

2016

**GREG TORGERSON, Plaintiff and Appellant, v. JOSH TALBOT, TEX
R. OLSEN, ESTATE OF BRET KOUNS, Defendants and Appellees. :
Brief of Defendant/Appellee**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GREG TORGERSON,

Plaintiff and Appellant,

v.

JOSH TALBOT, TEX R. OLSEN,
ESTATE OF BRET KOUNS,

Defendants and Appellees.

)
) **BRIEF OF**
) **DEFENDANT/APPELLEE**
)

) **Case No. 20160759**
)
)
)

**RESPONSE IN OPPOSITION TO PLAINTIFF/APPELLANT'S
APPEAL FROM THE GRANTING OF A MOTION TO DISMISS
PLAINTIFF'S DECLARATORY JUDGMENT ACT COMPLAINT
IN THE SIXTH DISTRICT COURT
IN AND FOR SEVIER COUNTY, STATE OF UTAH
HONORABLE WALLACE A. LEE**

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STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Code Annotated §78A-4-103 to review the District Court's order dismissing Appellant's collateral declaratory act complaint.

ISSUES PRESENTED FOR REVIEW

Appellant has misstated the issue presented by this appeal. The District Court granted Defendants' Motion to Dismiss. The Motion to Dismiss was based upon the fact the District Court was without jurisdiction. An action was pending in the Probate Court which had jurisdiction over the subject matter.

Therefore, Appellee does restate the issue presented for review.

1. Did the Probate Court of the Sixth Judicial District have jurisdiction over the parties and subject matter in District Court Case No. 153600021 and Appellate No. 20160758?

STANDARD OF REVIEW

A District Court's legal conclusions are given no deference by the Appellate Court.

PRESERVATION OF THE ISSUES

The issues raised in Appellant's brief were not preserved for appellate review. The District Court was without jurisdiction to consider a late filed collateral declaratory judgment act complaint while the same issues were being litigated in a separate probate proceedings in Case No. 153600021.

DETERMINATIVE STATUTES, RULES AND ORDINANCES

Utah Code Annotated §75-1-302, Utah Code Annotated §75-3-704, Utah Code Annotated §75-3-804(2), Utah Code Annotated §78B-6-404, Utah Code Annotated §78B-6-410.

STATEMENT OF THE CASE

A statement of the case is unusual since it requires the statement of facts before the Court in a separate probate action (Case No. 153600021). Decisions in the probate case are separately appealed to this Court and have been assigned Appellate No. 20160758. Since probate action had exclusive jurisdiction, Appellee will refer to the facts developed in the probate matter.

On March 10, 2016, the Personal Representative of the Estate of Donald Bret Kouns filed a Petition for Court Approval of an Agricultural Lease and Option to Sell Estate Property. In the petition, the Personal Representative explained that even though Appellant Greg Torgerson's claim against the estate was barred, Peterson was apprehensive that unless the Court assumes jurisdiction and approves the petition Greg Torgerson (Appellant) will unlawfully interfere. The petition also requested a Writ of Assistance authorizing peace officers to intervene if necessary.

Appellant Torgerson filed no response to the petition. Instead, on the 24th of March 2016, through counsel Lloyd Rickenbach, filed a Complaint for Declaratory Relief in a separate case numbered 160600010. The complaint seeks a declaration from the Court that

Torgerson has a lease on estate property that is valid. The lease attached to the Complaint was the same lease being reviewed in the probate proceedings. It was a purported agreement dated April 17, 2007 for the lease of "Charlie's Pasture and Town Cow Pasture east of Koosharem" for grazing of cattle for a consideration of \$15/head. The lease described no real property. A Motion to Dismiss the Declaratory Judgment Complaint was filed since the Court was without jurisdiction. The matter was pending and being adjudicated in the Probate Court. The District Court granted the Defendants' Motion to Dismiss the Collateral Declaratory Judgment Complaint

STATEMENT OF FACTS

The following facts are relevant to this appeal:

1. Complaint for Declaratory Judgment filed March 24, 2016 (Record on Appeal [ROA 1-14].
2. Motion to Dismiss Plaintiff's Complaint on jurisdictional grounds served 3/31/2016 (ROA 31-32).
3. Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's Complaint 3/31/2016 (ROA 31-32).
4. Combined Memorandum Decision and Order Dismissing Declaratory Judgment Act Complaint 8/15/2016 (ROA 185-209).

The Appellee demonstrates prior jurisdiction in the Probate Court (District Court No. 153600021 - Appellant No. 20160758) by restating facts set forth in the proceedings:

- (1) On June 10, 2015, the decedent, Donald Bret Kouns, hereinafter referred to as “Kouns” passed away. (Record on Appeal [hereafter ROA] 1-4)
- (2) On the 19th day of June 2015 Pam Peterson (hereinafter referred to as “Peterson” or “Personal Representative”) filed an Application for Informal Probate of Will and Appointment of Personal Representative. (ROA 1-4)
- (3) On July 8, 2015 Peterson was appointed Personal Representative of Kouns’ probate estate in Case No. 153600021. (ROA 16-17)
- (4) August 20, 2015 Peterson, through her counsel, advised Torgerson of the termination of all powers of attorney held by him; that his request to Peterson for “Agreement to Continue Lease and Sell Property” to Torgerson “will not be signed to give you a preference which you have outlined” and that any verbal lease Torgerson held was terminated. The letter notice further advised Torgerson he was allowed “to continue use of the property for the 2015 agricultural season which ends October 1, 2015.” Letter notice of August 20, 2015. (ROA 65-70)
- (5) On July 14, 2015 Peterson filed a notice to Greg Torgerson acknowledging Greg Torgerson (hereinafter “Torgerson”) had filed a demand notice and provided Torgerson with copies of the order and letters certifying Peterson’s appointment, along with a copy of a Notice to Creditors published in the Richfield Reaper, beginning July 15, 2015. (ROA 19-25)

(6) On October 7, 2015, Torgerson, acting pro se filed a "Claim Against the State". (ROA 26)

(7) On October 9, 2015 Peterson filed a Denial of the Claim on the basis that there was no contract between the decedent and Torgerson which granted rights in property now owned by the estate. (ROA 30-31)

(8) On March 10, 2016 Peterson filed a petition for court approval of agricultural lease and option to sell estate property ("the petition"). The petition further requested a writ of assistance requiring peace officers to intervene. A copy of the petition was mailed to Torgerson and to Lloyd Rickenbach. (ROA 32-35)

(9) April 4, 2016 Affidavits of Pam Peterson, Josh F. Talbot and Dallas Blaine Hatch in support of petition were filed and served upon Rickenbach. (ROA 36-45)

(10) Torgerson did not file any response to the petition for court approval of agricultural lease and option to sell estate property in Probate Case No. 153600021.

(11) On March 24, 2016 Torgerson through counsel, Rickenbach, filed a Complaint for Declaratory Relief in a separate case no. 160600010. Torgerson's complaint named the Estate of Bret Kouns, Pam Peterson (executor) and Tex Olsen, attorney for Personal Representative and Josh

Talbot as Defendants.

(12) On March 29, 2016, Peterson filed a Request to Submit the Petition in the probate proceedings 153600021 for decision and submitted to the Court a proposed Order and Writ of Assistance directed to the Sheriff of Sevier County. The proposed orders were served on both Torgerson and Rickenbach. (ROA 52-53)

(13) Previously on November 19, 2015 attorney Rickenbach served notice on Peterson and Olsen, her attorney, that he represented Torgerson concerning all matters in “Bret Kouns Estate Probate No. 153600021 (ROA 197).

(14) Although Torgerson was in default and filed no objection to the petition in Probate No. 153600021 the Court scheduled oral argument for April 18, 2016 on the request for a default order. (ROA 63-64)

(15) On the 30th day of March, 2016 the Court notified Attorney Olsen of the hearing. (ROA 63-64)

(16) On March 30, 2016 a copy of the Notice of Oral Argument was mailed to Lloyd D. Rickenbach, attorney at law, 117 Rickenbach Road, Koosharem, Utah 84744, postage prepaid. (ROA 213-237)

(17) On Saturday, April 16, 2016 Rickenbach claims he was not given notice of the April 18, 2016 hearing date (ROA 64).

(18) Rickenbach on Saturday, April 16th did file a Motion for a Continuance

of the Hearing of April 18, 2016 (ROA107-109).

(19) Rickenbach claims to be a resident of the State of Arizona when he discovered the April 18, 2016 hearing date (ROA351). Since the alleged fact of residency appears to be inaccurate the following facts are stated:

A. Rickenbach's appearance in the Bret Kouns Estate, Probate No.

153600021 dated November 19, 2015 stated:

Lloyd Rickenbach,
P.O. Box 440008
Koosharem, Utah 84744

B. All pleading headings:

Lloyd D. Rickenbach (096406)
P.O. Box 44008
Koosharem, UT 84744

Including address shown on Motion for a Continuance of April 16, 2016 and all subsequent motions and memorandums.

C. Address listing in 2016 Legal Eagle Directory Services showing at page 237 the address of

Lloyd D. Rickenbach
117 Rickenbach Road
Koosharem, UT 84744

(20) At 1:30 p.m. on April 18, 2016 the Court convened Probate Case No. 153600021 for oral argument as scheduled. Only Olsen and Peterson appeared. Olsen expressed surprise and objected to any continuance. Olsen

advised the petition was critically important to his clients because the spring planting season was in progress and the estate could not marshal estate assets and use them or sell them for the benefit of the estate beneficiaries and a decision was needed.

(21) On April 18, 2016 the Court directed the clerk to place a telephone call from the bench to Rickenbach's office at the telephone number listed on his pleadings. No contact could be made.

(22) April 18, 2016, the Court considered the Motion for a Continuance and ruled the motion was not timely filed and the motion was denied.

(23) April 19, 2016 at 4:57 the Court executed the proposed orders including an Order Approving the Lease and Option to Sell Estate Property together with a Writ of Assistance directed to the Sheriff of Sevier County to assist the estate in taking possession of the property for delivery to lessee Talbot. (ROA 122-125)

(24) Approximately seven minutes after filing the orders of April 19, 2016 (5:04 p.m.) Rickenbach filed his Motion for Rule 60 Relief from Judgment. (ROA 126-129)

(25) On April 20, 2016 Torgerson filed his Motion for Rule 64(f) Discharge of Wrongfully Obtained Order and Writ of Assistance. (ROA 130-155)

(26) On July 11, 2016 a hearing was held on Torgerson's Rule 60 Motion

which claimed Torgerson should be relieved of the judgment order because of the Court failing to send Torgerson notice on the 18th of April, 2016 hearing.
(ROA 308)

(27) The District Court issued a decision denying Torgerson's Rule 60 Motion on August 15, 2016 (ROA306-331)

SUMMARY OF ARGUMENT

The Appellant filed a Complaint seeking a declaratory judgment. The Appellee filed a Motion to Dismiss the Complaint since the subject matter was before the Probate Court having jurisdiction to adjudicate the matter. Therefore, the Court had no jurisdiction to consider the declaratory judgment action.

Although the matter was irrelevant to the granting of the Motion to Dismiss because of lack of jurisdiction, the Court did consider the fact that the action was time barred because of U.C.A. §75-3-804(2). It is true an action for specific performance is outside the claimed section cited. Torgerson had to demonstrate to the Personal Representative and to the District Court that a claim for specific performance existed. It was determined in the probate proceedings and hearing of July 11, 2016 on Appellant's 60(b) motion that no reasonable claim for specific performance exists. The Court determined there was "no meritorious defense" to entered orders.

Since Appellant failed to show a meritorious defense which sets forth specific and significantly detailed facts which, if proven, would have resulted in a judgment different than

the one entered, the claim was time barred.

BACKGROUND AND INTRODUCTION TO ARGUMENT

On March 24, 2016 Torgerson filed a Complaint for Declaratory Judgment. On March 31, 2016 the Personal Representative of the Kouns filed a motion and supporting memorandum to dismiss the declaratory judgment action. The basis of the motion was that the declaratory judgment action was without jurisdiction since the Probate Court had exclusive jurisdiction over the matter and the parties.

The motion filed served two purposes:

1. It demonstrated the District Court was without jurisdiction to consider the collaterally filed declaratory judgment action.
2. It put Appellant (Torgerson) on notice the matter was pending in the Probate Court and any defenses claimed should be filed in that action. If no filings were made it would follow that default relief would be available for the Personal Representative. No pleadings, or defenses were asserted in the probate matter and 19 days later default orders were entered granting relief.

Since the Probate Court had primary jurisdiction over the problems at issue a review of the probate proceedings follows:

On the 10th of June, 2015, the decedent, Donald Bret Kouns (hereinafter “Kouns”) passed away. On the 19th day of June 2015, Pam Peterson (hereinafter “Peterson” or “Personal Representative”) filed Application for Probate of Will and for Appointment as

Personal Representative. On July 8, 2015 Peterson was appointed Personal Representative of the Kouns estate in Case Number 153600021 (Appellate No. 20160758).

On October 7, 2015, Torgerson filed a “Claim Against the State”. Among other things he claimed a lease of undescribed property, water stock, irrigation equipment and farm equipment which he alleged did not expire until the end of 2017. The purported lease presented to the Personal Representative was dated April 17, 2007 and was for the lease of “Charlie’s Pasture and Town Cow Pasture east of Koosharem for grazing of cattle for a consideration of \$15/head...”. On October 9, 2015 Peterson filed a denial of the claim of Greg Torgerson. No separate action was filed to contest the claim denial within a period of 60 days as required by §75-3-804(2). Torgerson was in possession of all of the estate property and refused to allow the Personal Representative to marshal the assets for the benefit of Kouns’ heirs.

March 10, 2016 Peterson filed a Petition to secure possession of estate property and for approval of an agricultural lease of estate property to a third party which contained an option to sell. In the Petition Peterson details the fact that Torgerson is in possession of all estate property; that he has presented an alleged lease to “Charlie’s Pasture and Town Cow Pasture” as proof of his right to estate property consisting of 140 acres of irrigated land, 130 shares of water stock and irrigation equipment and farm equipment. The Petition was also supported by affidavits showing the Town Cow Pasture and Charlie’s Pasture were not owned by the Kouns estate. The Petition requested a Writ of Assistance be issued by the

District Court to the Sheriff of Sevier County to assist in placing the estate's lessee in possession of the estate property. Although Torgerson and his counsel, Rickenbach, were served with notices of all proceedings, they failed to respond in the probate proceeding. However, Torgerson did file on the 24th day of March, 2016 a Complaint for Declaratory Judgment in a separate case numbered 160600010.

Torgerson failed to respond in the probate proceedings and the District Court after careful review entered orders determining the estate's right to possession of estate property.

ARGUMENT

1. The District Court correctly granted the Personal Representative's motion to dismiss Torgerson's declaratory judgment.

A. The Probate Court in a pending filed action had jurisdiction over matters at issue.

B. A decision as to whether the statute of limitations had run against Appellant's claim was not material to the decision dismissing the collateral complaint.

A. The Probate Court in a pending filed action had jurisdiction over matters at issue.

The District Court's order should be affirmed if the Probate Court had exclusive jurisdiction of the matters to be adjudicated.

This Appellate Court in the *Estate of McLaughlin*, 754 P.2d 679 (Utah App. 1988) had the issue of Probate Court jurisdiction before it. In that case a personal representative

obtained a probate order authorizing the personal representative to sell estate property. An objector made the claim the Probate Court was without jurisdiction to authorize such sale and that the order was void for lack of subject matter jurisdiction. This Court affirmed the decision of the District Probate Court and reviewed the question of jurisdiction as follows:

(681) We think Perry's complaint is really that the court fashioned an unlawful remedy.

(682) The district court's probate jurisdiction is defined in Utah Code Ann. §75-1-302 (1978):

(1) [T]he court has jurisdiction over all subject matter relating to (a) Estates of decedents, ...

(2) the court has full power to make orders, judgments, and decrees and take all action necessary and proper to administer justice in matters that come before it.

(683) [4] the probate court has the powers granted by statute or reasonably implied from the statutory grant or reasonably necessary to effectuate the powers which are given. The personal representative is given specific authority to invoke the court's jurisdiction in section 75-3-704, which provides in relevant part:

A personal representative ... may invoke the jurisdiction of the court in a proceeding authorized by this code, to resolve questions concerning the estate or its administration.

Since the District Court in the probate proceedings had exclusive jurisdiction over the subject matter, the filing of a collateral action was without jurisdiction.

The Utah Supreme Court has considered the matter of collateral orders in the following cases:

State v. Morgan, 527 P.2d 225 (Utah 1974) where it is stated:

(226) [1] I. Judge H. was without jurisdiction to entertain Morgan's petition ... while the sentence, the subject of Morgan's appeal, still was pending in this court ...

(226) [2,3] Generally, one District Judge cannot overrule another acting District Judge having identical authority and stature.

In the case of *Harward v. Harward*, 526 P.2d 1183, a judge pro tem had entered an order. The Third District Court, through Judge Gordon R. Hall entered an order to set aside such order. The Supreme Court held that the judge pro tem had jurisdiction to enter such order and stated:

(1184) We take judicial notice of the fact that Allen L. Hodgson ... took his oath as a judge pro tempore, he became the equal in every respect to the regularly elected or appointed judges The orders he made are binding upon the parties unless and until they are reversed upon appeal to this Court. A fellow judge cannot set them aside.

A review of the Utah law demonstrates the probate court had exclusive jurisdiction in matters at issue. The separate collateral action filed 20 days later would not have granted additional authority for another trial or another appeal. All matters relevant to the issues between the parties were before the Court in the probate matter.

The District Court correctly held the collateral action could not be considered as a matter before the Court. Complete consideration of the issues between the parties are now before the Court in Appellate Case No. 20160758.

B. A decision as to whether the statute of limitations had run against Appellant's claim was not material to decision to dismiss the collateral complaint.

Torgerson makes the claim that the District Court's decision was based upon a holding that the declaratory judgment complaint was time barred. The Court did consider the fact the claim was barred. However, the District Court acquired no jurisdiction in the collateral


action filed 20 days after the Probate Court had assumed full jurisdiction over all matters at issue.

While it is irrelevant to these proceedings, Torgerson points out that a claim for “specific performance” is outside claim statute and cites the case of *In Re Estate of Sharp*, 537 at 1037. While the statement made and applied in the *Sharp* situation is correct, it is not correct in the Kouns probate case. Torgerson has not demonstrated to the Personal Representative or to the Court that he has a claim for specific performance. The controlling fact is the Probate Court determined that there was “no meritorious defense” to the probate petition. That finding also supported the fact that no specific performance claim exists. Therefore, the spurious claim was denied and it is time barred.

CONCLUSION

For the reasons we have set forth herein, the District Court’s decision granting the motion to dismiss the declaratory judgment act complaint should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of March, 2017 by

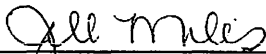


Tex R. Olsen
Attorney for Defendant/Appellee

SERVICE CERTIFICATE

I hereby certify that on the 21st day of March, 2017, two copies of the foregoing
***Response in Opposition to Plaintiff/Appellant's Appeal from the Granting of a Motion to
Dismiss Plaintiff's Declaratory Judgment Act Complaint, Sixth District Court in and for
Sevier County, State of Utah, Honorable Wallace A. Lee*** were mailed, postage prepaid, to
the following:

Michael P. Van Tassell
9524 E. 81st Street, Ste. B1559
Tulsa, Oklahoma 74133




Jill Miles, Legal Assistant

Certificate of Compliance With Rule 24(f)(1)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:
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DATED this 21st day of March, 2017.



Tex R. Olsen,
Attorney for Respondent/Appellee