

1966

## In the Matter of the Estate of Clarence Henry Mcfarland : Respondent's Brief

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Pugsley, Hayes, Rampton & Watkiss; Attorney for Respondents

---

### Recommended Citation

Brief of Respondent, *In Re: McFarland*, No. 10506 (1966).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/3738](https://digitalcommons.law.byu.edu/uofu_sc2/3738)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSITY OF UTAH

---

AUG 25 1966

LAW LIBRARY

IN THE MATTER OF THE  
ESTATE OF CLARENCE  
HENRY McFARLAND,

Deceased.

} Case No.  
10506

---

## RESPONDENTS' BRIEF

---

Appeal from the Judgment of the Third District Court  
of Salt Lake County

Honorable Marcellus K. Snow, Judge

UNIVERSITY OF UTAH

---

SEP 30 1966

LAW LIBRARY

PUGSLEY, HAYES, RAMPTON & WATKISS  
600 El Paso Natural Gas Bldg.  
Salt Lake City, Utah  
Attorney for Respondents

ARTHUR A. ALLEN, JR.  
1007 Kearns Building  
Salt Lake City, Utah  
Attorney for Appellant

# FILED

APR 22 1966

---

Clock, Supreme Court, Utah

## TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE....	1
DISPOSITION IN THE LOWER COURT....	1
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF FACTS .....	2
ARGUMENT	
I. THE APPEAL SHOULD BE DIS- MISSED FOR FAILURE OF APPELLANT TO PERFECT THE APPEAL OR CON- FORM TO THE RULES. ....	5
II. THE ORDER OF THE COURT BE- LOW WAS PROPER AND SHOULD BE AFFIRMED. ....	6
A. THE MOTION OF APPELLANT WAS NOT TIMELY MADE. ....	7
B. THE SALE WAS A PUBLIC SALE AND THE ORDER OF THE COURT CONFIRMING THE SALE WAS VALID AND PROPER. ....	7
C. THE EXECUTRIX IS ESTOPPED FROM ATTACKING THE VALIDITY OF THE SALE AND CONFIRMATION... ..	14
CONCLUSION .....	16

## AUTHORITIES CITED

## Statutes

Utah Code Annotated, 1953, 75-10-2 .....	10
Utah Code Annotated, 1953, 75-10-3 .....	10
Utah Code Annotated, 1953, 75-10-12 ....	8, 10, 11, 12
Utah Code Annotated, 1953, 75-10-15 .....	12, 13
Utah Code Annotated, 1953, 75-10-16 .....	7, 12, 14
Utah Rules of Civil Procedure, Rule 59 (b) and 59 (e) .....	7
Utah Rules of Civil Procedure, Rule 73 (a) .....	6
Utah Rules of Civil Procedure, Rule 75 (p) (1)....	6

## Cases

Lawrence vs. Butterfield, 12 Ut. 2d 347, 336 P. 2d, 607 .....	6
LePasiotes vs. Dinsdale, 242 P. 2d, 121 Ut. 359 ....	6
Nielson's Estate vs. Nielson, 107 Ut. 564, 155 P. 2d. 968 .....	14
Plimpton vs. Mattakeunk Cabin Colony, (D.C. Conn.) 9 Fed. Supp. 288, 306 .....	11

## Texts

4 A.L.R. 2d, 575 .....	11
Bancroft Probate Practice, 2d Edition, Sections 608 and 609 .....	15
34 C.J.S., Section 615, Executors and Administrators .....	15
34 C.J.S., Section 616, page 593 .....	15

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

IN THE MATTER OF THE  
ESTATE OF CLARENCE  
HENRY McFARLAND,  
Deceased. } Case No.  
10506

---

## RESPONDENTS' BRIEF

---

### STATEMENT OF THE KIND OF CASE

This is an appeal by the Executrix of the Estate of Clarence Henry McFarland, Deceased, from an Order of the District Court denying the motion of such Executrix to set aside an Order Confirming Sale of real property and to dismiss the petition for Confirmation of Sale of such property.

### DISPOSITION IN THE LOWER COURT

The lower Court overruled the motion of the Executrix, the appellant herein, and ordered that the Order

Confirming Sale of real property theretofore entered should remain in full force and effect (R 21).

## RELIEF SOUGHT ON APPEAL

While the appellant has failed and declined to submit a brief outlining its position or contentions or relief sought, it is assumed that appellant seeks a reversal of the Order of the District Court denying appellant's motion hereinafter referred to.

Respondents ask only that the appeal be dismissed and the order of the lower Court be affirmed.

## STATEMENT OF FACTS

The above-entitled matter is predicated upon an Order Confirming Sale of an interest in real property in the above-entitled estate. Sarah Jane McFarland, the duly qualified and acting Executrix of the estate, petitioned the Court for confirmation of sale of an undivided three-fourths interest in and to certain real property in Salt Lake County, Utah, said undivided interest being the interest which the estate held therein, the other undivided interest being held by one, Leslie W. and Deon B. Davis. An agreement for the sale of the undivided interest of the decedent, Clarence Henry McFarland, and of his estate, was entered into by said Executrix simultaneously with an agreement on the part of the said Davises to sell their undivided

interest. The purported purchaser of the estate interest was one, William C. Roderick, who, according to the Petition of the Executrix for Confirmation of Sale, had agreed to pay a total of \$3,500.00 for the whole property, three-fourths of which (or \$2,625.00) would become an asset of the estate by virtue of its interest in the whole property (R 2). The petition of the Executrix further alleged that the amount offered was in excess of 90% of the value of said real property.

The petition of the said Executrix further set forth as the basis for the petition that it was to the best advantage and interest of the estate that the same be sold and the sale confirmed by reason of the location and the joint ownership.

The Executrix of the estate, who signed the Petition for Confirmation, namely, Sarah Jane McFarland, was and is likewise the sole beneficiary of the estate under the Will of the decedent (R 29).

The Petition for Confirmation of Sale prayed that a time and place be fixed for the hearing of the petition and that notice be given to the persons entitled thereto in the manner required by law and the Order of the Court. Due and proper notice was given of the hearing on said petition by both mailing to all interested parties and by posting notice in three public places (R 27 and 28).

On the date set for hearing the Petition for Confirmation of the Sale, to-wit, on the 21st day of October,

the Court, the Honorable Marcellus K. Snow sitting, in open Court, opened the matter to public bid and asked whether or not there were any other, further or better bids for the property. Thereupon, Gordon C. Holt and Sterling G. Webber submitted a bid based upon \$4,000.00 for the whole of said property, which would result in three-fourths thereof, or \$3,000.00, being bid for the interest of the estate in said property, which said bid was more than 10% higher than the bid theretofore made and was considered by the Court to be a better bid than that previously made. The said Holt and Webber thereupon tendered to the Executrix, through the Court, more than 10% of said bid and further tendered, through the Court, a written agreement and offer to purchase said property on the basis therein set forth (R 5, 6, and 17). No other or better bids were made, and the Court thereupon sold said property to the said Holt and Webber and confirmed the said sale.

The Executrix, through her attorney, or otherwise, failed to have prepared an Order Confirming Sale, and the said Holt and Webber thereupon presented to the Court an Order Confirming Sale, and on the 24th day of March, 1965, the Court entered its Order Confirming Sale of said property to Gordon C. Holt and Sterling G. Webber and ordered the Executrix to issue an Executrix Deed for said property in customary form upon tender of the balance of the bid price therefor. Notwithstanding the tender of such purchase price and request for said Deed, the Executrix failed and refused



to execute and deliver the same to the said Holt and Webber.

On the 6th day of April, 1965, the Executrix filed a Motion for an Order dismissing the Petition for Confirmation of Sale and to declare null and void the Order Confirming Sale to Gordon C. Holt and Sterling G. Webber dated March 24, 1965 (R 7-9).

Objections to said Motion were filed by Holt and Webber (R 14-17). The Motion was considered finally by the Honorable Marcellus K. Snow on November 22, 1965, at which time he overruled the Motion to set aside the Order Confirming Sale (R 20) and on said date issued his Order denying said motion (R 21).

From the Order denying the motion of the Executrix to set aside the Order Confirming Sale, the Executrix appealed. The Executrix, through her counsel of record, has chosen not to file a brief in the action and simply stand on the record. Hence, the necessity for respondents to detail the facts of the action as above set forth.

## ARGUMENT

### I

THE APPEAL SHOULD BE DISMISSED FOR FAILURE OF APPELLANT TO PERFECT THE APPEAL OR CONFORM TO THE RULES.

The appellant has failed to perfect its appeal by failure to comply with the rules of this Court requiring the filing of an appellant's brief within one month after the record on appeal was filed in the Supreme Court (Rule 75 (p) (1), Utah Rules of Civil Procedure). Not only has the appellant failed to so comply, but the appellant has served notice upon the Court that it does not intend to comply with that rule. (See appellant's document filed in this Court on March 21, 1966 entitled "Notice of Reliance on Record on Appeal and Upon Certain Statutory Provisions and Cases.")

This Court held in the case of *LePasiotes vs. Dinsdale*, 242 P. 2d, 121 Ut. 359, that where an appellant failed to specifically designate matters constituting prejudicial error so that respondents could clearly and fairly meet appellant's contentions, that the Court will not review such claims of prejudicial error so generally assigned. See also *Lawrence vs. Butterfield*, 12 Ut. 2d. 347, 366 P. 2d, 607.

By reason of the failure and refusal of appellant to comply with the rules of the Court, we urge that the appeal should be dismissed. (Rule 73 (a) Utah Rules of Civil Procedure.)

## II

THE ORDER OF THE COURT BELOW  
WAS PROPER AND SHOULD BE AF-  
FIRMED.

*A. The Motion of Appellant Was Not Timely Made.*

The Order of the Court confirming the sale of the real property in question was made and entered by the Court on the 24th day of March, 1965 (R 6). Such an Order became a final judgment as to the matters therein set forth upon the entry thereof, the sale from that time being valid and binding (75-10-16, Utah Code Annotated, 1953). If the appellant was to interpose any motion to set aside the judgment or to alter or amend the judgment of the Court, such motion was required to be served not later than ten (10) days after the entry of the judgment. (Rule 59 (b) and 59 (e), Rules of Civil Procedure.) The motion of the Executrix to set aside the Order of the Court was not made nor filed until April 6, 1965, which was twelve days after the entry of the judgment, and hence, was not within the time prescribed by the rules of the Court.

*B. The Sale was a Public Sale and the Order of the Court Confirming the Sale was Valid and Proper.*

In the argument hereinafter set forth, we will endeavor to cover all phases of the matter which were presented by verbal argument of the appellant in the Court below, in view of the fact that appellant has chosen to file no brief or argument in support of its contentions in this Court. Likewise, the code sections mentioned in the document filed in this Court by the appellant entitled "Notice of Reliance Upon Record on Appeal" etc., will be referred to herein.

The primary contention, and in fact the sole contention, of the appellant in its arguments in the Court below, was that in spite of the fact that appellant-executrix had filed its Petition for Confirmation of Sale setting forth grounds and reasons therefor and alleging that the amount offered for the property as sought to be condemned was fair and in excess of 90% of the value of the property, that nevertheless, inasmuch as the appraisal was not in fact made and on file, the Court could not properly sell or confirm a sale of the property in these proceedings.

The appellant then replied and apparently now relies upon Section 75-10-12, Utah Code Annotated, 1953, which reads as follows:

“75-10-12. Confirmation of private sale. No sale of real estate at *private sale* shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof as in the case of an original appraisement. This may be done at any time before the sale or the confirmation thereof.”

It should be observed that the Petition for Confirmation of Sale signed and verified by Sarah Jane McFarland, the Executrix of the Estate of Clarence Henry McFarland, Deceased, and the appellant herein,

after setting forth as the primary basis for the sale that it would be to the advantage, benefit and interest of the estate because of the fact that it was simply an undivided interest in property held in common ownership with someone other than the estate, prayed that notice be given of the hearing in the manner provided by the law and by the Order of the Court.

Notice was accordingly given to all persons interested and to the public generally through the posting of notices in three public places, to-wit, the west front entrance of the County Courthouse, on a public posting board at 33rd South and State Streets, and in the Post Office in Murray, all in Salt Lake County, Utah, where said notices remained posted for ten days. Said notices set forth the terms of the offer theretofore made on the property so that the public was informed with regard thereto and thereby invited to appear and to bid at the time set for the sale of said property (R 27 and 28).

At the time appointed for the sale as set forth in the public notices thereof, the Court opened the matter up for public bid, asking for any other, further or higher or better bids than the one which had been made and concerning which the confirmation was sought (R 5). Such having been done, the sale then became a "public sale" and not a "private sale" of the property involved. It is important to note that our probate code from its very inception has and still does recognize both public and private sales and the differentiation

thereof in connection with property sold or to be sold in probate proceedings.

Section 75-10-2, U.C.A., to which appellant refers, simply reads as follows:

“Sale to be reported to and confirmed by court. All sales must be reported under oath to, and confirmed by, the Court before the title to the property sold passes, except as hereinafter otherwise provided.”

Section 75-10-3 immediately following that section, however, states:

“Sales—Report and confirmation. The executor or administrator may sell any property of the estate without order of the court, *at either public or private sale* and with or without notice as he may determine, but must make return of such sales in all cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such direction must be observed. In any case, no title passes unless the sale is confirmed by the court.”

The provisions of 75-10-2 are duplicated by 75-10-3, except for the references in the latter to both public and private sales. The purpose, of course, of the reference to this section is again to emphasize that our probate code expressly recognizes that sales of property thereunder may be at either *public* or *private* sale, but that the requirements of Section 75-10-12 relate only to private sales.

The law is simple and clear and adopts a common sense rule as to what is a public sale as opposed to a

private sale. A public sale is simply a sale in which the public, upon proper notice, is invited or permitted to participate. See annotation 4 A.L.R. 2d, 575, and Words and Phrases, Vol. 35, page 625. Even though the original offer to purchase the property may have been initiated on the basis of a private sale, the sale as conducted clearly was a public sale and the confirmation was of a public sale, after due notice where everyone and anyone desiring to do so had an opportunity to bid on the property. See in this connection *Plimpton vs. Mattakeunk Cabin Colony*, (D.C. Conn.) 9 Fed. Supp. 288, 306, in which the Court held that where equity receivers entered into a contract of sale with the purchaser, subject to confirmation by the Court, and notice was given to all interested parties and other bids were invited, and there was opportunity for fair competitive bidding, and a sale was confirmed at a public hearing, such sale was a "public sale" and not a private sale as respects validity, and that the confirmation thereof should not be disturbed.

Referring again to Section 75-10-12 entitled "Confirmation of *Private Sale*" it commences by defining the matter to which it relates as follows:

"No sale of real property at *private sale* shall be confirmed by the Court unless . . ."

Note that it does not say "at public or private sale" as do other sections of the probate code, nor does it simply refer to "sale" generally, but is definite and specific in limiting such to private sales.

There is, of course, an obvious reason for the provision of Section 75-10-12 in requiring a current appraisal before confirmation of a private sale, because at a private sale there is opportunity for unscrupulous executors or administrators to connive with persons interested in purchasing property at private sale so as to permit them to obtain said property at less than its reasonable value, to the detriment of others interested in the estate. When, however, the property is opened up for public bid in open court after notice, the prime reason for the current appraisal disappears in the face of competitive public bidding.

The code sections which vitally affect this matter, other than those heretofore quoted and which clearly give the Court authority to make a valid sale and order confirming the same, are Section 75-10-15 and 75-10-16, which read as follows:

**75-10-15. *Vacation and resale for better price.*** If the sale was unfair or the sum bid disproportionate to the value, or if it appears that a sum exceeding such bid by at least ten per cent, exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had. *If an offer greater in amount than that named in the return is made to the court in writing by a responsible person, the court may accept such offer and confirm the sale to such person, or order a new sale. (Italics added).*

**75-10-16. *Confirmation of sale.*** If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid is not



disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in the next preceding section is accepted by the court, the court must make an order confirming the sale, and directing conveyances to be executed. The sale from that time is confirmed and valid. If after the confirmation the purchaser neglects or refuses to comply with the terms of sale, the court may, on motion of the executor or administrator and after notice to the purchaser, order a resale of the property to be made. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable to the estate for the deficiency.

We observe that Section 75-10-15 relates to all sales without distinction as to whether they are public or private. In the matter before the Court, a bid was made by Holt and Webber exceeding the previous bid by at least 10%; the Court thereupon had authority to vacate the attempted sale to Roderick. Furthermore, at that time and in the public bidding, an offer in a greater amount than that previously bid was in fact made to the Court in writing (R 17) by a responsible person. The Court thereupon under the authority of the last sentence of Section 75-10-15 accepted such greater offer and confirmed the sale. (We point out that the last sentence of 75-10-15 seems to stand alone in authorizing the Court to act when conditions therein set forth are met.) The Court thereafter made and entered its formal order confirming the sale and directing the conveyance of the property to Holt and Webber

(R 6). The sale from that time was confirmed and valid. (Section 75-10-16).

The trial court in its sound discretion overruled the objections of the petitioner and appellant herein to the confirmation, and its motion to set aside the order confirming the sale. This court has held in *Nielson's Estate vs. Nielson*, 107 Ut. 564, 155 P. 2d. 968, that where a sale of property is made on a representation in the petition that it is for the benefit and best interest of the estate, and the Court having confirmed the sale, that:

“In reviewing an order confirming a sale or denying application for confirmation of sale, such order will not be set aside except upon a showing of abuse of discretion. There must be a showing of misapprehension of the facts by the court or capricious or arbitrary action without due regard to facts and circumstances.”

There has been no showing, nor any scintilla of proof that the Court did abuse its discretion in this matter.

*C. The Executrix is Estopped from Attacking the Validity of the Sale and Confirmation.*

The petition for confirmation of sale was made and signed by Sarah Jane McFarland, who is both the Executrix of the Estate and likewise the sole beneficiary under the Will of the decedent (R. 29). It is a uniform rule of law that a petitioner may not object to the confirmation of the sale, but waives the objection through the petition filed; furthermore, that objections

do not lie if they could have been raised on the hearing for confirmation. See Bancroft Probate Practice, 2d Edition, Sections 608 and 609. The same volume at Section 611, page 190, further sets forth the rule that if the only persons interested have ratified there can be no proper objections to the confirmation. In 34 C.J.S., Section 615, Executors and Administrators, the rule is stated thus:

“Neither the representative who made the sale nor his surety can impeach the validity of the proceedings instituted and conducted by such representative.”

Again in that same volume, Section 616 at page 593, it is stated:

“One who might otherwise successfully attack a sale may be estopped from so doing under the principles governing estoppel generally. Thus, one will not be heard to complain of defects for the existence of which he is himself responsible, or to object to the regularity of proceedings had on his own application, or instigation, or which he has aided in carrying into effect or consented to.”

It should be obvious under the authorities above set forth that the executrix, being the sole beneficiary and the only one having an interest in this matter, having initiated the proceedings and having requested the Court to confirm the sale, clearly has waived any objection to the proceedings thereunder or the validity thereof and is estopped to object to the sale made by the Court and the order of the Court confirming such

sale. Parenthetically in this regard, it should be stated that the full purchase price represented by the offer of Holt and Webber, which was accepted and confirmed, was long ago paid to the executrix and has never been returned or tendered back.

## CONCLUSION

For the reasons set forth above, we respectfully submit that the appeal should be dismissed and the order of the lower court affirmed.

Respectfully submitted,

ZAR E. HAYES

PUGSLEY, HAYES, RAMPTON  
& WATKISS

600 El Paso Natural Gas Bldg.  
Salt Lake City, Utah

Attorneys for Respondents