2011

Nupetco Associates, LLC v. Diane Dimeo : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE ESTATE OF ELEANOR AMELIA NEWBERRY STRAND, **Deceased.**	**Appellate Court Case No. 20110215**
NUPETCO ASSOCIATES, LLC, **Appellant,** **vs.** **DIANE DIMEO, as Personal Representative of the Estate,** **Appellee**	**On Appeal from the Second District Court, Probate Court, Case No. 063600007** **Honorable Thomas L. Kay**

APPELLANT'S REPLY BRIEF

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1. THE COURT OF APPEALS *MUST FIRST* DETERMINE THAT IT HAS JURISDICTION TO HEAR THIS APPEAL.

Ms. Dimeo misunderstands the importance of the probate court's failure to certify the Denial Order under Rule 54(b), as well as the importance of whether *Voorhees* and *Morrison* apply to the present case. She argues:

> Dimeo believes that the rule of Voorhees and Morrison applies and that both the Order of Appointment and the Order Denying the Petition to Vacate were final under the pragmatic test articulated in those cases. In the end it doesn't matter because Nupetco's request is so far out of time it has forfeited any right of challenge by failure to act seasonably on its rights.

Appellee's Brief at 16. In fact, if the trial court's refusal to certify the Order Denying Petition of Nupetco Associates, LLC (the "Denial Order"; R.317-19) is upheld on appeal, whether the rationale of *Voorhees* and *Morrison* applies to this case will determine whether the Court of Appeals has jurisdiction to consider this appeal. *In re Voorhees' Estate*, 12 Utah 2d 361,366, 366 P.2d 977, 980 (Utah 1961); *Estate of Morrison*, 933 P.2d 1015, 1017 (Utah App. 1997)

Similarly, in her conclusion, Ms. Dimeo claims: "Finally, Rule 54(b) certification is neither necessary nor proper, but it doesn't matter much because the initial Petition was out of time." Appellee's Brief at 17. If *Voorhees* and *Morrison* do not apply, then the Court of Appeals must consider whether the trial court abused its discretion in refusing to certify the Denial Order as final.

Otherwise, the Court of Appeals would **not** have jurisdiction to consider the substantive issues in this appeal.[1]

Contrary to Ms. Dimeo's position (Appellee's Brief at 14), whether *Voorhees* and *Morrison* applies is not an issue for the probate court. The sole issue before the probate court was whether, notwithstanding the fact that the Denial Order did not end the probate proceedings, the probate court should certify the Denial Order as a final order based on the findings required under Rule 54(b). Utah R. Civ. Proc. 54(b). Assuming the refusal to certify is upheld on appeal, then the issue for this Court is whether the Denial Order is nonetheless a final, appealable order under the reasoning in *Voorhees* and *Morrison.* If the trial court were to issue an opinion that the Denial Order was or was not final under the *Voorhees/Morrison* reasoning, it would not be binding on the Court of Appeals. Moreover, the Court of Appeals would still need to decide the issue *de novo* since its appellate jurisdiction would still depend on **its resolution** of the issue.

While Ms. Dimeo's claims that "[t]he 54 (b) certification issue is a distraction," and "it doesn't matter much" (Appellee's Brief at 16, 17), Nupetco

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[1] In addition, the Court of Appeals might be able to consider this appeal as an interlocutory appeal as authorized when a trial court certifies its order under Rule 54(b), but the appellate court determines the order is not final. Utah R. App. Proc. 5(a).

submits that it is a **critical** issue. If the Court of Appeals refuses to reverse the trial court's failure to certify the Denial Order as final and it also determines that *Voorhees* and *Morrison* do not apply, the Court of Appeals must dismiss the appeal and remand the case for further proceedings below. It may fully agree with Ms. Dimeo, but it would have no power to say so. On remand, Nupetco would be entitled to renew its appeal at some future, unknown time when the probate proceedings were "final" at which time the Denial Order would also be "final."

Given Ms. Dimeo's belief that *Voorhees* and *Morrison* apply to this appeal (Appellee's Brief at 16), it may not be necessary to consider the trial court's failure to certify the Denial Order as final. But since determining whether the *Voorhees/Morrison* reasoning applies is ultimately the Court of Appeals' decision to make, Nupetco notes that Ms. Dimeo's argument that certification could not be granted because Nupetco was not a party is flawed. Appellee's Brief at 14-15. The Denial Order adjudicated Nupetco's rights pursuant to a petition Nupetco filed seeking relief as an "interested person" under the Utah Uniform Probate Code. R. 244; Utah Code Ann. §75-1-201(24) (defining "interested person"); §75-3-105 (granting persons interested in decedent's estates the right to seek relief from the probate court). Arguing a court can adjudicate someone's rights without

that person being a party defies common sense. *See Openshaw v. Openshaw,* 80 Utah 9, 12 P.2d 364, 365 (1932) (order granting relief to non-party void).

Accordingly, Nupetco asks the Court of Appeals to determine that it has jurisdiction to hear this appeal and then to consider the substantive issues raised in the appeal.

2. SECTION 75-1-302 DOES NOT GRANT THE PROBATE COURT UNLIMITED JURISDICTION.

Ms. Dimeo argues that the grant of broad jurisdictional authority in Section 75-1-302(1), together with plenary power to resolve disputes in subsection (2), answers the inquiry as to whether the probate court here exceeded its jurisdictional authority. Appellee's Brief at 5-6. Section 75-1-302(1) provides:

> (1) To the full extent permitted by the Constitution of Utah, the court has jurisdiction over all subject matter relating to:
>
> > (a) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons;
> >
> > (b) protection of minors and incapacitated persons; and
> >
> > (c) trusts.

Utah Code Ann. §75-1-302 (1975). If that were the end of the inquiry, there would hardly be any need for any additional provisions in the Utah Uniform Probate Code. The probate court could hear any claim falling in these categories

and enter any order. In fact, as shown by *Matter of Estate of Anderson*, 671 P.2d 165 (Utah 1983), the balance of the probate code restrains both the exercise of jurisdiction and the power to adjudicate disputes.

a. Estate of Anderson Resolves the Jurisdictional Issues in this Case.

In *Estate of Anderson*, by an order entered in August 1977, the probate court resolved a disputed conservatorship and guardianship proceeding by approving a stipulation between the existing conservator/guardian for Grace M. Anderson and the successor conservator/guardian. Based on the parties' stipulation, the probate court ordered:

> Lois Jean Osborn [the successor guardian/conservator] shall not sign any trusts or any testamentary devises for Grace M. Anderson, nor shall Grace M. Anderson sign any such documents for herself without first petitioning and obtaining approval of this court.

Id. at 167.

Thereafter, in November 1977, without seeking the probate court's approval, Grace executed a new will and two new deeds transferring her real property to Lois Jean Osborn and herself as joint tenants. *Id.*

In further proceedings in February 1978, the probate court entered its order removing Ms. Osborn as conservator and appointing First Security Bank as

successor conservator. Based on another stipulation of the parties, the probate court held:

> 8. All deeds and instruments of conveyance executed by Grace M. Anderson from and after the 30th day of July, 1977 are hereby declared to be null and void, and specifically, the warranty deeds showing Grace M. Anderson as a grantor and Grace M. Anderson and Lois Jean Osborn as grantees dated the 28th day of November 1977, and recorded in Book 680, pages 41 and 42 in the office of the Davis County Recorder are void and of no effect.
>
> 9. All wills, codicils, and trust instruments executed by the said Grace M. Anderson from and after the 30th day of July 1977 are hereby declared to be null and void and of no effect upon the demise of the said Grace M. Anderson.

Id.

i. Proceedings After Grace's Death.

Grace then died, and a bench trial was held on objections to the probate of her November 1977 Will based on allegations of incompetency, fraud, undue influence, and the February 1978 Order voiding the Will. In November 1981, the probate court found Grace's November 1977 will to be valid. It further held that it had the authority in November 1981 to vacate those portions of the August 1977 and February 1978 Orders restraining Grace and declaring the November 1977 Will and Deeds invalid. Thus, the probate court voided portions of its August

1977 and February 1978 Orders, reinstated Grace's deeds, and admitted the November 1977 Will to probate. The contestants appealed. *Id.*

ii. The Supreme Court's Decision.

On appeal, the Supreme Court addressed two issues: (i) whether the probate court had the authority in November 1981 to vacate its earlier orders as to the two November 1977 deeds; and (ii) whether the probate court had the authority in November 1981 to vacate its earlier orders as to the November 1977 will.

Addressing the first issue, the Court held that the 1977 and 1978 orders became final upon their entry and that no appeal had been taken within the proper time period. *Id.* at 168. The Court therefore held that the portion of the November 1981 Order reinstating the November 1977 deeds was erroneous. The Supreme Court ruled that the February 1978 order voiding the deeds remained valid and binding, and it quieted title to the deeded properties in Grace's probate estate. *Id.*

While this same reasoning applied with equal force to the November 1981 Order's treatment of the November 1977 Will, the Supreme Court nonetheless affirmed the November 1981 Order in vacating those portions of the August 1977 and February 1978 Orders that invalidated Grace's November 1977 Will. *Id.* at 169. It did so on the basis that the August 1977 Order restraining Grace from

executing a will without court approval and its February 1978 Order voiding the November 1977 Will exceeded the probate court's jurisdictional authority. *Id.*

iii. The Importance of Estate of Anderson to this Case.

Section 75-1-302, quoted above, was the same in 1977, 1978, and 1981 as it is today. Utah Code Ann. §75-1-302 (1975). Notwithstanding Section 75-1-302, in *Estate of Anderson,* the Supreme Court held the probate court exceeded its jurisdictional authority in a matter involving: "estates of decedents . . . and estates of protected persons [and] protection of minors and incapacitated persons." Utah Code Ann. §75-1-302(1).

iv. The Supreme Court's Reasoning.

The Supreme Court first addressed the fact that both the August 1977 and February 1978 orders were entered pursuant to the stipulation of the parties. It held:

> Judgments by consent may be set aside under like conditions as contracts or under circumstances where the court exceeded its powers of adjudication. "A judgment by consent, in order to be valid, must be within the jurisdiction of the court." Provisions of judgments by consent which are beyond the jurisdiction of the court are not validated by the fact that the parties or their counsel consent to the judgment.

Id. at 168-69; citations omitted.

Second, the Supreme Court relied upon Section 75-5-408(1)(c). Utah Code Ann. §75-5-408(1)(c) (1975); *Estate of Anderson* at 169. That section grants the probate court the power to exercise all powers for a protected person that the protected person could exercise for him- or herself **except** the power to execute a will. Although the exception would not seem to apply to the probate court's action revoking the protected person's will, it clearly applied to the probate court's attempt to enjoin the decedent from executing a new will without court approval. In any event, the Supreme Court concluded: "[T]he provision of the [February 1978] order nullifying the November will was beyond the statutory power of the court and consent by the parties cannot validate it." *Id.*

b. Applying *Estate of Anderson* to this Case.

Like the probate court in *Estate of Anderson*, the probate court here exceeded its jurisdictional authority when it purported to appoint a personal representative after three years. After entering its Determination of Heirs on March 7, 2006, the probate court exceeded its jurisdictional authority by entering its Appointment Order on April 28, 2006. It further exceeded its jurisdictional authority when it ordered supervised administration, thus taking control and dominion over assets vested in the decedent's heirs and not subject to

administration. Accordingly, the probate court's Appointment Order should be vacated.

3. THERE IS NO "ADMINISTRATIVE EXCEPTION" TO SECTION 75-3-107.

While there are exceptions that permit administration beyond three years in certain limited circumstances, *see* Utah Code Ann. §75-3-107(1)(a) – (c), the stated purpose of Section 75-3-107(1) is to prohibit a petition or application for the "appointment" of a personal representative after three years. Utah Code Ann. §75-3-107(1). The **sole purpose** of an appointment proceeding is to obtain a court order appointing a personal representative to administer a decedent's estate. Utah Code Ann. §75-3-301(2)(d) (referring to "informal applications for appointment of a personal representative); §75-3-402(1) (referring to petitions "for appointment of personal representative"). It is neither logical nor accurate to claim that notwithstanding that no proceeding for appointment of a personal representative can be filed, an "administrator" (Appellee's Brief at 7-8) can be appointed to administer the estate under an "administrative" exception to Section 75-3-107.

In contrast to Ms. Dimeo's argument, when an applicant files an informal application for appointment, the applicant must verify (under oath or penalty of perjury):

> (f) That the time limit for informal . . . appointment as provided in this chapter has not expired either because three years or less have passed since the decedent's death, or if more than three years from death have passed, that circumstances as described by Section 75-3-107 authorizing tardy probate or appointment have occurred.

Utah Code Ann. §75-3-301(2)(f). The same allegation is required in formal appointment proceedings, although it need not be verified. Utah Code Ann. §75-3-402(1)(a) (requiring that formal petitions contain the same statements identified in "Section 75-3-301(2)" for informal applications; *see* Section 75-3-301(2)(f) quoted above). Given the requirement that this affirmative averment must be made **before a personal representative can be appointed**, it cannot follow that there is an "administrative" exception to the three year rule.

This prohibition against appointment and administration is not "harsh." Appellee's Brief at 7, 8. It is intended to be strictly applied, but that does not make it "harsh." While the appointment of a personal representative to administer the estate is prohibited after three years, subsection (2) of Section 75-3-107 provides the methodology to deal with that situation. "(2) The limitations provided in Subsection (1) do not apply to proceedings . . . to determine heirs of an intestate." Utah Code Ann. §75-3-107(2). After three years, the probate court can declare the decedent's heirs and it has "jurisdiction" to "distribute the decedent's property" to the heirs and to "determine what property was owned by the decedent

at the time of death." Utah Code Ann. §75-3-107(3). Because the decedent's estate devolved to the heirs at the moment of death (Utah Code Ann. §75-3-101(1977)), the declaration of heirship establishes the heirs' ownership of the decedent's property. There is no need for any further proceedings, and the probate court does not have jurisdictional authority to conduct any further proceedings.

In the present case, the probate court entered its Determination of Heirs on March 7, 2006, prior to and independent of its Order of Formal Appointment of Personal Representative on April 26, 2011. *Compare* R.18-20 *with* R.26-27. The Determination of Heirs identified the decedent's heirs (R.19, ¶7), identified property owned by the decedent at the time of the decedent's death (R.19, ¶8), and identified the intestate shares of the heirs. R. 19-20, ¶9. The probate court's Appointment Order purported to appoint personal representatives, grant them "letters of administration" (R.27), and order a supervised administration over property that had already been determined to be owned by the decedent's heirs. In entering the Appointment Order, the probate court exceeded its jurisdictional authority.

For these reasons, Ms. Dimeo's arguments in favor of her "administrative" exception that:

> [T]here would be no judicial or legal vehicle available to clear title and to address legal estate problems once the magic 3-year time period terminated;

and

> Estates will be summarily denied access to the courts solely through the passage of time and in many cases that passage of time may be in ignorance of death, heirs, location of assets, encumbrances, or other matters that must be acknowledged and addressed in order to accomplish the orderly distribution of estate property,

are incorrect. Appellee's Brief at 7, 8. Had the probate court acknowledged the limits of its jurisdiction and authority, all of the remedies necessary to resolve the issues raised by Ms. Dimeo would have been fully available to the heirs – the owners of the decedent's property and the real parties in interest.

4. THE COURT SHOULD NOT AFFIRM ON THE BASIS OF MS. DIMEO'S ALTERNATIVE THEORIES BECAUSE THE PROBATE COURT LACKED JURISDICTION, AND TWO THEORIES FAIL AS A MATTER OF LAW AND NONE OF THE THEORIES ARE "APPARENT FROM THE RECORD."

The probate court did not address the alternative theories raised by Ms. Dimeo on appeal. R. 317-18 (the "Denial Order"); Appellee's Brief at 9-14. Without any findings of fact, the probate court ruled:

> [T]he Petition of Nupetco Associates, LLC shall be and the same hereby is denied. The Court concludes that it has jurisdiction in this matter and that the personal representative was properly appointed and acted with authority pursuant to notice, hearing and authorization, all as approved and authorized by this Court.

R. 318. Ms. Dimeo is thus asking the Court of Appeals to affirm on the basis of the alternative theories she asserts.

a. If the Probate Court Lacked Jurisdiction to Enter the Appointment Order, Ms. Dimeo's Alternative Theories are Irrelevant.

Ms. Dimeo's alternative theories have no relevance to Nupetco's claim that the probate court did not have the jurisdictional authority to enter the Appointment Order. *Chen v. Stewart*, 2004 UT 82, ¶ 36, 100 P.3d 1177 (challenge to jurisdiction can be raised at any point in the proceedings). Since Nupetco filed its petition seeking vacation of the Appointment Order in the probate case, if the probate court lacked subject matter jurisdiction, Nupetco's petition must be granted and the probate court's Appointment Order must be vacated.

b. If the Probate Court Had Jurisdiction, then the Court of Appeals Should Address Ms. Dimeo's Alternative Theories.

If the probate court had jurisdiction to enter the Appointment Order, then the issue is whether it nonetheless committed an error of law by appointing Ms. Dimeo personal representative. In that event, the Court of Appeals may affirm the probate court's order on any other appropriate grounds. *Johnson v. Johnson*, 2010 UT 28, ¶ 13, 234 P.3d 1100. But, the Court of Appeals can also decline to affirm in any event. *Francis v. State, Utah Div. of Wildlife Resources*, 2010 UT 62, ¶19,

248 P.3d 44 ("It is well established that this court *may* affirm the judgment [on an alternative theory apparent from the record]."); emphasis in Supreme Court's opinion.

While the appellate court's right to affirm on any basis is broad, it is not unlimited. To affirm on an alternative theory, the theory must be "apparent from the record."[2] *Id.* In this case, the Court of Appeals should not affirm on any of the alternative theories asserted by Ms. Dimeo.

c. Determining When a Theory is "Apparent from [or on] the Record."

For a matter to be "apparent from [or on] the record," two thresholds must be met. First, the alternative legal theory asserted must be clear from the record so that the appellant has adequate notice of the alternative theory. *Id.* at ¶10. That is not an issue here because Ms. Dimeo made the arguments to the probate court that she now makes to the Court of Appeals.[3] R.273-80.

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[2] Ms. Dimeo attached the docket in the Nupetco Litigation to her Appellee's Brief in her Addendum. That was not part of the record on appeal. Nupetco asks the Court either to strike this document or to ignore it in reaching its decision.

[3] This requirement applies to theories that were not asserted in the trial court proceedings but were nonetheless apparent from the record.

Second, the appellate court must be able to determine from either the findings of the probate court or the uncontroverted facts that it can affirm on the alternative theory. *Bailey v. Bayles*, 2002 UT 58, ¶20, 52 P.3d 1158 ("When an alternate theory is apparent on the record, the court of appeals must then determine whether the facts as found by the trial court are sufficient to sustain the decision of the trial court on the alternate ground"); *Baker v. Stevens*, 2005 UT 32, ¶¶ 14-15, 114 P.3d 580 (authorizing affirmance if uncontroverted facts support alternative legal theory). Thus, this Court "may affirm on the alternate grounds advanced by [the appellee] only if the trial court's findings are sufficient, or the necessary facts are undisputed." *Richardson v. Hart*, 2009 UT App 387, ¶14, 223 P.3d 484.

d. Ms. Dimeo's Alternative Theories.

Ms. Dimeo asserts three alternative theories. She asserts that the Court of Appeals can affirm the Denial Order on the basis the Appointment Order was a final order, on the basis of her analysis of Rule 60(b), or on the basis of laches. Appellee's Brief at 9-14. In the case of the argument that the Appointment Order is a final order and the argument that Rule 60(b) applies, those arguments fail as a matter of law. As to laches, there are insufficient facts in the record to affirm the Denial Order on that basis.

i. The Appointment Order is Not a Final Order as to Nupetco.

Regarding her first alternative theory, Ms. Dimeo argues that the Appointment Order was a final order, and accordingly, that finality precludes any appeal of that order. Appellee's Brief at 9-10. Of course, Nupetco is not appealing the Appointment Order. While the Appointment Order was a final order, that order only binds those persons who receive notice of the petition for relief and the hearing on that petition. Utah Code Ann. §75-3-105(1) (While authorizing interested persons to seek relief in formal proceedings, it also provides: "Persons notified are bound though less than all interested persons may have been given notice.") As the record on appeal shows, no one gave Nupetco notice of the petition for appointment of a personal representative. *See* Appellant's Brief at xii (citations to the record). Having not received notice, the Appointment Order was not binding on Nupetco notwithstanding it may be both binding and final as to all persons who received notice of the petition. *C.f. Openshaw v. Openshaw,* 80 Utah 9, 12 P.2d 364, 365 (1932) ("[a] decree in favor of a person who is not a party to the action or proceeding is void because the court has no jurisdiction to make it." (citation omitted).[4])

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[4] On the other hand, as explained more fully in Section 1 at 3-4 above, Nupetco was clearly a party to **its** Petition to Vacate and is a party to **its** appeal of the Denial Order.

ii. The Time Restraints in Rule 60(b) Do Not Apply to Nupetco.

As to her second alternative theory, Ms. Dimeo argues that the Petition to Vacate was in reality a motion for relief from the Appointment Order under Rule 60(b). Appellee's Brief at 9-12. She then argues that the Petition was untimely even "under [a] liberal construction" of Rule 60(b). Appellees Brief at 11.

Rule 60(b) was inapplicable to Nupetco. That rule offers relief from an order etc. entered against "a party or his legal representative." Utah R. Civ. Proc. 60(b) (prefatory language). Nupetco had no notice of the petition for Ms. Dimeo's appointment or the hearing on that petition. When the probate court entered its unlawful Appointment Order, Nupetco was not a party. Thus, the time restraints in Rule 60(b) did not and do not apply to Nupetco.

e. The Uncontroverted Facts for Purposes of Considering Ms. Dimeo's Other Theories.

The record discloses the following facts:

i. The Appointment Order was entered on April 28, 2006 (R.26);

ii. Nupetco did not receive notice of the Petition Ms. Dimeo filed in the probate court nor of any hearing held on that petition;

iii. Ms. Dimeo acting as personal representative of the decedent's estate filed her complaint in the Nupetco Litigation in July 2006 (R. 274); and

iv. Nupetco filed its Petition to Vacate on March 10, 2010 (R.244).

There are no other uncontroverted facts that would support an alternative theory.

f. There are No Uncontroverted Facts to Sustain Ms. Dimeo's Alternative Theories.

All of Ms. Dimeo's alternative theories are based on claims that the Petition to Vacate was untimely. Both the Rule 60(b) and the laches arguments depend upon facts sufficient to find that an **unreasonable** amount of time had elapsed. In addition, regarding her Rule 60(b) argument, Ms. Dimeo cites *Warren v. Dixon Ranch Co.*, 123 Utah 416, 260 P.2d 741, 743 (1953) (addressing equitable issues in determining whether to grant Rule 60(b) motions). Appellee's Brief at 11-12. While the continuing validity of *Warren* is doubtful (*see Jones v. Layton/Okland,* 2009 UT 39, ¶19, and ¶19 fn. 12, 214 P.3d 859) the record on appeal does not contain any facts that would permit this Court to determine if Nupetco acted "within a reasonable time" or that would otherwise allow the Court to weigh the equities between the parties.

As to laches, the undisputed facts establish a delay of three and three quarter years from the date Nupetco learned of Ms. Dimeo's appointment in July 2006 until Nupetco filed its Petition to Vacate in March 2010. Even so, these facts do not establish that the delay was unreasonable nor do they establish that Ms. Dimeo

was prejudiced. Ms. Dimeo implies that Nupetco knew that her appointment was unlawful at the time Ms. Dimeo filed suit against Nupetco, and she alleges that she has spent considerable time and money in pursuing her claims as personal representative. Appellee's Brief at 13. There are no facts to support these assertions. And even if there were facts to support these assertions, the Court of Appeals would need to consider all relevant facts. Among other facts the Court should consider would be Nupetco's reason for delay and the date when Nupetco learned it was being harmed as a result of Ms. Dimeo's unlawful appointment. Both facts would be highly relevant to any inquiry regarding the reasonableness or unreasonableness of the delay in filing the Petition to Vacate.

Thus, the facts necessary to consider whether the Rule 60(b) argument or the laches argument should be applied are not apparent from the record. As the Supreme Court recently explained:

> [T]o be "apparent on the record" requires "more than mere assumption or absence of evidence contrary to the [alternate] ground or theory. The record must contain sufficient and uncontroverted evidence supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal."

Francis v. State, Utah Div. of Wildlife Resources, 2010 UT 62, ¶19, 248 P.3d 44. While this limitation is directed at the requirement that the appellant have notice

of the alternative theory, an issue that is not present here, this same limitation would naturally apply in determining whether there are sufficient facts to support an alternative theory.

g. The Court Should Not Affirm on Ms. Dimeo's Alternative Theories.

Because the alternative theories Ms. Dimeo asserts are not apparent from the record and two of the arguments are unavailing in any event, the Court should not affirm the probate court's decision based on these arguments.

CONCLUSION

For the foregoing reasons, the Court of Appeals should reverse the Denial Order (Tab 5) and remand with directions to enter an order voiding the Appointment Order (Tab 3) and all other orders based upon the Appointment Order. R.139-41, 169-71, 197-99, 209-210, 219-20, 240-41, 294.

Dated this 1 day of September, 2011.

CHARLES M. BENNETT, PLLC

Charles M. Bennett
Attorney for Appellant, Nupetco Associates, LLC

CERTIFICATE OF SERVICE

I certify that, on the 1 day of September, 2011, I served the original and copies of the foregoing **APPELLANT'S REPLY BRIEF** as follows:

a. Two copies of the brief to:

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b. A courtesy copy by email to Richard C. Dibblee at: dibs@xmission.com

c. Eight copies, one of which contains the original signature of counsel for Nupetco Associates, by hand delivery to:

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