

2017

**Kari L. Baumann, Plaintiff/Appellant, v. The Kroger Company Dba  
Smith's Pharmacy #40063; And Gregory P. Tayler, m.d.,  
Defendants/Appellees**

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF  
GORDON WARREN WOMACK,

Decedent.

GORDON DOUGLAS WOMACK,

Petitioner/Appellant,

vs.

STACY LEE WOMACK LEAVITT and  
NICHOLLE WOMACK HENDRICKSON,

Respondents/Appellees.

**BRIEF OF APPELLEES**

Appellate Case No. 20160544-SC

WRIT OF CERTIORARI OF THE UTAH  
COURT OF APPEAL'S OPINION AFFIRMING  
THE EIGHTH JUDICIAL DISTRICT, DUCHESNE COUNTY  
THE HONORABLE SAMUEL P. CHIARA

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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this appeal by virtue of the provisions of Utah Code Ann. § 78A-4-103(2)(j).

## **ISSUE PRESENTED FOR REVIEW**

Whether the court of appeals erred in affirming the district court's conclusion that Petitioner sought a vacatur or modification of the prior estate-closing order that was barred by the statute of limitations. Dow v. Gilroy, 910 P.2d 1249, 1250 (Utah App. 1996) ("[t]he application of a statute of limitation is a question of law, which we review for correctness"), citing Gramlich v. Munsey, 838 P.2d 1131, 1132 (Utah 1992) ("[t]he trial court's determination that the statute of limitation had expired is a question of law which review for correctness, giving no particular deference to the lower court") (brackets added).

The issue was preserved in the District Court by briefs and oral argument, as well as the Utah Court of Appeals.

## **CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS**

Utah Code Ann. §§ 75-3-410, 412, & 413.

## **STATEMENT OF THE CASE**

### **Nature of the case**

On June 3, 1991, the District Court construed Gordon Warren Womack's ("hereinafter known as "Decedent") Will to state that all of Decedent's grandchildren are to have a remainder interest in oil, gas, and mineral rights that are included in any assets distributed to their parents. R. at 113, ¶ 5, 118, ¶¶ Grandchildren. Petitioner is the child

and the Respondents are the grandchildren of Decedent. R. at 118, ¶ Children of Gordon Douglas Womack.

Petitioner seeks to reverse the decision of the Appellate Court affirming the District Court's denying and dismissing the Amended Petition to Reopen Estate and Reappoint Personal Representatives and Construe Will (hereinafter known as "Amended Petition") in an attempt to have Decedent's Will re-construed, or rather have the Amended Estate Closing Order and Schedule of Distribution Annexed to Amended Estate Closing Order (hereinafter known as "Schedule of Closing Order") amended, modified, and/or vacated, and have a new order to reflect specific language allowing for Petitioner to receive all the benefits from the oil, gas, and mineral rights during his lifetime, where the remainders, the grandchildren, are not to receive any of the royalties until the death of Petitioner. R. at 115, 300, ¶ 3. Petitioner supports his request for a new order by the presentment of an affidavit of Decedent's attorney, who constructed the Will, approximately twenty-two (22) years after the Amended Estate Closing Order and Schedule of Closing Order. R. at 143.

### **Course Proceedings and Disposition of the District Court**

On June 15, 1989, the Petition for Formal Probate of Will and Formal Appointment of Personal Representatives was filed with the District Court, approximately two weeks after the death of Decedent. R. at 1, ¶ 4. On June 27, 1989, the District Court granted Formal Probate of Will and Formal Appointment of Personal Representatives, where Gloria Janet Womack and Jeff Warren Womack ("hereinafter collectively known as Personal Representatives"), siblings of Petitioner, were appointed



Personal Representatives. R. at 15, ¶ 6. On May 14, 1990, the District Court entered an Estate Closing Order. R. at 52, ¶ 1.

On May 21, 1991, the Personal Representatives caused to be filed with the District Court a Petition to Reopen Estate, Reappoint themselves Personal Representatives, and, among other things, Construe Will. R. at 57, ¶ 3. On June 3, 1991, the District Court entered Findings of Facts and Conclusions of Law, and an Order to Reopen Estate, where among other things, the Will was construed concerning the bequest of mineral rights as to the grandchildren, pursuant to provision VI(1) of Decedent's Will. R. at 74-75, ¶ 7, 80, ¶ 8. On June 19, 1992, the Personal Representatives caused to be filed with the District Court a Petition for Approval of Final Settlement and Distribution. R. at 83. On July 29, 1992, the District Court entered an Amended Estate Closing Order (Order of Complete Settlement) and Schedule of Closing Order. R. at 112 & 115.

On February 4, 2014, Petitioner caused to be filed with the District Court a Petition to Reopen Estate and Reappoint Personal Representatives and Construe Will. R. at 120. On April 24, 2014, Petitioner caused to be filed with the District Court his Amended Petition. R. at 134. On May 9, 2014, Respondents caused to be filed with the District Court their Objection to the Amended Petition (hereinafter "Objection"). R. at 174. On October 6, 2014, oral arguments were made to the District Court concerning Respondents' Objection. R. at 272, 330-59. On November 4, 2014, the District Court ruled and ordered to deny and dismiss Petitioner's Amended Petition, where the District Court stated "[t]his is the final, appealable order in this matter, and no further pleadings or proposed orders are necessary." R. at 300.

On November 20, 2014, Petitioner caused to be filed with the District Court a Notice of Appeal. R. at 302-03. On December 9, 2014, Petitioner caused to be filed a Docketing Statement. R. at 316-18. On April 28, 2016, months after hearing oral arguments, the Utah Court of Appeals entered its opinion affirming the District Court's Ruling. R. at Court of Appeals ("C.A.") Opinion. The Court of Appeals stated that "[t]he absence of an extraction-proceeds provision does not create an ambiguity," rather "the absence of an extraction-proceeds provision in the will indicates that no such provision was intended." R. at C.A. Opinion, pp. 8-9. As a result, the Court of Appeals concluded that "any petition asserting that Decedent intended to grant extraction proceeds to the life-estate holders, rather than...the remainder, necessarily seeks vacatur or modification of the 1992 amended estate-closing order." R. at C.A. Opinion, p. 9. Further, the Court of Appeals then found that the statute of limitations, Utah Code Ann. § 75-3-412(1)(a)-(c) and Utah Code Ann. § 75-3-413, must be applied to Petitioner's Petition. R. at C.A. Opinion, p. 9.

### **Statement of Facts**

On May 31, 1989, the death of the Decedent occurred, where Decedent left a Will. R. at 6, 10-13. On June 15, 1989, the Personal Representatives caused to be filed a Petition for Formal Probate of Will and Formal Appointment of Personal Representatives. R. at 1-4. On June 27, 1989, Decedent's Will was formally probated. R. 16, ¶ 1. On May 14, 1990, the District Court entered an Estate Closing Order. R. at 52-53. On May 21, 1990, the Personal Representatives petitioned the District Court to Reopen Estate, where among other things they requested for the District Court to

construe the Will. R. at 57, ¶ 3. The Personal Representatives specifically requested for the District Court to construe the following provision of Decedent's Will, ¶ VI(1):

Furthermore, the oil, gas mineral rights of which I am seized or possessed at the time of my death, are devised to each of my children, share and share alike, for life, remainder to the children of each of my children, each of my grandchildren to divide their parents' share by representation per stirpes and not per capita.

R. at 57, ¶ 3. Further, the Personal Representatives requested of the District Court to determine the properties of the estate and the "point in time which grandchildren are determined." R. at 57, ¶ 3. Specifically, it was requested that the District Court find that all the grandchildren, adopted or natural, be included, "who are or have been in being at the time of death of their parent who is a child of the decedent." R. at 57, ¶ 3. On June 3, 1991, the District Court entered an Order to Reopen Estate, where the aforementioned paragraph, VI(1), of Decedent's Will "shall be construed to mean that it was the decedent's intent that all children of his children be included, adopted or natural, who are or have been in being at the time of death of their parent who is a child of decedent." R. at 80, ¶ 8(2). The Order to Reopen Estate continues in specifying Decedent's children and grandchildren. R. at 80-81, ¶ 4. On July 29, 1992, the District Court entered an Amended Closing Order (Order of Complete Settlement), which included "[i]f such assets are, or include, mineral rights, a remainder interest in such mineral rights to the grandchildren of the decedent be provided, as appropriate, pursuant to the requirements of the decedent's Will as construed by this court's Order of June 3, 1991." R. at 113, ¶ 5 (brackets added). Also on July 29, 1992, the District Court entered a Schedule of Closing Order, which stated that "[e]ach grandchild receives an undivided remainder interest in fee of each

child's respective parent's interest, by representation, of any and all of the decedent's oil, gas and mineral rights in and under the real property allocated to their said parent above." R. at 118, ¶ Grandchildren (bracket added). On November 19, 1992, the Deed concerning the real property distributed to Petitioner by Decedent was recorded, where it stated: "Gordon Womack [child of Decedent] for life, with remainder to Stacey Lee Womack, Burton Womack, Jaime Womack Parker, Nicolle Womack, Issaac Womack and Linzie Womack [grandchildren], and any other children he may have at the time of his death, covering the West 1/3 of the NW1/4[.]" R. at 135, ¶ 8 (brackets added).

On February 4, 2014, Petitioner caused to be filed with the District Court a Petition to Reopen Estate and Reappoint Personal Representatives and Construe Will, where he amended said Petition on April 24, 2014. R. at 120-128, 134-140. However, Petitioner entered in an Oil and Gas agreement with a third-party to lease his life estate in the oil, gas and mineral rights of the land distributed to him from Decedent prior to the filing of his Petition to Reopen Estate. R. at 138, ¶ 20. Sometime after that, Crescent Point Energy U.S. Corp., the lessee that Petitioner entered into an agreement concerning his life estate in oil, gas, and mineral rights, contacted Petitioner and informed him that all royalty payments were suspended and being held in a corpus. R. at 138, ¶¶ 21 & 22. Petitioner was informed that this suspension of payments was due to the Deed not specifying whether life estate holder, Petitioner, or the remainders, including Respondents, are to receive immediate payment of the royalties. R. at 138, ¶¶ 21 & 22.

Petitioner then proceeded to file his Amended Petition, where it stated that he was seeking to have the Will construed, more specifically ¶ VI(1), to determine the



Decedent's intent on whether the life estate holder or the remainders are to receive immediate payment of the royalties from the gas, oil, and mineral rights from the administered formal probated estate of Decedent, almost twenty-two (22) years after the Will had been previously construed. R. at 138, ¶¶ 21 & 22 (the second 22), 113, ¶ 5. Petitioner's Amended Petition specifically requests for the District Court to construe the Will, ¶ VI(1), to include "a life estate in and to the right to receive all rents, royalties, bonuses and other income from production of said minerals during their lifetime, along with all executive rights to enter into leases on behalf of both the life estate and remainder, without liability for waste." R. at 138-39, ¶ 22 (the second 22). In support of Petitioner's Amended Petition, an affidavit, dated July 8, 2013, was submitted from the attorney who drafted Decedent's Will on April 4, 1989, almost twenty-four (24) years earlier. R. at 138, ¶ 21, 143, ¶ 2. The aforementioned affidavit stated that the attorney understood that the Decedent considered "his oil, gas and mineral interests to be an 'income stream' which he was leaving to his children during their lifetimes" and that the Decedent "wanted to keep the oil, gas and mineral rights in the family, so that his grandchildren could enjoy the benefits that their parents would enjoy." R. at 143, ¶¶ 5 & 6. However, the attorney's understanding of Decedent's intent concerning his oil, gas and mineral right, almost twenty-four (24) years after constructing the Will, is not reflected in the actual Will, nor did the District Court construe it as such almost twenty-two (22) years earlier. R. at 11, ¶ VI(1), 113, ¶ 5.

On May 9, 2014, Respondents caused to be filed an Objection to Petitioner's Amended Petition, where among other arguments, they challenged Petitioner's Amended

Petition as being barred by the statutes of limitation provided under the Utah Probate Code, more specifically Utah Code Ann. §§ 75-3-410, 412, & 413. R. at 179-81, ¶ I. On September 4, 2014, Petitioner caused to be filed a Response to Respondents' Objection, where he contended that the statutes of limitations in Respondents' Objection are irrelevant to the present issue, although Petitioner further contended that Utah Code Ann. § 75-3-107(2) affirmatively provides no limitation as to the construing of wills. R. at 229-30, ¶ Petition is Not Time Barred. On September 11, 2014, Respondents caused to be filed a Reply to Petitioner's Response, where Respondents reinforced their argument for the statutes of limitation provided by the Utah Probate Code and that Utah Code Ann. § 75-3-107 was irrelevant. R. at 238-40, ¶ Petition is Barred by Utah Probate Code.

On October 6, 2014, both parties presented their arguments orally before the District Court. R. at 272, 330-59. On November 4, 2014, the District Court entered a Ruling and Order denying and dismissing Petitioner's Amended Petition. R. at 300. The District Court relied on Utah Code Ann. §§ 75-3-410, 412, & 413 and *In re Estate of Chasel*, holding that Petitioner's request to add language in construing the will requires a "vacation of the prior order and issuing a different order", which the Utah Probate Code does not allow twenty-two (22) years after entering a closing order. R. at 299-300; *See* 725 P.2d 1345 (Utah 1986). On November 11, 2014, Petitioner cause to be filed with the District Court his Notice of Appeal. R. at 302-03. On April 28, 2016, the Court of Appeals affirmed the District Court's ruling.

## SUMMARY OF THE ARGUMENT

First, Petitioner's argument that his Amended Petition is a Petition to Interpret is false and misleading. Petitioner's Amended Petition specifically requests for the District Court to including specific language modifying the will and the Amended Estate Closing Order, reappoint co-personal representatives, and to authorize corrective deeds for redistribution of Decedent's estate. Based upon Petitioner's specific requests to the Court, it is clear that Petitioner is not merely seeking for a construing of the will, rather Petitioner is seeking to reopen the probate and seek for more than just and make specific amendments.

Second, Petitioner's Amended Petition requests for the District Court to amend, modify, or vacate a previous order. Petitioner contends that he is only seeking for the District Court to construe Decedent's Will, more specifically ¶ VI(1), concerning the life estate of the oil, gas, and mineral rights. However, the District Court previously construed that very provision twenty-three (23) years prior to the Amended Petition, where the Amended Estate Closing Order and the Schedule Closing Order reflected such construing. As such, Petitioner is not merely seeking for the District Court to interpret Decedent's Will, rather Petitioner is seeking for the District Court to re-construe ¶ VI(1) of Decedent's Will, which will amend, modify, and/or vacate the Amended Estate Closing Order and the Schedule of Closing Order, in attempt to add language to the Deeds of the properties administered in the formal probate proceedings.

The specific language for which Petitioner seeks to add to the previous Orders is supported by the introduction of an affidavit by the drafter of Decedent's Will, where the

affidavit was created twenty-four (24) years after the actual construction of the Will and the death of Decedent. Petitioner is seeking to add specific language in an attempt to re-construe provision VI(1) of Decedent's Will, resulting in the amending, modifying, and/or vacating of the previous Orders which include the original construing of the very same provision.

The formal probate of Decedent's Will by the District Court only validated the construction of the Will and does not include interpreting, or construing, the intent of Decedent in the administering of his estate. As such, the first Estate Closing Order did not reflect any construing of the Will. However, almost two weeks after the first Estate Closing Order, the Personal Representatives petitioned to reopen the estate and specifically requested for the District Court to construe ¶ VI(1) of Decedent's Will. The District Court acquiesced and included in the Findings of Fact and Conclusions of Law, the Amended Estate Closing Order, and the Schedule of Closing Order an interpretation, or a construing, of the requested ¶ VI(1) of the Will. Petitioner's Amended Petition seeks for the District Court to re-construe the very same provision, which would amend, modify, and/or vacate the previous Orders, effectively negating them.

The Utah Probate Code, more specifically Utah Code Ann. §§ 75-3-410, 412, and 413 provide restrictions and time limitations to the amending, modifying, vacating, and appealing of an order in probate proceeding. Pursuant to the restrictions and time limitations of the Utah Probate Code, Petitioner's Amended Petition is effectively seeking to amend, modify, and/or vacate the District Court's Orders twenty-two (22) years later, which is prohibited. As such, the District Court denied and dismissed



Petitioner's Amended Petition and the Appellate Court affirmed the District Court's ruling.

### **ARGUMENT**

**I. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S DENYING AND DISMISSING PETITIONER'S AMENDED PETITION WHERE IT IS TIME BARRED BY THE UTAH PROBATE CODE.**

**A. Petitioner's Amended Petition Seeks to Amend, Modify and/or Vacate an Estate Closing Order Instead of Merely Seeking to Interpret Decedent's Will**

The probating of a will is the declared validation of a will, where the will is "effective to prove the transfer of any property or to nominate a personal representative." *See Utah Code Ann. § 75-3-102.* A formal probate of a will includes notification to interested parties of the proceeding to validate the will and administering of the decedent's estate, where an interested party can object to the validation of the will, appointment of the personal representative, and the determination of heirs, among other things. *See Utah Code Ann. § 75-3-403(1).* However, the validating of a decedent's will by the court only involves whether the construction of the will is proper, not an interpretation of the language contained in the document regarding the decedent's intent. *See Utah Code Ann. § 75-3-408.* Nevertheless, the court can be requested, or petitioned, to interpret the will, or parts of the will, also known as construing, where such interpretation is included in the order closing the estate. *Ibid.* (where there is "opportunity for contest by all interest parties", which includes the interpretation). The order closing the formally probated estate is considered final and is subject to restrictions, including

time limitations, for amending, modifying, vacating and appealing, pursuant to Utah Code Ann. § 75-3-410, 412, and 413.

Petitioner's Amended Petition clearly seeks to do more than just be a Petition to Interpret. The second ¶ 22 of the Amended Petition states:

Resolution of the ambiguity in accordance with the Decedent's intent is achievable by construing the Will and Deeds to include the following provision: "a life estate in and to the right to receive all rents, royalties, bonuses and other income from production of said mineral during their lifetime, along with all executive rights to enter into leases on behalf of both the life estate and remainder, without liability for waste."

Clearly Petitioner was not merely seeking for the District Court to interpret the language of the Will as it was written over twenty-two (22) years ago, rather Petitioner was requesting for the District Court to amend the Will with specific language based upon a submitted affidavit from the drafter of the Will, again twenty-two (22) years later. R. at 139-140 and 143-144. Requesting for the District Court to amend the Will would also necessitate the District Court amending the final closing order, which is subject to the Probate Code's statute of limitations. Likewise, Petitioner also seeks for the reappointment of co-personal representatives and for the authorization of corrective deeds. Petitioner's request to amend the Will to include specific language, reappointed co-personal representatives, and to authorize corrective deeds invalidates that fact that Petitioner's Amended Petition was solely a Petition to Interpret.

Decedent's formally probated Will, more specifically ¶ VI(1), was requested to be construed by the Personal Representatives in their Petition to Reopen Estate in 1991. The District Court entered a Finding of Facts and Conclusions of Law, an Amended Estate

Closing Order, and a Schedule of Closing Order which all included a construing of the requested ¶ VI(1) of Decedent's Will. R. at 54-56, 70-77, 112-19. Petitioner, twenty-two (22) years after the District Court entered the Amended Orders, requests for the District Court to re-construe the very same provision, which necessitates for the Amended Orders to be amended, modified, and/or vacated. R. at 138, ¶ 22(the second 22). However, since the provision of Decedent's Will has already been construed and a final order was entered concerning as such, Petitioner's Amended Petition is actually seeking to amend, modify, and/or vacate the previous final orders and is barred by the statute of limitations to do so under the Utah Probate Code.

**B. The Utah Probate Code Provides Restrictions, Including Statutes Limitation, to the Amending, Modifying, and/or Vacating of an Entered Estate Closing Order.**

Petitioner argues that his request for a construing of the Will or the Amended Estate Closing Order is not time barred by the Utah Probate Code. *See* Petitioner's Br. at 37. Petitioner also states that the District Court erroneously relied on Utah Code Ann. §§ 75-3-201(15), 410, 412, 413 and *In re Estate of Chasel* in rendering its ruling. *Ibid*.

Petitioner is not merely seeking to construe the Will as he is representing to the court, rather Petitioner is seeking to re-construe the very same provision of the Will, ¶ VI(1), that the District Court construed previously. The District Court included the construed provision in an order entered twenty-two (22) years prior to Petitioner's Amended Petition, where acquiescing to Petitioner's request requires an amending, modifying, and/or vacating of the previous order. Therefore, Petitioner is asking the

District Court at least for a new order, where the District Court correctly relied on the restrictions and time limitations of formal testacy orders under the Utah Probate Code.

### **1. Formal Probate Proceedings (Formal Intestacy).**

The key element of a judicially probated case, known as a formally probated estate or a formal testacy proceeding, is the requirement for notice of the proceeding to all interested persons as the District Court stated in its Ruling and Order. *See* R. at 298; Utah Code Ann. § 75-1-201(18); Utah Code Ann. § 75-3-401(1) (“[a] formal testacy proceeding is litigation to determine whether a decedent left a valid will”) (brackets added). Otherwise, notice is not required or omitted and interested parties may not have an opportunity to contest the proceedings, including asserting any rights as an heir. It is likely not equitable or just for a limitation to exist where there is no notice to these interested parties. Conversely, in order to bring finality to the estate, a formal probate proceeding, where there is notice required to all interested parties, allows for issues to be addressed and resolved where the administering of the estate does not go on in perpetuity. Therefore, statutes of limitation are provided to bring finality and resolution to a formally probated estate.

The Utah legislature adopted and enacted the Uniform Probate Code as the Utah Uniform Probate Code (hereinafter known as “Utah Probate Code”), which was drafted by the National Conference of Commissioners on Uniform State Laws, in 1975. *See* Utah Code Ann. § 75-1-101, *et seq.*; Uniform. Probate Code § 1-101, *et seq.* In constructing the Uniform Probate Code, the drafters provided commentary concerning their intent of



the application to the code itself, which is akin to legislative intent. Through this commentary, the drafters provide a greater definition of the purpose for certain sections.

## 2. Utah Code Ann. § 75-3-410.

The District Court cites to the last sentence in Utah Code Ann. § 75-3-410, one of the sections of the Utah Probate Code for which it relied upon, which states that “[a]fter a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous order and subject to the time limits of Section 75-3-412.” (Bracket added). Utah Code Ann. § 75-3-410 is codified as § 3-410 in the Uniform Probate Code and has not been amended since adoption. The Comment by the drafters for this section is as follows:

Except as otherwise provided in Section 3-412 [codified under the Utah Probate Code as Utah Code Ann. § 75-3-412], an order in a formal testacy proceeding serves to end the time within which it is possible to probate after-discovered wills, *or to give effect to late-discovered facts concerning heirship*. Determination of heirs is not barred by the three year limitation [Uniform Probate Code 3-108 and Utah Code Ann. § 75-3-107] but a judicial determination of heirs is conclusive unless the order may be vacated.

This section authorizes a court to engage in some construction of wills incident to determining whether a will is entitled to probate. It seems desirable to leave the extent of this power to the sound discretion of the court. If wills are not construed in connection with a judicial probate, they may be subject to construction at any time.

Uniform Probate Code, § 3-410, Comment (emphasis added and brackets added).

Petitioner is attempting to proffer an affidavit by the drafter of Decedent’s Will, which was created twenty-four (24) years after the construction of the Will, concerning

the rights of Petitioner under the Will, more specifically as to ¶ VI(1). R. at 143-44. The drafters of the Uniform Probate Code intended for there to be a limitation in giving “effect to late-discovered facts concerning heirship.” Unif. Probate Code § 3-410.

The affidavit of the attorney who constructed the Will is a late-discovered fact concerning the rights of Petitioner. Petitioner submitted the affidavit in support of adding language to Decedent’s Will, more specifically provision VI(1), where such provision was construed in the Amended Estate Closing Order. R. at 112-14. Utah Code Ann. § 75-3-410 is intended to limit such effect pursuant to Utah Code Ann. § 75-3-412. Petitioner’s Amended Petition either intended for the affidavit to be an instrument of the Decedent, which it’s not since the Decedent did not directly cause for its existence, or is entering late-discovered facts concerning Petitioner’s rights incident to having the Amended Estate Closing Order amended, modified, and/or vacated. Either way, § 410 speaks to the limitations to introduce said affidavit for the purpose of establishing Petitioner’s rights. As such, the District Court did not err in relying on § 410 since Petitioner proffered late-discovered facts concerning Petitioner’s rights after a final order in a formal testacy proceeding.

### **3. Utah Code Ann. §§ 75-3-412 & 413.**

Utah Code Ann. § 75-3-412 states:

(1) Subject to appeal and subject to vacation as provided in this and in Section 75-3-413, a formal testacy order under this part...is final as to all persons with respect to all issues concerning the decedent’s estate that the court considered or might have considered *incident* to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

(a) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceedings and were given no notice of it, except by publication.

...

(c) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs.

...

(3) A petition for vacation under either Subsection (1)(a) or (b) must be filed prior to the earlier of the following time limits:

(a) If a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, six months after the filing of the closing statement.

(b) Whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by Section 75-3-107 when it is no longer possible to initiate an original proceeding to probate a will of the decedent.

(c) Twelve months after the entry of the order sought to be vacated.

(Emphasis added).

Utah Code Ann. § 75-3-413 states that “[f]or good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal. (Bracket added).

In addressing § 412, the only real section that applies to the current issue is § 412(1), since there is only one will and no other wills have been submitted for probate, where the Will has been formally probated and construed, at least construed as to ¶ VI(1), and there is no dispute as to there being any other will of the Decedent. The plain language in § 412(1) states that a formal testacy order is final subject to an appeal, where an appeal must be filed within thirty (30) days after the final order. *See* Utah R. App. P.

4(a). Likewise, a formal testacy final order is also subject to vacation under § 412(1)(a)-(d), concerning either a later offered will, determination of heirs, or a determination of decedent's death, none of which are applicable to the present case, or a general request for vacation where § 413 is applied. The plain language in § 412(1) also states that a formal testacy order is final to all persons and all issues of the decedent's estate, issues that the court considered or might have considered. Further, the aforementioned issues have to be incident to the interpretation that is relevant to "whether the decedent left a valid will" and "to the determination of heirs." Utah Code Ann. § 75-3-412(1).

The key word in this section is incident, which is defined as "dependent upon, subordinate to, arising out of, or otherwise connected with."<sup>1</sup> Hence, a majority of, if not all, issues concerning the decedent's estate are incident, or dependent on, whether there is a valid will and determination of heirs.

In *Uzelac v. Uzelac (In re Uzelac)*, where the wife of the decedent was awarded \$230,660 against the decedent's estate and she filed a Motion to Reconvey the Homestead under a probate action, which was denied pursuant to a separate time limitation under the Utah Probate Code for distributing property, she then appealed the order denying her motion three years later. 2008 UT App 33, ¶¶ 8, 13-16. The court stated that, pursuant to Utah Code Ann. § 75-3-412(1), "a formal testacy order resulting from a proceeding is generally final 'as to all persons with respect to all issues concerning the decedent's estate that the court considered,' subject to appeal." Id. at ¶ 16. The court held that "[b]ecause final orders by a court probating a will are subject to the

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<sup>1</sup> *Black's Law Dictionary* 126 (9th ed. 2009).



Utah Rules of Appellate procedure...Wife has thirty days to appeal the denial of her motion”, where she did not and was barred in bringing forth an appeal. *Id.* (bracket added).

In the case law relied upon by the District Court in its Ruling and Order, *In re Estate of Chasel*, the court held that Utah Code Ann. § 75-3-412 applied where after the decedent’s will was probated and the court entered a final estate order, new wills were discovered ten months later and an attempt was made to vacate the probated will, where the argument presented was that the new wills truly reflected the decedent’s intent. R. at 228; 725 P.2d 1345, 1347 (Utah 1986). The petitioner argued that § 412 did not apply since the probated will was done so informally, although the court held otherwise where the court stated that the petition to probate the initial will requested a judicial finding concerning decedent’s death and as to his sole heir. *Id.* at 1348. Accordingly, the court further held that since it was a formal testacy, ten months was outside of the limitations to introduce the wills and vacate the order probating the prior will, pursuant to § 412.

Utah Code Ann. § 75-3-413 is fairly simple where it provides that a final estate order from formal testacy proceeding can be modified or vacated, where there is good cause, within the standard time for appeal, which again is thirty (30) days from the entering of a final order. *See Utah App. P. 4(a)*. A perfect example of this application occurred when the Personal Representatives Petitioned to Reopen the Estate May 21, 1990, which was seven days after the Estate Closing Order was entered, and within the time allowed for appeal of the Estate Closing Order. R. at 52-56. Essentially, the Personal Representatives were seeking to modify and in effect vacate the original Estate Closing

Order, where an Amended Closing Order was granted on July 29, 1992. R. at 112-14.

Pursuant to § 413, this action was within the limitations to do so and was not barred.

#### **4. Application of Utah Code Ann. § 75-3-410, 412, and 413 to the Present Issue.**

Petitioner contends that his Amended Petition is not meant to be a device to reopen the probate, where it is a “Petition to Interpret” which does not require a reopening of the probate proceedings. *See* Petitioner’s Br. at 25-26. Petitioner states that his Petition is only to clarify ambiguity that exists concerning the language on the Deeds for the property distributed by the formal probate, and to determine the decedent’s true intent. *Ibid.*

However, Petitioner contradicts himself by stating that it is not necessary to reopen the probate proceedings, although he is seeking a judicial finding where the Amended Petition requests for the District Court to include a specific provision of the Will, ¶ VI(1), reappoint co-personal representatives, and for authorization of corrective deeds. R. at 138, ¶ 5, 22 (the second 22). It is improper procedurally and illogical to request for a judicial finding concerning the probated Will, where the Amended Estate Closing Order has been entered, without reopening that matter so it can be addressed judicially. Further, the Deeds must reflect the Will, or the re-construing of the Will, and that can only be done by reopening the matter and formally requesting for the District Court to amend, modify, and/or vacate the previous orders.

In accordance with the findings of the District Court, to have a judicial finding where the Will is construed, or rather re-construed, to add a specific provision would require an amending, modification, or vacation of the Orders previous construing the

Will. R. at 300, 112-19. Amending, modifying, and/or vacating these orders is not permissible pursuant to §§ 410, 412, and 413, where a formal probate order is subject to appeal or vacation and the time allotted to expired almost twenty-two (22) years ago. Petitioner may argue that it is only his objective to amend, modify, and/or vacate part of the previous Orders, although this would still be subject to the aforementioned statutory limitations.

Further, § 412(1) specifically states that all persons and all issues that the court considered or might have considered which are incident to the verification of a will and the determining of heirs are final when the District Court enters a formal testacy order. The issue of the life estate as to the oil, gas, and mineral rights, the construed ¶ VI(1) of the Will, is incident to the fact that the Will was formally verified and there was a formal determination of the heirs. As such, the Amended Estate Closing Order considered issues incident to the verification of the Will and the determination of heirs and is final subject to appeal or vacation, where both an appeal and vacation are barred in the present case by the time limitations set forth under Utah Code §§ 75-3-412(1), 413, and Utah R. App. P. 4(a), again by about twenty-two (22) years.

Petitioner may argue that the District Court did not consider the issue of a disbursement of royalty payouts regarding the life estate of the oil, gas, or mineral rights. However, that does not negate the fact that there is a final order concerning the interpretation of the Will regarding the life estate of the oil, gas, and mineral rights, which would be amended, modified and/or vacated were the District Court to include the

language requested by Petitioner in his Amended Petition. R. at 138, ¶ 22 (the second 22).

The doctrine of waste and life estates are almost synonymous with each other. Utah Code Ann. § 78B-6-1001 provides that waste of a life estate property establishes liability for which the remainder can seek relief. See *Dooley v. Stringham*, 7 P. 405, 408 (Utah 1985) (“[w]aste is substantial damage to the reversion, done by one having an estate of freehold for years, during the continuance of the estate[.]”) (brackets added). There can be no dispute that Petitioner’s use, as a life estate holder, of the oil, gas, or mineral rights constitutes waste as to the reminders. Likewise, it is not necessary to be specialized in property law to know that the duty of the life estate holder is to maintain the condition of the property for the benefit of the remainders. It is likely that the District Court considered, or may have considered, that any use of the oil, gas, or mineral rights by Petitioner would result in waste to the property and to include disbursement of payments to the remainders for their interest. At the very least, it is recorded in the Amended Estate Closing Order that the District Court considered the life estate concerning oil, gas, and mineral rights in relation to Respondents having a right as remainders. Therefore, since it is likely that the District either considered or might have considered the issue of the life estate concerning the oil, gas, and mineral rights concerning the benefits to both parties, § 412(1) is applicable and the issue was final when the Amended Estate Closing Order was entered, subject to appeal or subject to vacation pursuant to § 413.

It has been argued that limiting the District Court's authority to interpret a Will infringes on the intent of the Decedent and leaves affected heirs at an impasse, perpetually unresolved and without recourse in law. Likewise, that such results from the time limitations imposed under §§ 410, 412, and 413 disrupts the harmony of the Utah Probate Code when taken as a whole.

In addressing the former, the same argument concerning a decedent's true intent could be made in regards to the time limitations of §§ 410, 412, and 413 when there is a new or later offered will, which is found or brought forward after a formal testacy. Like in *In re Estate Chasel*, where not just one will was found after the final order, rather there was multiple wills, and the court found it prudent for there to be finality concerning the designation of the decedent's true intent and denied the probating of the newly discovered wills. 725 P.2d at 1347.

Petitioner claims that the court of appeals "never reached the legal merits of the case by disposing of it on grounds of statute of limitations," which is not true. *See Petitioner's Br.* at p. 33. The Opinion clearly states that "the statutory time limits for petitions for vacation or modification apply to the 2014 petition," which seems to dispose of the issue on the grounds of statute of limitations. C.A. at ¶ 17.

Petitioner misses the undeniable point of formal probate proceedings, which is to bring finality to a decedent's estate, where measures are taken to insure that the intent of the decedent is administered, although done so in a manner that is expeditious and efficient in "administering the estate of the decedent and making distributions to his successors." *See Utah Code Ann. § 75-3-102(2)*. Unless other property of the estate is

discovered after the estate has been settled in a formal testacy proceeding, all other issues are final. See Utah Code Ann. § 75-3-1008 ("If other property of the estate is discovered after an estate has been settled...the court upon petition of any interested person...may appoint the same or a successor personal representative to administer the subsequent-discovered estate). In the present issue there is no newly discovered property of the estate that would be subject to Utah Code Ann. § 75-3-1008. As such, the District Court relied upon §§ 410, 412, and 413 for finality to the formally probated estate.

As for the time limitations provided in the Utah Probate Code establishing perpetually unresolved issues without recourse in the law, whereby limiting the construing or re-construing of wills, that is simply not true. Like in the present case, where there is a life estate concerning oil, gas, and mineral rights, there are many such bequeaths around the country where no language is afforded concerning the waste by the life estate holder and royalty payment distributions. There is no legal authority specifically in Utah, but many states and Federal courts, including the Tenth Circuit, have established precedence based upon long held doctrines directly on point with the current issue. In Welborn v. Tidewater Assoc. Oil Co., the Tenth Circuit held that:

It is well settled that a remainderman may not make an oil and gas lease to permit immediate exploration and production with the consent of the life tenant. Likewise, a life tenant cannot drill new oil or gas wells, or lease the land to others for that purpose. A life tenant and the remainderman may lease the land by joint lease and they may agree as to the division of the rents and royalties. In the absence of such agreement, the life tenant is not entitled to any part of the royalties, but is entitled only to the income from such royalties.



217 F.2d 509, 510 (10th Cir. 1954). The court continued to hold that any royalties belonging to the remaindermen, where there is no agreement between the two parties, must be held in a corpus until the passing of the life estate holder, at which time the funds will then be released. *Id.* See also Burden v. Gypsy Oil Co., 40 P.2d 463, 468 (Kan 1935); Union Gas & Oil Co. v. Wiedermann Oil Co., 277 S.W. 323, 324 (Ky 1924); Carter Oil Co. v. McQuiqq, 112 F.2d 275, 280 (7th Cir. 1940); Wilson v. Youst, 28 S.E. 781, 785 (W. Va. App. 1897); Barnes v. Keys, 127 P. 261 (Okla. 1912); Shulthis v. MacDougal, 162 F. 331, 343 (8th Cir. 1907). As such, it is highly unlikely that the lack of an order from the District Court specifically addressing the disbursement of royalty funds will lead to the perpetual impasse where there is no recourse in law.

Therefore, the restrictions and time limitations provided in § 410, 412, and 413 are relevant and applicable to the present issue where Petitioner's request for re-construing of the Will requires the amending, modifying, and/or vacating of the Amended Estate Closing Order and the District Court did not err in relying on such limitations in denying and dismissing Petitioner's Amended Petition. Accordingly, based upon the foregoing, the court of appeals did not err in affirming the District Court's conclusion that Petitioner sought to amend, vacate, or modify the prior estate closing and was barred by statute of limitations.

**C. Utah Code Ann. § 75-3-107 is Not Relevant or Applicable to the Present Case Where Petitioner is Seeking to Amend, Modify, or Vacate an Estate Closing Order.**

Utah Code Ann. § 75-3-107(1) states that “[n]o informal probate proceeding or formal testacy proceeding, other than a proceeding to probate a will previously probated

at the testator's domicile, may be commenced more than three years after the decedent's death[.] (Bracket added).

Utah Code Ann. § 75-3-107(2) states that “[t]he limitations provided in Subsection (1) do not apply to proceedings to construe probated wills or determine heirs of an intestate. (Bracket added).

Petitioner states that § 107(2) provides “no time limitation for construing the Will as was requested in the Petition to Interpret.” *See* Petitioner's Br. at 39. However, Petitioner fails to recognize that § 107(2) only speaks to the applicability of construing a will within the time limitations of § 107(1), it does not provide a general allowance of the construing of wills as relating to the entire Utah Probate Code. In § 107(2), it states that the limitations in §107(1) do not apply to “proceedings to construe probated wills.” However, § 107(2) speaks only to the three year limitation provided in § 107(1), not to § 412 or § 413, or any other section in the Utah Probate Code. As such, it is not a valid statement that § 107(2) provides no time limitation for construing the Will, rather only as to § 107(1).

Respondents agrees that § 107(2) does provide that a probated will can be construed. However, Petitioner is requesting for the District Court to re-construe, not construe, Decedent's Will, ¶ VI(1), and to amend, modify, and/or vacate the Amended Estate Closing Order, which includes a construing of the Will sought by Petitioner. Section 107(2) does not speak to the re-construing of a probated will, which would be included in a judicial order, nor does it establish that an order in a formal testacy proceeding is without restrictions and time constraints, which would negate §§ 410,412,

and 413. Since § 107(2) does not provide an exception to the re-construing of wills or to restrictions and time limitations to formal testacy orders, it is not relevant or applicable to the present issue.

Therefore, since § 107 does not address re-construing of probated wills or that construing of wills is not subject to any other section in the Utah Probate Code except for Utah Code Ann. § 75-3-107(1), this statute is not relevant or applicable to the present issue.

### CONCLUSION

Therefore, based upon the foregoing, Respondents respectfully request for the court to affirm the Court of Appeal's affirming of the District Court's Ruling and Order, denying and dismissing Petitioner's Amended Petition.

DATED AND SIGNED this 5th day of January, 2017.

**SALCIDO LAW FIRM, PLLC**

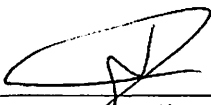


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**CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)(C)**

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1)(A) because this brief contains 7,747 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) since this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Times New Roman style.

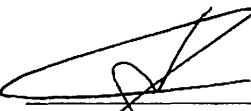
DATED AND SIGNED this 5th day of January, 2017.

  
\_\_\_\_\_  
Jon M. Hogelin  
Attorney for Respondents/Appellees

**CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of January, 2017, true and correct copies of the foregoing **BRIEF OF APPELLEES**, were sent, postage pre-paid, first class, U.S. Mail, to:

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## **ADDENDUM**

**Uniform Probate Code**  
**(§§ 3-410, 412, & 413) (2013)**

# **UNIFORM PROBATE CODE (1969)**

(Last Amended or Revised in 2010)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT  
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WITH COMMENTS

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be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by Section 3-612. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death, may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

#### **Comment**

Model Probate Code (1946) Section 80(a), slightly changed. If the court is not satisfied that the alleged decedent is dead, it may permit amendment of the proceeding so that it would become a proceeding to protect the estate of a missing and therefore "disabled" person. See Article V of this Code.

**SECTION 3-410. FORMAL TESTACY PROCEEDINGS; PROBATE OF MORE THAN ONE INSTRUMENT.** If two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how many provisions of a particular instrument are affected by the other instrument. After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of Section 3-412.

#### **Comment**

Except as otherwise provided in Section 3-412, an order in a formal testacy proceeding serves to end the time within which it is possible to probate after-discovered wills, or to give effect to late-discovered facts concerning heirship. Determination of heirs is not barred by the

three year limitation but a judicial determination of heirs is conclusive unless the order may be vacated.

This section authorizes a court to engage in some construction of wills incident to determining whether a will is entitled to probate. It seems desirable to leave the extent of this power to the sound discretion of the court. If wills are not construed in connection with a judicial probate, they may be subject to construction at any time. See Section 3-108.

#### **SECTION 3-411. FORMAL TESTACY PROCEEDINGS; PARTIAL**

**INTESTACY.** If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the court shall enter an order to that effect.

#### **SECTION 3-412. FORMAL TESTACY PROCEEDINGS; EFFECT OF ORDER;**

**VACATION.** Subject to appeal and subject to vacation as provided in this section and in Section 3-413, a formal testacy order under Sections 3-409 to 3-411, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

(1) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will:

(A) were unaware of its existence at the time of the earlier proceeding; or

(B) were unaware of the earlier proceeding and were given no notice thereof,

except by publication.

(2) If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted from the determination and it is also shown that the persons were unaware of their relationship to the

decedent, were unaware of his death or were given no notice of any proceeding concerning his estate, except by publication.

(3) A petition for vacation under paragraph (1) or (2) must be filed prior to the earlier of the following time limits:

(A) if a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, six months after the filing of the closing statement;

(B) whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by Section 3-108 when it is no longer possible to initiate an original proceeding to probate a will of the decedent; or

(C) twelve months after the entry of the order sought to be vacated.

(4) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs.

(5) The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at his last known address and the court finds that a search under Section 3-403(b) was made.

If the alleged decedent is not dead, even if notice was sent and search was made, he may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is

equitable in view of all of the circumstances.

#### **Comment**

The provisions barring proof of late-discovered wills is derived in part from Section 81 of Model Probate Code (1946). The same section is the source of the provisions of paragraph (5) above. The provisions permitting vacation of an order determining heirs on certain conditions reflect the effort to offer parallel possibilities for adjudications in testate and intestate estates. See Section 3-401. An objective is to make it possible to handle an intestate estate exactly as a testate estate may be handled. If this is achieved, some of the pressure on persons to make wills may be relieved.

If an alleged decedent turns out to have been alive, heirs and distributees are liable to restore the "estate or its proceeds". If neither can be identified through the normal process of tracing assets, their liability depends upon the circumstances. The liability of distributees to claimants whose claims have not been barred, or to persons shown to be entitled to distribution when a formal proceeding changes a previous assumption informally established which guided an earlier distribution, is different. See Sections 3-909 and 3-1004.

1993 technical amendments clarified the conditions intended in paragraphs (1) and (2).

**SECTION 3-413. FORMAL TESTACY PROCEEDINGS; VACATION OF ORDER FOR OTHER CAUSE.** For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal.

#### **Comment**

See Sections 1-304 and 1-308.

**SECTION 3-414. FORMAL PROCEEDINGS CONCERNING APPOINTMENT OF PERSONAL REPRESENTATIVE.**

(a) A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as personal representative, or of one who previously has been appointed personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by Section 3-402, as well as by this section. In other cases, the petition shall contain or adopt the statements required by Section 3-301(1) and describe the question relating to priority or qualification of the personal