

2002

Owens v. Young : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROBERT OWENS, :
: Appellate Case No. 20021065-CA
Appellee/Petitioner, :
: District Court Case No. 884900742 DA
: Honorable William B. Bohling
: :
CINDY LOU YOUNG : Argument Priority 15
: :
Appellant/Respondent. :
:

APPELLANT'S REPLY BRIEF

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Utah Court of Appeals

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**Paulette Stagg
Clerk of the Court**

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Appellant, Cindy Thompson, formerly Cindy Young, submits this reply to the response brief of the appellee, Kathy Lee Seich. (Appeal Record is abbreviated "AR").

I. PRELIMINARY STATEMENT

This is a nearly, if not absolutely, a classic case of justification for enlarging the time for filing a motion to substitute a party after the 90 day time provided in Rule 25 (a)(1) has expired. The delay in filing the motion was primarily occasioned by the resistance of the appellee- respondent to getting a personal representative appointed to the Estate of Robert Owens. Further, the Utah Supreme Court, in *Stoddard v. Smith*, 27 P.3d 546 (Utah 200), pointed out that Rule 6(b)(2) of the Utah Rules of Civil Procedure allows for the enlargement of time after the time for doing so has expired upon a showing of excusable neglect. (*Id.* @ p. 551) There is excusable neglect for not having filed the motion to substitute within the 90 day period and good cause for moving to substitute the personal representative as a party outside the 90 day period.

A. The Inventory Attached to Appellee's Reply Brief Should Be Stricken

The appellee, Kathy Lee Seich, has filed a document styled Inventory, which was filed in the probate action, as an addendum to her response brief on appeal. The document is irrelevant to this appeal and, further, is not a part of the record below in this action . It is wholly inappropriate for appellee to file or submit a document in her brief which was not before the trial court below in this matter. The purpose of submitting the document is not clear, but it appears to be an attempt to influence this Court in some manner. The truthfulness of the document has not been tested below. Further, appellant submits that an

evidentiary hearing would show it is not a complete inventory of the decedent's estate. This Court should order that the document be stricken from the record and admonish the appellee for submitting a document which is not apart of the record below, and which was not available to the Court below, to consider in rendering its holding.

II. ARGUMENT

A. Ninety Day Limitation In Rule 25(a) (1)

Appellee argues that the petition to modify was correctly dismissed for failure of the appellant to comply strictly with Rule 25(a) (1) of the Utah Rules of Civil Procedure. Ms. Seich claims that appellant failed to file a motion for an enlargement of the time and that, in any event, the plain language of the Rule requires dismissal. She also argues that Appellant did not raise that issue below in the trial court and should not be allowed to raise it for the first time on appeal.

Seich's claim that appellant did not raise the issue of an enlargement of time below is not correct. Appellant Thompson did raise the issue below in the trial court. Thompson did not file a motion styled as an enlargement or extension of time. She nevertheless did move the Court for a substitution of Kathy Lee Seich as personal representative of the estate of the decedent Robert Owens and the request for an enlargement of time is necessarily implied in the motion. (AR, p.1889) Appellant raised and briefed the issue of an enlargement of time to move for the substitution in her reply to Seich's response to the Motion to Substitute Party. Seich's response was filed as a motion to dismiss the action. (AR 1863)

The issue of an enlargement of time was also raised in oral argument of the motions before the Honorable Commissioner and also before the Honorable trial Judge. (AR 1955,

pp. 8-9) In fact, a copy of *Tatterson v. Koppers, Co.*, 104 F.R.D. 19, 20 (W.D. Pa. 1984) submitted to the court at the time of the hearing before the trial judge, was placed in the file by him. (AR 1907) *Tatterson* is a case in the United States District Court for the Western District of Pennsylvania that held that under Rule 6(b) of the Federal Rules of Civil Procedure, an enlargement of the 90 day period in Rule 25(a) may be granted after the 90 day period has expired.

Connelly v. Rathjen, 547 P.2d 1336 (Utah 1976), cited by appellee is not applicable.

B. Appellant Showed Excusable Neglect.

Appellee Seich also argues that Appellant Thompson has not shown good cause and/or excusable neglect for not seeking an extension of time in which to move to substitute the personal representative of the estate as a party before the expiration of the 90 day period. Appellant, after learning that the appellee did not intend to probate the will of the decedent and to be appointed as personal representative of the estate, filed an application for adjudication of intestacy and/or appointment of a personal representative on behalf of her minor child on October 24, 2001. (Admission of Appellee, Brief of Appellee, p. 9 ¶ 13) On November 13, 2001, Appellee filed an Objection To the Petition (Application) For Adjudication of Intestacy and for Appointment of Personal Representative. (Admission of Appellee, Brief of Appellee, pp 9-10, ¶ 14)

Appellee argues that the value of the Estate was less than \$25,000.00 and that she did intend to avoid probate by transferring the assets by affidavit pursuant to the Utah Probate Code. These statements were not made and are not supported by any evidence in the case below. Made as they are now, they are self serving. Further, the appellant does not agree

and believes the statements as to the contents and the value of the Estate to be inaccurate and incomplete. However, whether or not those statements are true does not alter the factual circumstances which required the appointment of a personal representative of the Estate in this case. It was necessary to have the Estate of Robert Owens brought before the probate Court and a personal representative appointed for the Estate to continue to prosecute the counterclaim of the appellant in the case below. Appellee Seich resisted it, thus delaying probate and the ultimate substitution of the personal representative of the estate in the action below. (Appellee's Brief, p. 9, ¶ 12)

Appellee states, tongue in cheek, that it is disingenuous for respondent to argue she could not have filed a motion within the 90 day period. (Appellee's Brief P. 15) However, appellant Thompson did file an application or petition to start the probate action, as well as an application for an order to protect against dissipation of the assets of the Estate. This was the appellant's good faith approach to having a personal representative appointed in order to substitute the Estate as a party in the case below. It was resisted by the appellee.

Appellee argues that the Appellant could have filed a motion to substitute within the 90 day period without waiting for a personal representative to be appointed. Respondent now recognize that this could probably have been done, but even so, that would have been moving to substitute the Estate as a party in a hollow or vacuum so to speak. Matters could not have progressed in the action below without the appointment of a personal representative. As respondent and her counsel viewed it then, it was necessary to obtain the appointment first, and they then proceeded to do so with reasonable dispatch. If they erred in that understanding and approach, it was excusable neglect. However, she

proceeded timely, and in doing so, the appellant has demonstrated her good faith. On the other hand, it was the intentional resistance of the appellee that caused the delay. Any alleged prejudice to appellee was brought about as a result of the appellee's own doing. Had the motion been timely filed and granted, without the personal representative of the Estate being a party, the prosecution of matters in the case below could not have proceeded further until the personal representative was appointed. The four prong test for determining whether to grant the motion to enlarge the time in Rule 25(a)(2) under Rule 6(b) as enunciated in *Stoddard v. Smith*, 27 P.3d 546,551 (Utah 2001) has been met. Appellant proceeded in good faith and appellee resisted, apparently hoping that the appellant might stub her toe procedurally and provide some technical reason for appellee to defeat the otherwise meritorious and inevitable substitution of the personal Representative of the Estate as a party in the action below. As enunciated in *Tatterson v. Koppers, Co., Inc.*, 104 F.R.D. 19, 20 (W. D. Pa. 1984) in relation to the same Rule in the Federal Rules of Civil Procedure, "However, the history of Rule 25(a) and Rule 6(b) makes it clear that the 90 day period was not intended to act as a bar to otherwise meritorious actions, and extensions of the period may be liberally granted."

C. The Court Failed To Make Adequate Findings of Fact And Abuse Its Discretion

Respondent correctly notes on page 14 of her brief that the Court of appeals reviews denial of a motion to enlarge time for abuse of discretion. She argues on page 16 that there are sufficient findings of fact to support the trial court's dismissal. In fact, the trial court made no findings of fact at all. It merely concluded to dismiss the case on the bare language of the

statute and the application of the case law. The Honorable Judge stated that after considering the memoranda of the parties, and after hearing the arguments of counsel, he had decided to sustain the recommendation of the Commissioner and that Rule 25 required that the case be dismissed. He stated he was not persuaded by the cases cited by the respondent and that a far better interpretation of the law was that the action did not survive the death of the petitioner. His analysis was strictly a conclusion of law.

Appellant has met the fourfold requirement noted by the Appellee on page 14 of her brief: 1) the appellant has demonstrated good faith as noted above; 2) Prejudice is not the other party's having to defend the case as she would have if it had progressed to trial in any event. It is some other event or things that have come about as result of the passage of time or some other reason that increases the difficulty for the other party to try the case. the appellee has not shown any prejudice and if any exists it has been brought about by appellee's own resistance to the appointment of a personal representative and to the substitution in the action below; 3) The reason for the delay was the good faith attempt by the appellant to have a personal representative appointed and which the appellee resisted; 4) The length of the delay is an interesting issue. Had a motion to substitute parties been filed within the 90 day period, the case still would not have moved forward without the appointment of a personal representative. Any delay caused by failing to move for substitution before the appointment did not delay the case as a whole or have any adverse impact upon the judicial proceeding. Any delay or adverse impact upon the judicial proceeding lies at the feet of the appellee's resistance to the bringing of a probate action to obtain the appointment of a personal representative. The Utah Supreme Court stated in *Pacer*

Sport And Cycle, Inc. v. Myers, 534 P.2d 616, 617 (Utah 1975) that “. . .we, on appeal, should not reverse its (trial court’s) ruling except for abuse of discretion, to wit, that it is arbitrary, capricious, or not based on adequate findings or on the law. The ruling could be viewed as arbitrary because of the good faith and excusable neglect of the appellant. However it certainly is not based upon adequate findings. Further, the dismissal is not based upon a fair application of the law. Rule 6 should be construed broadly under the circumstances of those in this case with a liberal view towards allowing an extension or enlargement of time for filing beyond the 90 day period. It is also in keeping with the public policy of having matters resolved on their merits rather than by technical or procedural pitfalls.

**D. The Cause Of Action Below Did Survive
The Death Of Robert Owens**

Appellee argues that the appellant’s cause of action below (counterclaim) did not survive the death of Robert Owens. She cites no cases in point. The only cases cited by the appellee are cases in which the decree of divorce had not been entered and the parties had not been divorced prior to the death of one of the parties. They are not applicable here.

This case is akin to a creditor - debtor case, where the debtor passes away and the estate is left with the liability to the creditor. The Decree in this case had been entered. Child support had been awarded. Appellant’s claim for an increase in child support was made as a counterclaim to a petition to modify the custody provisions of the Decree and after the appellant, respondent below, had hired a private detective agency to discover that the petitioner, Robert Owens, was working. The petition for custody was made moot when the

child returned on her own to live with the appellant (mother). The counterclaim was not tried because of constant motions and objections to rulings being filed, primarily by the petitioner, before he died. The appellant attempted successfully to amend her counterclaim with strenuous resistance from the petitioner. The Court granted appellant's motion to amend by order entered on August 25th 2001, only five days before the petitioner, Robert Owens, died. There was not time or means to try the counterclaim between the granting of the motion and the demise of the petitioner.

As noted in appellant's main Brief on Appeal, the discovery was completed, pay records of the petitioner had been obtained and all that remained for trial was determining child support from the pay of the petitioner and that of the appellant, and the date(s) upon which to modify and the amount(s) that the child support should be modified. *Daly v. Daly*, 533 P.2d 884 (Utah 1975) is a case in which the divorce did not become final before the death of one of the parties. That case does not apply to the case below.

The quotation of the appellee from *Nelson v. Davis* 592 P.2d 594 (Utah 1979) is indeed interesting. In *Nelson*, the decree was not entered before the husband died. It does not apply here. However, should it be applied as the appellee argues, according to that quotation, now that Robert Owens is deceased, the property rights should revert to what the rights had been before the divorce action was filed. That would mean that the appellant here would be entitled to all of Robert Owens' Estate. Somehow appellant does not believe this is what the appellee intends to have happen.

Appellant cites cases in her main brief on appeal where the issue of child support survived the death of one of the parties, the party which was burdened with the liability.

Appellee's contention that the death of Robert Owens abated the action below is untenable and is without merit.

E. The Appellee Should Not Be Awarded Attorney's Fees On Appeal.

The appellee argues that she should be awarded costs and attorney's fees on appeal because the appeal is frivolous. Appellee's argument itself is frivolous. If she is right, appellant should be awarded her fees. However, on appeal the courts are reluctant to assess fees unless the appeal or the opposition to the appeal is clearly un-meritorious and unless fees were awarded to that party below. In this case the appeal is not frivolous. It is not taken for any reason to harass or delay. The appellee has not established any such basis for a fee award.

In *O'Brien v. Rush*, 744 P.2d 306 (Utah App. 1987), cited by appellee in support of her request, a mechanic held the parties car hostage for security to pay the repair bill without any basis. The Court held that the position of the mechanic was without merit and not based on law or fact. Accordingly, the Court awarded fees for the appeal.

In this case the appeal has much merit. In fact, the precise issue appears to be a matter not ruled upon previously by the Court. In any event the Appellee's motion for attorney's fees should be denied.

IV. CONCLUSION

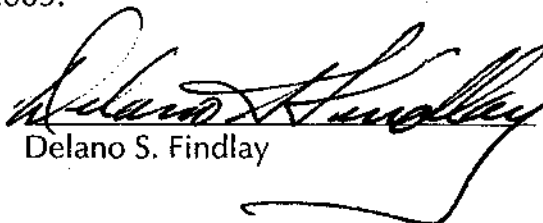
The case below did not abate with the death of Robert Owens. The appellant motion to substitute the personal representative of the Estate of Robert Owens as a party to the action below, though not timely, was nevertheless meritorious and had good cause. The appellant demonstrated good faith in her attempts to have a personal representative appointed and

substituted in the action below before the 90 day period expired. The personal representative was not appointed because of the reluctance and resistance of the appellee. Appellant's failure to move for a substitution within the 90 day period was due to excusable neglect and did not prejudice the appellee. The trial court abused its discretion in failing to allow substitution under the facts of the case.

The Court should reverse the decision of the trial court and remand the case with instructions to allow the substitution and to try the counterclaim of the appellant, the respondent, below.

Appellee's request for attorney's fees should be denied.

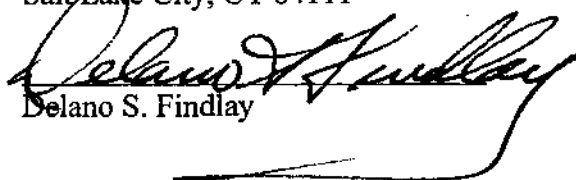
Dated this 4 day of February, 2003.


Delano S. Findlay

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing Reply Brief to be mailed, first class postage prepaid, to the below named person this 4th day of February, 2000:

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