200)

Although Judge Dever had specifically found that the parties had stipulated and agreed that the proceeds were an asset of the estate to be administered according to the Utah Probate Code, Judge Young clearly violated the long-standing rule of law regarding the “law of the case” doctrine as adopted in the State of Utah.

The branch of the “law of the case” doctrine that states that one district court judge cannot overrule another of equal authority “has evolved to avoid the delays and difficulties that arise when one judge is presented with an issue identical to one which has already been passed upon by a coordinate judge in the same case”. Mascaro v. Davis, 741 P.2d 938, 946-47 (Utah 1987), citing also In re Estate of Cassit, 656 P.2d 1023, 1025 (Utah 1982), Madsen v. Salt Lake City School Board, 645 P.2d 658, 664 (Utah 1982), Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735, 736 (Utah 1984), among others.

The Utah Supreme Court has found an exception to this branch of the “law of the case” doctrine in AMS Salt Industries, Inc. v. Mag. Corp. of America, 942 P.2d 315 (Utah 1997). However, that exception exists only where issues decided by the first judge are presented to a second judge in a “different light”, as where summary judgment initially denied is subsequently granted after additional evidence is adduced. Id. at 319. Such an exception is clearly not present in the case on appeal. There was no additional evidence adduced, only an apparent change of heart by the Respondents after the Decedent’s wife filed for a statutory homestead allowance. The Respondents did not even file sworn

affidavits to support that any such “change of heart” was based on excusable neglect or misunderstanding of the law. Respondents simply filed an objection to the Petitioner’s petition. (R. 91-93).

POINT II

THE DECEMBER 13, 1999 ORDER
CONTAINS NUMEROUS FINDINGS OF FACT
AND CONCLUSIONS OF LAW THAT ARE
CLEARLY ERRONEOUS OR CONSTITUTE
LEGAL ERROR, AND ARE NOT SUPPORTED
BY ANY EVIDENCE.

Both the December 13, 1999 and March 16, 2000 Orders contain findings of fact that are clearly erroneous. There were not any sworn affidavits before the Court except the verified petitions of Petitioner, nor were there any evidentiary hearings conducted by the trial court. Paragraph 1 of the December 13, 1999 Order is clearly erroneous. Although the Third Cause of Action of the Nevada action alleges wrongful death, there was no evidence that the Decedent died as “a result of injuries” sustained in an automobile/pedestrian accident, except the June 22, 1999 Order of Judge Dever which stated “the Decedent sustained permanent physical injuries that contributed to his death”. (R. 71). Paragraph 2 of the December 13, 1999 Order characterizes the Nevada action as a “wrongful death” action when in fact it constituted only one cause of action out of three in the Complaint. (R. 19-24; R. 70). Petitioner may have inadvertently contributed to that misconception by Respondents in entitling her petition as a “Petition for Approval of Wrongful Death Settlement”. (R. 14).

However, the parties' Nevada counsel, Bob Benton, in his April 3, 1999 letter to his clients states:

As I have indicated before, Mr. Waters' medical expenses exceeded \$100,000.00 as a result of his injuries. **The suit was brought for her personal injuries. The suit survived his death and is being brought by his estate.** Normally, this character of a claim is the asset of the estate and is distributed under the laws of the intestate distribution in the state in which the deceased was a residence. In this case, that is Utah. Please seek local counsel as I am not competent to advise as to the Utah law aspect. Mr. Waters' doctor testified that although his cause of death was not the accident, it may have had a "substantial contribution". With this evidence, I had to file suit naming all of the heirs at law which would be his surviving widow and children. Normally, this claim would require the testimony of the surviving children and surviving widow as to the individual loss to society, companionship, and affection, as well as pecuniary loss. It is my understanding that none of the children lost money as a result of Mr. Waters' demise. In this respect, there is a conflict of interest between my various clients. As a result, I requested all of you to seek legal representation when it comes to distribution of the limited proceeds generated by this lawsuit I asked the parties to contact counsel have the lawyer call me with reference to how to handle the distribution of this small recovery. **Jeanna called and indicated that the surviving daughters all got together and agreed that it should go into the estate to be distributed under Utah law of dissent and distribution** Your agreement to place the net proceeds into the estate would obviate the need for the surviving daughters to come to Las Vegas and testify at length. There is not enough money available to fight over. I am glad that you do not want to. I would appreciate a letter from each of you indicating your wish to have the net proceeds paid to the Estate of Leonard Waters, deceased, to be distributed by the estate now pending in Utah . . . (Emphasis added). (R. 178-180 Exhibit "C").

Paragraph 3 of the December 13, 1999 Order also contains a finding of fact that is clearly erroneous. The proceeds of the Nevada settlement were **not** turned over to the Petitioner as personal representative of the estate to determine the proper shares payable to the heirs. The proceeds were turned over to the personal representative to be paid to the Estate of Leonard Waters to be distributed by the estate now pending in Utah under the Utah law of dissent and distribution.

The December 13, 1999 Order also contains conclusions of law which are legally wrong. Paragraph 6 of said Order states:

The proceeds of this wrongful death are not property of the State [sic] but are the property of the heirs. The estate holds the proceeds for the benefit thereof. (R. 198-200).

This mixed finding of fact and conclusion of law is in direct contravention to the Nevada Complaint and the stipulation and agreement of the parties and is clearly unsupported by law. The Complaint listed three causes of action, only one of which was maintained by the Decedent's heirs and that cause of action was shared jointly with the Decedent's spouse. There is no evidence whatsoever of any allocation of the settlement proceeds between the estate, the Petitioner, or Respondents. The only **evidence** is the plain language of the stipulation between the parties and the June 22, 1999 Order of the trial court.

Finally, paragraph 5 of the December 13, 1999 Order also cites a Utah case, Switzer v. Reynolds, 606 P.2d 244 (Utah 1980), as a conclusion of law determinative for a matter that was litigated and settled under Nevada law. Switzer recites Utah law and is not authority for Nevada law.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION BY CONTRAVENING THE WRITTEN AGREEMENT AND STIPULATION OF THE PARTIES IN THE DECEMBER 13, 1999 ORDER.

The December 13, 1999 Order is also in direct contravention of the stipulation of the parties to the Nevada action. Each of the parties to the Nevada action executed a stipulation dated April 17, 1999 which states as follows:

We, the undersigned, being the surviving children of Leonard Waters, deceased, **do hereby make our wishes known regarding the proceeds of the settlement** of the above-referenced case. It is our wish that the **net proceeds be paid to the Estate of Leonard Waters, deceased, to be distributed** by the estate now pending in Utah under Utah law of dissent and distribution. (Emphasis added). (R. 38-39 Exhibit "E"; R.181-184 Exhibit "D").

Each of the parties executed the aforementioned agreement and stipulation after having been advised by Bob Benton, their Nevada counsel, to contact independent counsel familiar with probate administration in the State of Utah. The Respondents had ample opportunity and notice, and choose unanimously to consent to the payment of the settlement proceeds to the Decedent's estate. The Trial Court abused its discretion in essentially vacating and reversing that agreement and stipulation without even a sworn affidavit suggesting that the Respondents were misguided or not aware of the legal impact of their consent. Certainly, there was never any evidence or testimony received to support such a

claim, nor was any ever proffered. They simply objected to giving the Decedent's surviving spouse a homestead allowance despite the fact that it was mandated by Utah law.

POINT IV

THE TRIAL COURT FURTHER ERRED IN ORDERING THE FILING OF AN INTERPLEADER ACTION BETWEEN THE PARTIES.

The December 13, 1999 Order directing the personal representative to file an action in interpleader does not appear to be permitted under Rule 22 of the Utah Rules of Civil Procedure. Rule 22 provides:

Persons having claims against the plaintiff may be joined as defendants and may interplead when their claims are such that the plaintiff is or may be exposed to double liability. It is not grounds for objecting to the joinder that the claims of several claimants or the titles on which their claims depend do not have a common origin or are not identical, but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross claim or counterclaim (Emphasis added).

In this case, the plaintiff is none other than the Petitioner, Helena Waters, who is the personal representative of the Decedent's estate. Petitioner is also an individual plaintiff, as are several of the Decedent's adult children [Respondents] in the Nevada action. None of the parties have claims against the Petitioner or any third party. Competing claims to settlement assets should have been resolved by the Nevada court, but the parties, with full knowledge and after being advised to seek independent counsel, elected not to do so and

knowingly directed that the proceeds should be paid to and administered as part of the Decedent's estate under the laws of intestate succession as adopted in Utah. The facts in this case, even if the Respondents were allowed to change their minds, simply do not warrant an interpleader action. Interpleader is not the appropriate remedy. It might be if the insurer for Michelle Dennison were still holding the settlement proceeds, but such is not the case.

POINT V

THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THAT THE PETITIONER WAS NOT ENTITLED TO A STATUTORY HOMESTEAD ALLOWANCE AND THAT THE STATUTORY EXEMPT PERSONAL PROPERTY ALLOWANCE COULD NOT BE GRANTED WITHOUT AN EVIDENTIARY HEARING.

The March 16, 2000 Order denying the Petitioner, as surviving spouse of the decedent, a statutory homestead allowance pursuant to Utah Code Ann. §75-2-401 and 404 and finding that any exempt personal property allowance set forth in Utah Code Ann. §75-2-402 was conditional upon an evidentiary hearing to determine whether or not sufficient personal property existed to establish or satisfy the allowance is clearly in violation of the above statutes. Although the March 16, 2000 Order does not contain a finding of fact that there was not any real property contained in the Decedent's probate estate, Petitioner acknowledges that there is none.

This is a case of first impression in the State of Utah since there is no known Utah authority directly on point as to the contention of Respondents that a homestead allowance

can be satisfied by a nonprobate asset, specifically in this case from joint tenancy property held by the Decedent and his wife. The Respondents submitted arguments to the trial court that the homestead allowance should be waived or deemed satisfied since the Petitioner received the Decedent's joint tenant interest in certain real property.

However, that argument is not consistent with the statute or case law that the homestead allowance be satisfied strictly from probate assets. The American Law Institute of the American Bar Association offered some guidance as to what was intended in drafting the original homestead allowance provision in the Uniform Probate Code, which was originally adopted "as is" by the Utah legislature.

Many states have constitutional or statutory provisions intended to secure to the family a part of the estate in the form of a home or residence. Such provisions are outmoded in a society where many people no longer own homes, but reside in apartments. However, one desirable feature of the traditional homestead allowance was that it provided some property for the family ahead of claims of creditors against the estate and at the same time provided an element of the estate that could not be taken away from the family by the decedent's will Applicable only when the decedent is domiciled in the state the homestead allowance goes to the surviving spouse The homestead allowance, like the family allowance, is in addition to the share of the spouse or child under the law of intestate succession, by way of an election of the spouse or a share passing to the spouse or child by the decedent's will except where the will specifically provides otherwise. *Uniform Probate Code Practice Manual, Vol I, (ALI ABA) page 111-112.*

Since there is no Utah case law directly on point, it is appropriate that this Court look to the express language of the statutes and to decisions in surrounding states with similar or identical statutory language.

The Uniform Probate Code provisions dealing with the homestead allowance is codified in Utah Code Ann. §75-2-401 and 404¹:

75-2-401. Homestead Allowance - Amount. A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of \$10,000. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to \$10,000 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from, and has priority over, all claims against the estate, except claims for reasonable funeral expenses and expenses of administration. The homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by intestate succession, but is chargeable against any share passing by the will of the decedent, unless the will provides otherwise.

75-2-404. Source, determination, and documentation. If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving spouse, the children or the guardian of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. . . .

The clear language of the statute awards the surviving spouse a \$10,000.00 allowance. It does not limit the allowance to real property having a value of \$10,000.00. Furthermore, it

¹ The statutes were amended effective July 1998 and have been renumbered. However, since the Decedent died before the amendments were adopted, the statutes in effect at the time of Decedent's death are cited.

is in addition to any share passing by intestate succession. In this case, the Decedent did not leave a will.

Cases from neighboring states that have addressed this issue support the position that the statutory homestead allowance is no longer just an interest in land, but is an allowance which may be satisfied by any type of property. Matter of Estate of Merkel, 618 P.2d 872, 877 (Mont. 1980)². That same principle is supported by decisions in California and Idaho. The District Court of Appeals, Second District, in In Re Ronayne's Estate, 231 P.2d 105, 107-108 (Cal. App. 2 Dist. 1951) found that the right of a surviving spouse to a homestead is independent of and in addition to any other right or property he or she may have whether acquired under the will of the decedent or otherwise, and must be awarded from the estate even if there is no community or separately owned real property in which the decedent had an interest. In Simmons v. Ewing, 529 P.2d 776, 778 (Idaho 1974), the Idaho Supreme Court found that under a will which bequeathed all of the Decedent's community property to the decedent's trust, and in which only separate property remained, separate property was the sole source of funds for the homestead allowance to the surviving spouse. Exempt property and homestead allowances were properly awarded to the surviving spouse with funds for the allowance being taken from the decedent's separate property.

While there are no apparent decisions directly on point regarding the homestead allowance in Utah, there is a case dealing with exempt personal property allowances under

² The Montana Supreme Court reached this same conclusion regarding the exempt personal property allowance in Matter of Estate of Dunlap, 649 P.2d 1303, 1305 (Mont. 1982).

Utah Code Ann. §75-2-402. A surviving spouse's right to an exempt personal property allowance under Utah Code Ann. §75-2-402 is absolute. Estate of Wagley, 760 P.2d 316, 318 (Utah 1988). In Wagley, the Supreme Court found that after payment of costs of administration and a family allowance, there were no assets left to satisfy an exempt personal property claim. The probate estate was insolvent. But the Court allowed the absolute exempt personal property allowance to be satisfied in full from multi-party bank accounts in which the decedent had an interest prior to her death, but which reverted to others upon her death. Clearly, the Utah Supreme Court in so ruling clearly recognizes the supremacy of the statutory homestead, exempt personal property, and family allowances.³ The Utah Supreme Court in Wagley also cites the Montana and Idaho cases set forth above as having sound and persuasive interpretations of the Uniform Probate Code provisions regarding exempt personal property and homestead allowances.

The March 16, 2000 Order constitutes legal error in that it fails to award an absolute statutory homestead allowance from other assets of the estate and further implies that before any exempt personal property can be awarded, an evidentiary hearing must be held to determine the exact value of personal property held in the estate, and whether there is sufficient exempt personal property to justify an allowance..

³ The Wagley decision does not discuss homestead allowances because no homestead allowance was ever claimed in that case. Id. at 318.

CONCLUSION

The Trial Court clearly erred and abused its discretion in its December 13, 1999 Order in reversing the June 22, 1999 Order and the stipulation and agreement of the parties. Numerous findings of fact and conclusions of law contained in the December 13, 1999 Order are flawed and are clearly erroneous or legally incorrect. Finally, the Trial Court ignored the clear language of certain provisions of the Uniform Probate Code as adopted in Utah and the case law of neighboring states interpreting those provisions and abused its discretion in denying the surviving spouse of the Decedent a homestead allowance and refusing to award an exempt personal property allowance until it was established that there was sufficient exempt personal property in the estate to justify such an award. Petitioner respectfully requests this Court to reverse the Orders of the Trial Court and award her the statutorily-mandated homestead and exempt personal property allowances.

DATED this 2 day of August, 2000.



WYNN E. BARTHOLOMEW
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) copies of the foregoing Brief of Appellant to W. Andrew McCullough, Attorney for Respondents, 895 West Center Street, Orem, Utah 84057, postage prepaid, this 2 day of August, 2000.

A handwritten signature in cursive script, appearing to read "Wayne E. Hartman", is written over a horizontal line.

ADDENDUM 1

Order of Utah Supreme
Court dated March 28, 2000

FILE COPY

IN THE SUPREME COURT OF THE STATE OF UTAH

---oo0oo---

In the Matter of the
Estate of:
Leonard D. Waters,
Deceased.

FILED
UTAH SUPREME COURT

MAR 28 2000

PAT BARTHOLOMEW
CLERK OF THE COURT

Helena Waters,

Appellant,

v.

Case No. 20000017-SC
973300061

Darla Jorgenson, Jeanna Scott,
Barbara D. Reynolds, Theordora
Ann (Teddi) Brown, Sherrie M. Allan,
and Frederick L. Waters,

Appellees.

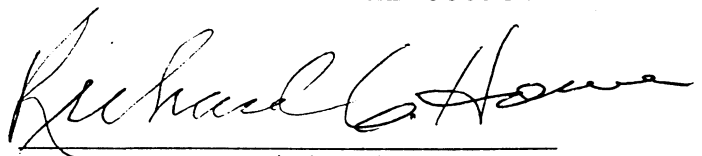
ORDER

This matter is before the Court upon a Petition for
Permission to Appeal an Interlocutory Order, filed pursuant to
Rule 5 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the Petition for Permission to
Appeal an Interlocutory Order filed on January 3, 2000 is
granted. IT IS FURTHER ORDERED pursuant to section 78-2-2(4),
Utah Code Annotated, this matter is transferred to the Utah Court
of Appeals for disposition. All further pleadings should be
directed to that court.

FOR THE COURT:

March 28, 2000
Date



Richard C. Howe
Chief Justice

CERTIFICATE OF MAILING

I hereby certify that on March 28, 2000, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

WYNN E. BARTHOLOMEW
ATTORNEY AT LAW
5505 S 900 E STE 300
SALT LAKE CITY UT 84117

W. ANDREW MCCULLOUGH
ATTORNEY AT LAW
895 W CENTER ST
OREM UT 84057

and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

THIRD DISTRICT, TOOELE DEPT
ATTN: ROENA
47 S MAIN ST
TOOELE UT 84074

Dated this March 28, 2000.

By 
Deputy Clerk

Case No. 20000017
THIRD DISTRICT, TOOELE DEPT , 973300061

ADDENDUM 2

Order of the Utah Court
of Appeals dated
April 24, 2000

FILED
Utah Court of Appeals
APR 24 2000

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Julia D'Alesandro
Clerk of the Court

In the Matter of the Estate of)
Leonard D. Waters, deceased,)

ORDER GRANTING AMENDED
PETITION FOR PERMISSION
TO APPEAL FROM AN
INTERLOCUTORY ORDER

Helena V. Waters, Personal)
Representative of the Estate)
of Leonard D. Waters,)

Case No. 20000017-CA

Petitioner,)

v.)

Darla Jorgenson, Jeanna Scott,)
Barbara D. Reynolds, Theodora)
Ann (Teddi) Brown, Sherrie M.)
Allan, Frederick L. Waters,)

Respondents.)

Before Judges Bench, Billings, and Davis.

Prior to pouring the appeal over to us, the supreme court granted petitioner's petition for permission to appeal an interlocutory order. This matter is now before us on petitioner's amended petition for permission to appeal an interlocutory order. IT IS HEREBY ORDERED that the petition is granted.

The briefing schedule will be set by separate notice.


Dated this 24 day of April, 2000.

FOR THE COURT:

Judith M. Billings
Judith M. Billings, Judge

ADDENDUM 3

Order of the Third
District Court dated
December 13, 1999

FILED
3RD JUDICIAL DISTRICT COURT
99 DEC 13 PM 4:03
FILED BY: 

W. ANDREW MCCULLOUGH, L.L.C. (2170)
Attorney for Respondents
895 West Center Street
Orem, Utah 84057
(801) 222-9535

IN THE THIRD JUDICIAL DISTRICT COURT OF TOOELE COUNTY

STATE OF UTAH

---oooOooo---

IN THE MATTER OF THE ESTATE OF:	:	ORDER
	:	
LEONARD D. WATERS,	:	
	:	
	:	Civil No. 973300061
Deceased.	:	

---oooOooo---

THIS MATTER came on regularly for hearing before Hon. Judge David S. Young, Judge of the above entitled court, pursuant to petitioners request for homestead and family allowances. The court, having read the memorandum of the parties and being fully advised on the premises, now makes and enters the following ORDER:

1. The deceased, Leonard D. Waters, died on or about December 14, 1996, as a result of injuries sustained in an automobile-pedestrian accident.

2. A wrongful death action was brought by the heirs of the estate, including the Petitioner and Respondents herein. That action resulted in a settlement, after expenses and attorneys fees, in the approximate amount of \$30,000.00.

3. The action was brought in the State of Nevada, and the proceeds were turned over to petitioner herein, as personal representative of the estate, to determine the proper shares payable to the heirs.

4. The primary assets claimed by the estate at this point consist of the proceeds of the wrongful death action as set forth above.

5. Pursuant to Utah Law:

...the wrongful death statute creates a new cause of action which runs directly to the heirs to compensate each for the individual loss suffered by the death. The action may be maintained by the personal representative for the benefit of the heirs or by one or more of the heirs. Switzer v. Reynolds, 606 P.2d 244 (Utah 1980).

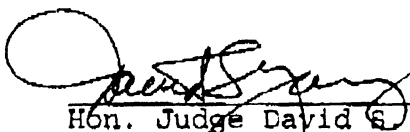
6. The proceeds of this wrongful death action are not property of the State, but are property of the heirs. The estate holds the proceeds for the benefit thereof.

7. The estate of Leonard D. Waters, being in possession of the proceeds, is directed to file an interpleader action with this court, pursuant to Rule 22 U.R.C.P. to determine how the proceeds should be divided between the heirs.

8. If such an interpleader action has not been filed within 30 days from the date of this Order, Respondents herein may proceed by declaratory judgment action to determine their rights in the proceeds of the wrongful death action.

DATED this 13th ^{December} day of ~~November~~, 1999.

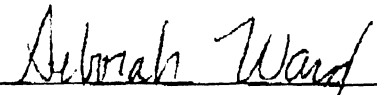
BY THE COURT:


Hon. Judge David S. Young

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 1999, I did mail a true and correct copy of the foregoing Order, postage prepaid, to:

Wynn Bartholomew, Esq.
5505 South 900 East
Suite 300
Salt Lake City, UT 84117


Abraham Ward

C:\WPDOCS\PROBATE\WATERS.ORD

ADDENDUM 4

Utah Code Ann. §75-2-401

Utah Code Ann. §75-2-402

Utah Code Ann. §75-2-403

Utah Code Ann. §75-2-404

Uniform Probate Code
Practice Manual, Vol I,
pgs. 110-114

stead allowance, exempt property, and family allowance of the spouse in the property of the other and a renunciation of all benefits which would otherwise pass to him from her by intestate succession or by virtue of the provisions of the will executed before the waiver or property settlement.

1975

205. Proceeding for elective share — Time limit.

The surviving spouse may elect to take his elective share in the augmented estate by filing in the court and giving or delivering to the personal representative, if any, a petition for the elective share within one year after the date of death or within six months after the probate of the decedent's will, whichever limitation last expires; but nonprobate transfers described in Subsection 75-2-202(1)(a) shall not be included in the augmented estate for the purpose of computing the elective share, if the petition is filed later than one year after death. The court may extend the time for election as it may for cause shown by the surviving spouse before the election has expired.

The surviving spouse shall give notice of the time and place for hearing to persons interested in the estate and to devisees and recipients of portions of the augmented estate whose interests will be adversely affected by the election of the elective share.

The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination of the court.

After notice and hearing, the court shall determine the value of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as may be appropriate under Section 75-2-207. If it appears that property included in the augmented net estate has not come into the possession of the personal representative, or is not distributed by the personal representative, the court, nevertheless, shall fix the liability of any person who has any interest in the fund or property or who has possession of it, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom a claim could be sought, but no person is subject to contribution for a greater amount than he would have been if relief had been granted against all persons subject to contribution.

The order or judgment of the court may be enforced as may be in suit for contribution or payment in other courts of this state or other jurisdictions.

1975

6. Effect of election on benefits by will or statute.

A surviving spouse is entitled to homestead allowance, exempt property, and family allowance, whether or not he or she takes an elective share.

1975

7. Charging spouse with gifts received — Liability of others for balance of elective share.

In the proceeding for an elective share, values included in the augmented estate which pass or have passed to the surviving spouse, or which would have passed to the surviving spouse but were renounced, are applied first to satisfy the elective share and to reduce any contributions due from other persons of transfers included in the augmented estate.

Remaining property of the augmented estate is so apportioned as to fix liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the right to its proceeds, are subject to the contribution to the elective share of the surviving spouse. A person

liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.

1977

PART 3

SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

75-2-301. Omitted spouse.

(1) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(2) In satisfying a share provided by this section, the devisees made by the will abate as provided in Section 75-3-902.

1975

75-2-302. Pretermitted children.

(1) If a testator fails to provide in the will for any of the testator's children who were born or adopted after the execution of the will, or for the issue of a deceased child, if that deceased child was born or adopted after the execution of the will, the omitted child or issue receives a share in the estate equal in value to that which the child or issue would have received if the testator had died intestate unless:

(a) it appears from the will that the omission was intentional;

(b) when the will was executed the testator had one or more children and devised substantially all the estate to or for the exclusive benefit of the other parent of the omitted child, or of the deceased child whose issue are omitted; or

(c) the testator provided for the child or issue by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(2) If at the time of execution of the will the testator fails to provide in the will for a living child solely because the testator believes the child to be dead, the child receives a share in the estate equal in value to that which the child would have received if the testator had died intestate.

(3) In satisfying a share provided by this section, the devisees made by the will abate as provided in Section 75-3-902.

(4) If the issue of a deceased child takes the share of the deceased child under Section 75-2-605, the issue may not be considered pretermitted and may not receive a share of the estate under this section.

(5) If it appears from the will that the omission of a child of the testator was intentional and if no express provision is made in the will for the issue of the child, the testator will be considered to have intended to also omit the issue.

1988

PART 4

EXEMPT PROPERTY AND ALLOWANCES

75-2-401. Homestead allowance — Amount.

A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of \$10,000. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to \$10,000 divided by the number of minor and

dependent children of the decedent. The homestead allowance is exempt from, and has priority over, all claims against the estate, except claims for reasonable funeral expenses and expenses of administration. The homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by intestate succession, but is chargeable against any share passing by the will of the decedent, unless the will provides otherwise. 1988

75-2-402. Exempt property — Amount.

In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding \$5,000 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than \$5,000, or if there is not \$5,000 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the \$5,000 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except reasonable funeral expenses, and the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of the reasonable funeral expenses, homestead allowance, and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by intestate succession, but is chargeable against any share passing by the will of the decedent unless the will provides otherwise. 1988

75-2-403. Family allowance.

(1) In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration. The allowance may date from the death of the decedent but may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims but not over reasonable funeral expenses and the homestead allowance.

(2) The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to allowances not yet paid. 1975

75-2-404. Source, determination, and documentation.

If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving spouse, the children or the guardians of the minor children are unable or fail to do so within a

reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. He may determine the family allowance and may disburse funds of the estate in payment of the family allowance in a lump sum or periodic installments, or a combination, but not exceeding the total sum of \$6,000. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined. 1979

PART 5

WILLS

75-2-501. Who may make a will.

Any person 18 or more years of age who is of sound mind may make a will. 1975

75-2-502. Execution.

Except as provided for holographic wills, writings within Section 75-2-513, and wills within Section 75-2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will. The signing by the witnesses must be in the testator's presence and in the presence of each other. 1975

75-2-503. Holographic will.

A will which does not comply with Section 75-2-502 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator. If there are several holographic wills in existence with conflicting provisions, the holographic will which is established by date or other circumstances to be the will that was last executed shall control. If it is impossible to determine which will was last executed, the consistent provisions of the several wills shall be considered valid and the inconsistent provisions shall be considered invalid. 1977

75-2-504. Self-proved will.

(1) Any will may be simultaneously executed, attested, and made self-proved, by acknowledgment of it by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs, whether or not that officer is also a witness to the will, and evidenced by the officer's certificate, under official seal, in substantially the following form:


"I, _____, the testator, sign my name to this instrument this _____ day of _____, 19____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly, or willingly direct another to sign for me, that I execute it as my free and voluntary act for the purposes expressed in it, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

Testator

We, _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly, or willingly directs another to sign for him, and that each of us, in the presence and hearing of the

UNIFORM PROBATE CODE PRACTICE manual

second edition

volume 1 
EDITED BY RICHARD V. WELLMAN
of the University of Georgia School of Law
Educational Director, Joint Editorial Board for the Uniform Probate Code

AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION
COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION
4025 CHESTNUT STREET • PHILADELPHIA • PENNSYLVANIA 19104

Unlike the rule existing in some jurisdictions, assertion of an elective share remedy under the Code does not involve a rejection of the decedent's will. Hence, there is no reason why an electing spouse might not continue to claim the benefit of a tax apportionment clause contained in the will.

II. EXEMPTIONS

A. Family Allowance

The family of a decedent who was domiciled in the state are entitled to a reasonable allowance for maintenance during the period of administration. (Section 2-403) The personal representative may determine the allowance himself, or he may petition the court for a larger allowance. The authority of the personal representative to act without a court order is limited to a total sum of \$6,000, which may be paid in a lump sum or in periodic installments not exceeding \$500 per month for one year.

The purpose of the family allowance is to provide for support of the family while the estate is undergoing administration. In determining the amount, particularly when a court order is required to approve an allowance in excess of \$6,000, account should be taken of both the previous standard of living and the nature of other resources available to the family to meet current living expenses. If the surviving spouse has a substantial income, this should be taken into account. This would be particularly true where the husband is the surviving spouse, since he usually is not accustomed to being supported by his wife's wealth. In general the purpose of the allowance is to provide for a period of adjustment. Other assets available to the family may entirely eliminate the necessity for any family allowance. For instance, a husband may have created a living trust that would provide immediate income to the family after his death, so that there would be no disruption in the standard of living. If life insurance proceeds have been paid to the family in a lump sum, or are being paid in periodic installments, consideration can be given to whether the decedent intended these proceeds to be used for the period of adjustment or to be conserved as capital. If a husband has been the principal source of family support, the wife should not be expected to use her capital to support the family until his estate is available.

How much allowance is necessary must be determined in the individual case on its facts. Need is always relative and what is reasonable

has to be decided in the light of many factors. Since the family allowance comes ahead of claims of creditors, the court may not continue the allowance for longer than one year if the estate is inadequate to discharge allowed claims.

What members of the family may participate in the allowance? The surviving spouse, minor children whom the decedent was obligated to support, and children who were, in fact, being supported by the decedent are within the scope of the allowance. The whole allowance may be paid to the surviving spouse for the benefit of the spouse and the children. However, if a child is not living with the surviving spouse, the allowance may be divided between the spouse and the child as their needs appear. If there is no spouse the allowance may be paid to the children or to persons having their care and custody.

The facility of payment provision in Section 5-103 provides greater detail regarding payment of sums due to minors for whom no conservator has been appointed. If a person entitled to the family allowance dies, his right to any future payments terminates. Hence, it was the view of the draftsmen that a family allowance award to a surviving spouse is a terminable interest that is not includable in the federal estate tax marital deduction.

The family allowance is not charged against the share passing to the surviving spouse and children by intestate succession or to the elective share of the surviving spouse. Similarly, it is ordinarily not charged against any provision in the will of the decedent, but the will may expressly provide otherwise. Thus, if the will makes a provision for the surviving spouse and states that it is in lieu of a family allowance, the wife could not take the provision under the will without having the family allowance charged against it.

B. Homestead Allowance

Many states have constitutional or statutory provisions intended to secure to the family a part of the estate in the form of a home or residence. Such provisions are outmoded in a society where many people no longer own homes but reside in apartments. However, one desirable feature of the traditional homestead law was that it provided some property for the family ahead of claims of creditors against the estate and at the same time provided an element of the estate that could not be taken away from the family by the decedent's will. The Code retains both of these features in terms of a dollar allowance, called a homestead

allowance. (Section 2-401) This allowance gives the family a modest nest egg; \$5,000 has been suggested as an amount, but the precise amount is left to the local legislature for determination at the time the Code is adopted. The homestead allowance has priority over all claims against the estate, and over all gifts by will. Applicable only when the decedent was domiciled in the state, the homestead allowance goes to the surviving spouse; and if there is no surviving spouse, the allowance is divided equally among minor children and dependent children of the decedent. Note that unlike the family allowance where only those minor children who the decedent was obligated to support may be beneficiaries, the homestead allowance may benefit all minor children of the decedent as well as other children who were dependent on him. Again, the homestead allowance, like the family allowance, is in addition to the share of the spouse or child under the law of intestate succession, by way of an election by the spouse, or a share passing to the spouse or child by the decedent's will except where the will specifically provides otherwise.

In states where there is a constitutional right to a homestead, this constitutional right must be deducted from the homestead allowance under the Code.

C. Exempt Property

In addition to the homestead allowance, the surviving spouse of the decedent is entitled to certain exempt property. (Section 2-402) As is the case with all family rights described by Parts 2 and 4 of Article II, the right to exempt property is limited to survivors of a decedent who was domiciled in the state. If there is no surviving spouse, then the children are entitled to the same right as the surviving spouse would have had. In the case of exempt property, this includes all the children of the decedent, not just minor or dependent children. The children share equally in this property. What property is exempt? Up to \$3,500 in household furniture, automobiles, furnishings, appliances, and personal effects may be selected. If the estate is otherwise sufficient, property specifically devised may not be used to satisfy the right to exempt property. If the chattels selected are subject to a security interest so that the value in excess of the security interests is less than \$3,500 or if the exempt property in the estate does not amount to \$3,500, the spouse or children would then be entitled to other property in the estate necessary to make up the \$3,500 amount. The right to exempt

property has priority over all claims against the estate, except that the right to assets to make up a deficiency of exempt property will not take priority over the homestead allowances and family allowance.

The right to exempt property (and other property to make up the deficiency, if any) is in addition to the property passing to the surviving spouse or children by the will of the decedent unless the will provides otherwise. This means that items of exempt property may be specifically devised only if there are other items available to make up the \$3,500 amount and that the exempt property will normally come out of the residue. Of course, the testator may force the spouse or children to elect to take property under the will in lieu of the exempt property by an express provision in the will, *e.g.*, "this provision for my wife is expressly in lieu of her right to homestead allowance and exempt property, and any family allowance to my wife shall be charged against this provision under my will."

A marital property settlement agreement as described by Section 2-204, by which the spouse has waived all rights in the decedent's estate, would bar the spouse's right to all exemptions described by Article II, Part 4, but would not bar the rights of children. If not barred, the right to exempt property is in addition to any elective share of the spouse and comes out of the estate before rights under intestate succession are determined if the estate passes intestate.

The spouse may select appropriate property as exempt within the rules outlined above. If there is no spouse, adult children may select property as exempt, and guardians of any minor children may select for them. If there is no guardian, the personal representative may make the selections on behalf of the minor children. If no selection is made by the surviving spouse or the children or their guardians within a reasonable time, the personal representative may select property. The personal representative may execute appropriate documents in order to establish the ownership of property taken as exempt. For example, if the surviving spouse selects an automobile as an item of exempt property, the personal representative has power to execute whatever documents may be required by the state Motor Vehicle Department to transfer ownership. In appropriate cases he may execute a document known as a "deed of distribution." (Section 3-907)

Suppose that the surviving spouse wishes to select two items of normally exempt property, household furnishings in the amount of

\$2,000 and an automobile valued at \$2,100, and that none of these items have been specifically devised. The spouse is entitled to exempt property in a value not exceeding \$3,500 and the selected items exceed this by \$600. Although the Code has no express provision for this situation, there appears to be no reason why the spouse could not select these items by paying the \$600 excess to the personal representative. This would in effect be a selection of exempt property in the amount of \$3,500 and a sale as to the \$600, the personal representative having full power to sell under Article III of the Code.

Viewed together, the exemptions described in Sections 2-401 through 2-404 have great significance in relation to the administration of estates, particularly those of small or modest size. The aggregate value of the exemptions and allowances that can be paid without court order is \$14,500 when the survivors include a spouse or dependent minor children, and \$3,500 if only nondependent children survive. If the gross value of the assets of the estate do not exceed the exemptions, the personal representative can distribute the estate in kind to the beneficiaries of the exemptions without being concerned whether the estate is testate or intestate, solvent or insolvent. Land as well as chattels or money can be used to satisfy the exemptions; the personal representative's deed of distribution will assure the spouse, as the recipient of property distributed as exempt, that a marketable title can be given to any good faith purchaser; Section 3-910 and the definition of "distributee" in Section 1-201 control. The only risks for the personal representative in such a distribution would be those of the proper identity of the distributee as the real spouse or child of the decedent and the question of value.

If the estate is worth more than the available exemptions, the personal representative, nonetheless, can make quick distribution of up to \$14,500 in any kind of estate assets with minimum risk. If the exemption payment is made in cash so that there can be no question of valuation or interference with specific gifts made by a will, the only risk would be the identity of the recipients. Distributions in kind may pose valuation problems; Section 3-906 would be relevant. Distributions of specifically devised assets would be wrongful if other assets are available to discharge the exemptions. Even a wrongful distribution would give the distributee a title that would become marketable in the hands of a good faith purchaser. See Section 3-910. Sections 3-909 and 3-1006 are relevant to the liability of distributees of improperly distributed assets.

III. UNINTENTIONAL OMISSION OF A SPOUSE OR CHILDREN IN THE WILL

Under certain circumstances, a testator may execute a will and unintentionally omit certain persons for whom he would normally provide at the time of his death. The Code specifically covers three of these situations:

1. Where the surviving spouse married the testator after execution of the will (Section 2-301)
2. Where children are born to the testator or adopted by him after execution of the will (Section 2-302) and
3. Where the testator believes one of his children to be dead at the time he executes the will (Section 2-302)

In any of these cases the omission may be intentional. Thus, a testator might execute a will in contemplation of a pending marriage and intentionally make no provision for the spouse and expressly state in the will that he intended to make no provision. In such a case the spouse would still be protected by an elective share. Note that the will is not revoked either by the subsequent marriage or even by a marriage and birth of a child after execution of the will. Section 2-508. Again, a testator may execute a will leaving all his property to his spouse if she survives him and intentionally make no provision for his children, including any afterborn children. Or a testator may have a son who has run away from home and who the testator believes is dead, but who would be disinherited even if the testator thought him alive. The provisions of Part 3 of Article II are intended to protect the spouse and children in the enumerated situations only if the omission was unintentional. Hence, the Code permits, within certain limits, evidence to establish whether the testator would have wanted a share for the spouse or child. In the case of a spouse married after the execution of the will, it must appear from the will that the omission was intentional or that the testator may have provided for the spouse by transfer outside the will, such as life insurance or joint tenancy arrangements. In such cases the intent of the testator that these transfers be in lieu of a testamentary provision may be shown by evidence of the testator's statements or the amount of the transfer, or other evidence. If a child born or adopted after execution of the testator's will claims a share by reason of these Code sections, his claim may be defeated if it appears from the will that the omission was intentional or, if when the will was executed, the testator had one or more children and still devised

ADDENDUM 5

Order of the
Third District Court
dated March 16, 2000

FILED
THIRD JUDICIAL DISTRICT COURT OF TOOELE COUNTY
JAN 16 2000 10:10
FILED BY

W. ANDREW MCCULLOUGH, L.L.C. (2170)
Attorney for Respondents
895 West Center Street
Orem, Utah 84057
(801) 222-9635

IN THE THIRD JUDICIAL DISTRICT COURT OF TOOELE COUNTY

STATE OF UTAH

---oooOooo---

IN THE MATTER OF THE ESTATE OF:	:	ORDER
	:	
LEONARD D. WATERS,	:	
	:	
	:	Civil No. 973300061
Deceased.	:	

---oooOooo---

THIS MATTER came on regularly for hearing before Hon. David S. Young, Judge of the above-entitled court, on January 31, 2000, pursuant to Petitioner's Objection to Proposed Order and Motion for Reconsideration, Petition for Approval of Homestead Exemption and Personal Property Allowance, and Petition for Approval of Family Allowance and Reimbursement of Funeral Expenses. Petitioner was represented by her attorney, Wynn Bartholomew. Respondents were represented by their attorney, W. Andrew McCullough. The Court, having heard the arguments of the parties and being fully advised in the premises, now makes and enters the following ORDER:

1. Petitioner's objections to the Order of December 13, 1999 raised by Petitioner are hereby denied.

2. The Motion for Reconsideration made by Petitioner is hereby denied.

3. Petitioner's Petition for Approval of Homestead Allowance is denied on the basis that there is no real property in this estate, and that allowance presupposes the existence of real property in the probate estate before it can be awarded.

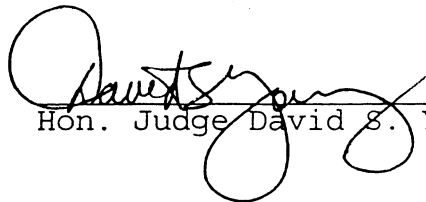
4. The Court determines that an evidentiary hearing is necessary to determine the extent of any exempt personal property allowance, conditioned on the value of personal property in the estate. An evidentiary hearing is also necessary on the question of whether a family allowance should be awarded to Petitioner as Decedent's spouse.

5. The stay order on the December 13, 1999 Order pending a ruling on Petitioner's Objections and Requests for Reconsideration is hereby vacated. The time for appeal of an interlocutory order commences from the date of this Order.

6. The Court further denies Petitioner's request to certify this matter for appeal pursuant to Rule 54(b) U.R.C.P. It is the opinion of the Court that the matters of personal property allowance and family allowance should be determined prior to any appeal.

DATED this 16 day of March, 2000.

BY THE COURT:

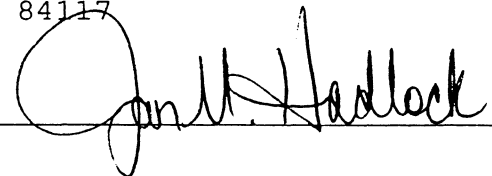


Hon. Judge David S. Young

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2000, I did mail a true and correct copy of the foregoing Order, postage prepaid, to:


Wynn Bartholomew, Esq.
5505 South 900 East
Suite 300
Salt Lake City, UT 84117



ADDENDUM 6

Order of the
Third District Court
Dated June 22, 1999

WYNN E. BARTHOLOMEW #0233
Attorney for Petitioner
Plaza I at the Sports Mall
5505 South 900 East #300
Salt Lake City, Utah 84117
Telephone: (801) 263-0569

FILED
3RD DISTRICT COURT TOOELE
99 JUN 22 PM 1:20
FILED BY 

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
TOOELE COUNTY, STATE OF UTAH

IN THE MATTER OF THE ESTATE OF:

LEONARD D. WATERS,

Deceased.

ORDER APPROVING
WRONGFUL DEATH SETTLEMENT

Civil No. 973300061

Upon review of the Petition for Approval of Wrongful Death Settlement filed with the Court by Petitioner, Helena Waters, on April 27, 1999, the Court finds that:

1. The required notice has been given or waived, including notice by publication, by posting, and by mail pursuant to the Order of this Court dated May 11, 1999.
2. On or about December 23, 1997 Petitioner, Helena Waters, individually, as surviving spouse, and as personal representative of Decedent's estate, and Darla Jorgensen, Jeana Scott, Barbara Reynolds, Teddi Brown, Sherry Waters, and Frederick Waters, individually and as surviving children of the Decedent, filed a wrongful death and personal injury action against Michelle Denison in the District Court of Clark County, State of Nevada, Case No. A382762.
3. The Plaintiffs in said action retained Nevada attorney, Robert Benton, on a contingent fee basis to pursue an action against Michelle Denison for damages caused to and

injuries sustained by the Decedent in an auto/pedestrian accident on January 18, 1996 in Clark County, Nevada, wherein the Decedent sustained permanent physical injuries that contributed to his death on December 14, 1996.

4. Each of the Plaintiffs in that action, including Petitioner acting individually and on behalf of the estate as Personal Representative, entered into written Fee Agreements with Robert Benton providing for payment of one-third (1/3) of the gross recovery received from said settlement as attorney's fees.

5. On or about April 7, 1999, the Plaintiffs reached a settlement with Michelle Denison and her insurer for the insurance policy limits of \$100,000.00 payable to the Plaintiffs.

6. Contemporaneously with the execution of the settlement agreement, Mailhandlers Benefit Plan, which had a subrogation claim for medical services provided to the Decedent, agreed to reduce its subrogation claim to \$30,000.00.

7. All of the Plaintiffs in the above-referenced lawsuit are also heirs of the Decedent's estate.

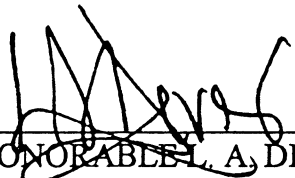
8. Since the aforementioned settlement did not differentiate between the various claims of the estate and those of the individual Plaintiffs, the Plaintiffs stipulated and agreed that the net proceeds from the settlement of the aforementioned lawsuit shall be considered an asset of the Decedent's estate and shall be distributed to the heirs of Decedent's estate according to the laws of intestate succession for the State of Utah.

9. The attorney for the Plaintiffs in said wrongful death action is hereby authorized and ordered to pay the net proceeds from the aforementioned settlement to the personal

representative of Decedent's estate, Helena Waters or her attorney, for administration and subsequent distribution to heirs.

DATED this 22 day of June, 1999.

BY THE COURT:



HONORABLE L. A. DEVER
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Order Approving Wrongful Death Settlement, postage prepaid, this 17th day of June, 1999, to the following:

Helena Waters
157 East 100 South
Tooele, Utah 84074

Darla Jorgenson
11042 North 5600 West
Highland Utah 84003

Jeanna Scott
749 West 2260 North
Lehi, Utah 84043

Barbara D. Reynolds
1150 North 200 West #38
Lehi, Utah 84043

Theodora Ann (Teddi) Brown
1150 North 200 West #32
Lehi, Utah 84043

Sherry M. Allan
1150 North 200 West #38
Lehi, Utah 84043

Frederick Leonard Waters
12523 North 79th Drive
Preoria, Arizona 85381

Andrew McCullough
Attorney for Heirs
895 West Center Street
Orem, Utah 84057