

2003

Karen Wood v. Colleen Wood : Brief of Appellant

Utah Court of Appeals

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Andrew B. Berry; attorney for appellant.

Michael K. Black; Young, Kester, Petro; attorney for appellee.

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IN THE UTAH COURT OF APPEALS

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KAREN WOOD,

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Plaintiff and Appellant,

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Case Number 20030159-CA

vs.

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COLLEEN WOOD, individually and
as personal representative of
the estate of Raymond D. Wood,

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Defendants and Appellants.

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BRIEF OF APPELLANT

APPEAL FROM THE ORDER OF DISMISSAL GRANTING
SUMMARY JUDGMENT AGAINST THE PLAINTIFF IN THE
SEVENTH JUDICIAL DISTRICT COURT FOR EMERY COUNTY
STATE OF UTAH, THE HONORABLE BRUCE K. HALLIDAY PRESIDING

Michael K. Black #5595
Attorney for Appellee
39 West 300 North
Provo, Utah 84601
Telephone: 801 377-9696

ANDREW B. BERRY, JR. #0309
Attorney for Appellant
62 West Main Street
Moroni, Utah 84646-0600
Telephone: 435 436-8200

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Clerk of Court

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Attorney for Appellee
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Provo, Utah 84601
Telephone: 801 377-9696

ANDREW B. BERRY, JR. #0309
Attorney for Appellant
62 West Main Street
Moroni, Utah 84646-0600
Telephone: 435 436-8200

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STATEMENT OF JURSDICTION

Jurisdiction is conferred upon this Court by Utah Code Annotated, Section 78-2a-3(2)(h), and by Rules 3 and 4, of the Utah Rules of Appellate Procedure.

STATEMENT OF THE CASE

The Plaintiff and Appellant, Karen Wood, was married to Raymond D. Wood on the 31st day of August, 1973, and had two (2), children as issue of their marriage, Eric and Amanda. *R.41-42.*

The Woods purchased a home and real property during their marriage which was conveyed to them in joint tenancy with the right of survivorship. *R. 42, 58-59.*

Raymond Wood and Karen Wood were divorced April 14, 1987. *R. 33-34, 43.*

The Decree of Divorce awarded Raymond Wood the marital residence and real property to Raymond Wood “subject to the indebtedness thereon and awarded Karen Wood a Ten Thousand Dollar (\$10,000.00), judgment against Raymond Wood, for her equity in the marital property. *R. 32-34.*

The real property remained in joint tenancy following the divorce because Raymond Wood did not pay Karen Wood her equity in the marital property. *R. 35-37, 43.* On April 27, 1997, Karen Wood and Raymond Wood, and their counsel, Michael A. Harrison and David M. Allred, respectively, entered into a Stipulation in the divorce action agreeing to the payment of the monies owed Ms. Wood and providing for her attorney, Michael Harrison, to deliver an executed quit claim deed to the home and real property when the monies owed her were paid in full by Raymond Wood. *R. 21, 35-37.*

Raymond Wood married Colleen Wood on August 26, 1998, in Carbon County, Utah. *R. 20, 43.*

On July 17, 2000, Raymond Wood committed suicide. *R. 21, 63-65.* At the time of his death Raymond Wood had not paid Karen Wood the judgment for her equity in the real property and Michael Harrison had not delivered the quit claim deed to Raymond Wood. Karen Wood. *R. 41-45, 63-65.*

On July 25, 2000. Colleen Wood filed an Application for Informal Appointment

of Personal Representative and Determination of Intestacy in the Seventh Judicial District Court for Emery County. *R. 1-3.*

On August 25, 2000, Karen Wood executed and recorded in the Office of the Emery County Recorder an Affidavit and Death Certificate as the surviving joint tenant of Raymond Wood, transferring the real property into her name alone. *R. 64-65.*

On September 25, 2000, Colleen Wood was appointed as the personal representative of the Estate of Raymond D. Wood. *R. 42-46.* On December 18, 2000, Colleen Wood filed in the probate court an Inventory which included the real property which was in joint tenancy between the deceased, Raymond Wood, and his survivor, Karen Wood. *R. 49-50.*

The probate record has no proof that notice to creditors was given or published as required by U.C.A. Section 75-3-801. *R. 1-176.*

On June 1, 2001, Colleen Wood as personal representative filed a motion and on June 14, 2001, an order to show cause directing Karen Wood to appear before the probate court and show cause why her counsel, Michael A. Harrison, should not provide the “signed Deed of Reconveyance” to the personal representative’s counsel and pay attorney fees. *R. 62-65.* Karen Wood was served with the Order to Show Cause on June 6, 2001. *R. 72-73.*

The trial court heard the personal representatives motion for order to show cause on June 19, 2001, and Karen Wood was present. *R. 75.*

On July 9, 2001, the personal representative Colleen Wood filed her Motion to Deny Creditor’s Alleged Claim and her memorandum in support thereof. *R. 87-94.* The unsworn memorandum claimed that a notice to creditors had been published in an Emery

County newspaper and that Karen Wood had not presented a creditor's claim to the personal representative within the period for presenting claims. *R. 87-94.* There is no proof of publication in the probate court record of the publication of any notice to creditors as required by Utah Probate Code, Section 75-3-801. *R. 1-176.*

On July 17, 2001, Karen Wood filed in the probate court a motion for leave to file a late memorandum requesting an extension of time to August 7, 2001. *R. 96.* On July 23, 2001, the attorney for the personal representative filed an objection to Karen Wood's request for an extension to employ counsel and file a memorandum in opposition to the motion to deny Karen Wood's creditor's claim. *R. 104-110.*

On July 26, 2001, Karen Wood filed an Objection and Response to Motion to Deny Creditor's Claim in the probate court asserting that she is not a creditor of the estate and that the notice to creditors did not apply to her because she is the sole owner of the real property and that it was not property of the estate. Paragraphs 4, and 5, refer to prior discussions about Karen Wood's claim to the real property between the estate's attorney, David Allred, and Karen Wood and her attorney Samuel Chiara on October 25, 2000. Karen Wood *R. 111-113.*

On August 10, 2001, the probate court denied Karen Wood's request for additional time to file an objection to the personal representative's Motion to Deny Creditor's Claim and stated that an objection had not been filed. *R. 114.* The order also stated that the personal representative had filed a Notice of All Creditors in the Emery County Progress and that Karen Wood had not filed a claim as required by U.C.A. 75-3-801(1), ordering that Karen

Wood's claim be denied and ordering Karen Wood have her counsel, Michael Harrison, release the "deed of trust," and awarding the personal representative attorney fees. *R. 114-115*. A Notice of Entry of Order was file on August 23, 2001, by counsel for the personal representative. *R. 124-125*.

On September 17, 2001, new counsel for the personal representative, Colleen Wood, entered his appearance and on October 18, 2001, new counsel for Karen Wood entered his appearance. *R. 126-129*.

On October 18, 2001, Karen Wood filed her quiet title action against Colleen Wood individually and as personal representative of the Estate of Raymond D. Wood, asserting her ownership of the real property which was held in joint tenancy with Rayond Wood at the time of his death. *R. 1-7, in the quiet title action, Seventh Judicial District Court case number 010700169*.

On November 27, 2001, Colleen Wood individually and as personal representative filed her answer admitting her possession of the real property and asserting that the joint tenancy was terminated by a Decree of Divorce between Raymond Wood and Karen Wood, that Karen Wood's claim in the quiet title action had been adjudicated in the probate action and was barred by the doctrine of *res judicata*. *R. 12-15, in the quiet title action*.

On September 10, 2002, the personal representative filed a Motion to Consolidate the quiet title action with the probate action and moved to dismiss the quiet title action and for summary judgment. The motion and memorandum were not supported by affidavit. The basis of the motion for summary judgment was that Karen Wood divorced from

Raymond Wood and thus not an heir of the estate, that the award of the real property in the divorce action rendered the quiet title claim *res judicata*, that the quiet title action was adjudicated in the divorce action which severed the joint tenancy in the real property rendering Karen Wood a creditor of the estate, and *res judicata* because the probate court had determined the “claim” by the probate court’s denial of the “creditors claim” of Karen Wood. *R. 16-40, in the quiet title action*. The memorandum acknowledged that Raymond Wood had not paid Karen Wood the monies which were a condition precedent to the delivery of the Quit Claim Deed to Raymond Wood from Karen Wood’s counsel, Michael Harrison. *R. 27, in the quiet title action*. The personal representative moved for consolidation of the quiet title action with the probate action because, “The parties in the Probate case are identical to the parties in this litigation [the quiet title action] and in the interest of judicial economy would dictate that the matters should be consolidated.” Attached to the motion for summary judgment were the Decree of Divorce entered by the Court on April 14, 1987, and the Stipulation entered on April 28, 1997, in the divorce action between Karen Wood and Raymond Wood. *R. 32-37*.

On October 1, 2002, Karen Wood filed her sworn affidavit and memorandum of points and authorities in opposition to Colleen Wood’s motion for consolidation and motion for summary judgment. She asserted in her affidavit that she and Raymond Wood had purchased the real property in joint tenancy with the right of survivorship and that the real property remained in joint tenancy following the divorce and that on April 28, 1997, the Karen Wood, Raymond Wood and their respective counsel had intended and Stipulated in the divorce action that the real property remain in joint tenancy until Raymond Wood had fully paid Karen

Wood for her equity in the home. Karen Wood executed a quit claim deed which was to be held by her counsel, Michael A. Harrison, for delivery to Raymond Wood upon full payment of Karen Wood's equity in the home and real property in order to "intentionally to preserve and protect Karen Wood's interest in the home and real property." *R. 41-45. 46-65,66-85.*

In her memorandum of points and authorities in opposition to the personal representative's motion for summary judgment in the quiet title action Karen Wood agreed that because she and Raymond Wood were divorced that she was not an heir of his estate. She asserted that she was not a creditor of Raymond Wood's estate and that the probate court is without jurisdiction to hear or determine a suit to quiet title to the real property the personal representative was claiming belonged to Raymond Wood's estate, and thus was not *res judicate* and the probate action and the quiet title action could not be consolidated. *R. 46-52.*

Karen Wood in opposition to the personal representatives motion for summary judgment disputed the personal representatives facts and argued that the divorce proceeding did not terminate nor sever the joint tenancy and the right of survivorship to the real property. *R. 52.* She asserted (at *R. 43-44.*), and argued (at *R. 46-65.*), that she and Raymond Wood had intended and agreed that the home and real property should remain in joint tenancy until she had been fully paid her equity therein and that the Quit Claim Deed held by her counsel, Michael Harrison, would not be delivered to Raymond Wood until he had paid Karen Wood in full for her interest in the marital residence and real property.

She asserted that Raymond Wood the deceased had never paid her the monies he owed her and that he had committed suicide. *R. 52-53.* She asserted that the deed was never

delivered to Raymond Wood because he had not paid her the monies he owed her. R. 52-53.

Karen Wood asserted that questions of disputed fact existed as to the intention of she and Raymond Wood upon the question of whether she was divested of her interest in her home and real property and cited in support of her contention the Stipulation in the divorce action that the quit claim deed would not be delivered to Raymond Wood until Karen Wood had been paid in full for her equity in the marital property. R. 52-65. Karen Wood also asserted that the affidavits in support of the motion for summary judgment were fatally defective because there was no showing of the personal knowledge and competency of the affiant, Coleen Wood, to testify to the facts in the divorce action. R. 54-65.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented by this appeal are set forth below. The standard of review for each of the issues presented upon this appeal is a correction of error standard and that no particular deference is given to the trial court's ruling on questions of law. A summary judgment presents for review conclusions of law only because by definition summary judgments do not resolve factual issues, and the appellate Court reviews the conclusions for correctness, without according deference to the trial court's legal conclusions. *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989).

a. Whether the trial court properly concluded that Karen Wood is a creditor of the Estate of Raymond Wood? *Preserved at R. 46-86, 70-72.*

b. Whether the probate court was without jurisdiction to determine Karen Wood's quiet title claim to her residence and real property? *Preserved at R. 46-85, 70-72.*

c. Whether the issue of Karen Wood's interest in her residence and real property was res judicata? *Preserved at R. 16-40, 41-45, 66-75, 74-85.*

d. Whether the probate court had jurisdiction to determine the issues in a quiet title action? *Preserved at R. 66-85.*

e. Whether the divorce proceeding severed the joint tenancy and the right of survivorship or specifically preserved the joint tenancy and survivorship to secure the payment of Karen Wood's equity to her? *Preserved at R. 66-85.*

f. Whether there was a disputed issue of material fact precluding the grant of summary judgment? *Preserved at R. 66-85.*

g. Whether the quiet title action should have been consolidated with the probate action? *Preserved at R. 66-85.*

STATEMENT OF THE FACTS

The facts material to the consideration of the issues before this Honorable Court are:

The Plaintiff and Appellant, Karen Wood, was married to Raymond D. Wood on the 31st day of August, 1973, and had two (2), children as issue of their marriage, Eric and Amanda. *R. 41-42.*

The Woods purchased a home and real property during their marriage which was conveyed to them in joint tenancy with the right of survivorship. *R. 42. 58-59.*

Raymond D. Wood and Karen Wood purchased a home during their marriage situate at 255 West 200 North, Orangeville, Utah. Copies of the two (2), Warranty Deeds by

which they acquired their interest in their home and real property were attached to Karen Wood's affidavit *R. 58-59.*

The Warranty Deed dated September 15, 1986, from Donna L. Gillis, to Karen Wood and Raymond D. Wood, transferred and conveyed the real property to us "as joint tenants with full rights of survivorship and not as tenants in common." This warranty deed was recorded in the office of the Emery County Recorder on January 2, 1987, as entry number 315284, in book 165, at pages 198-199 *R. 58.*

The Corrected Warranty Deed dated December 29, 1986, from Melba R. Shiner, to Karaen Wood and Raymond Darrell Wood, transferred and conveyed the real property to them, "as joint tenants." This Corrected Warranty Deed was recorded in the office of the Emery County Recorder on December 30, 1986, as entry number 315275, in book 165, at page 184 *R. 59.*

Raymond Wood and Karen Wood were divorced April 14, 1987 *R. 33-34, 43.*

The Decree of Divorce awarded Raymond Wood the marital residence and real property to Raymond Wood "subject to the indebtedness thereon and awarded Karen Wood a Ten Thousand Dollar (\$10,000.00), judgment against Raymond Wood, for her equity in the marital property *R. 32-34.*

The real property remained in joint tenancy following the divorce because Raymond Wood did not pay Karen Wood her equity in the marital property *R. 35-37, 43.* On April 27, 1997, Karen Wood and Raymond Wood, and their counsel, Michael A. Harrison and David M. Allred respectively, entered into a Stipulation in the divorce action agreeing to the

payment of the monies owed Ms. Wood and providing for her attorney, Michael Harrison, to deliver an executed quit claim deed to the home and real property when the monies owed her were paid in full by Raymond Wood. *R. 21, 35-37.*

Raymond Wood married Colleen Wood on August 26, 1998, in Carbon County, Utah. *R. 20, 43.*

On July 17, 2000, Raymond Wood committed suicide. *R. 21, 63-65.* At the time of his death Raymond Wood had not paid Karen Wood the judgment for her equity in the real property and Michael Harrison had not delivered the quit claim deed to Raymond Wood. Karen Wood. *R. 41-45, 63-65.*

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On July 17, 2001, Karen Wood filed in the probate court a motion for leave to file a late memorandum requesting an extension of time to August 7, 2001. *R. 96.* On July 23, 2001, the attorney for the personal representative filed an objection to Karen Wood’s request for an extension to employ counsel and file a memorandum in opposition to the motion to deny Karen Wood’s creditor’s claim. *R. 104-110.*

On July 26, 2001, Karen Wood filed an Objection and Response to Motion to Deny Creditor's Claim in the probate court asserting that she is not a creditor of the estate and that the notice to creditors did not apply to her because she is the sole owner of the real property and that it was not property of the estate. Paragraphs 4, and 5, refer to prior discussions about Karen Wood's claim to the real property between the estate's attorney, David Allred, and Karen Wood and her attorney Samuel Chiara on October 25, 2000. Karen Wood *R. 111-113*.

On August 10, 2001, the probate court denied Karen Wood's request for additional time to file an objection to the personal representative's Motion to Deny Creditor's Claim and stated that an objection had not been filed. *R. 114*. The order also stated that the personal representative had filed a Notice of All Creditors in the Emery County Progress and that Karen Wood had not filed a claim as required by U.C.A. 75-3-801(1), ordering that Karen Wood's claim be denied and ordering Karen Wood have her counsel, Michael Harrison, release the "deed of trust," and awarding the personal representative attorney fees. *R. 114-115*. A Notice of Entry of Order was filed on August 23, 2001, by counsel for the personal representative. *R. 124-125*.

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On October 18, 2001, Karen Wood filed her quiet title action against Colleen Wood individually and as personal representative of the Estate of Raymond D. Wood, asserting

her ownership of the real property which was held in joint tenancy with Rayond Wood at the time of his death *R. 1-7, in the quiet title action, Seventh Judicial District Court case number 010700169.*

On November 27, 2001, Colleen Wood individually and as personal representative filed her answer admitting her possession of the real property and asserting that the joint tenancy was terminated by a Decree of Divorce between Raymond Wood and Karen Wood, that Karen Wood's claim in the quiet title action had been adjudicated in the probate action and was barred by the doctrine of *res judicata*. *R. 12-15, in the quiet title action.*

On September 10, 2002, the personal representative filed a Motion to Consolidate the quiet title action with the probate action and moved to dismiss the quiet title action and for summary judgment. The motion and memorandum were not supported by affidavit. The basis of the motion for summary judgment was that Karen Wood divorced from Raymond Wood and thus not an heir of the estate, that the award of the real property in the divorce action rendered the quiet title claim *res judicata*, that the quiet title action was adjudicated in the divorce action which severed the joint tenancy in the real property rendering Karen Wood a creditor of the estate, and *res judicata* because the probate court had determined the "claim" by the probate court's denial of the "creditors claim" of Karen Wood. *R. 16-40, in the quiet title action.* The memorandum acknowledged that Raymond Wood had not paid Karen Wood the monies which were a condition precedent to the delivery of the Quit Claim Deed to Raymond Wood from Karen Wood's counsel, Michael Harrison. *R. 27, in the quiet title action.* The personal representative moved for consolidation of the quiet title action with

the probate action because, “The parties in the Probate case are identical to the parties in this litigation [the quiet title action] and in the interest of judicial economy would dictate that the matters should be consolidated.” Attached to the motion for summary judgment were the Decree of Divorce entered by the Court on April 14, 1987, and the Stipulation entered on April 28, 1997, in the divorce action between Karen Wood and Raymond Wood. *R. 32-37.*

On October 1, 2002, Karen Wood filed her sworn affidavit and memorandum of points and authorities in opposition to Colleen Wood’s motion for consolidation and motion for summary judgment. She asserted in her affidavit that she and Raymond Wood had purchased the real property in joint tenancy with the right of survivorship and that the real property remained in joint tenancy following the divorce and that on April 28, 1997, the Karen Wood, Raymond Wood and their respective counsel had intended and Stipulated in the divorce action that the real property remain in joint tenancy until Raymond Wood had fully paid Karen Wood for her equity in the home. Karen Wood executed a quit claim deed which was to be held by her counsel, Michael A. Harrison, for delivery to Raymond Wood upon full payment of Karen Wood’s equity in the home and real property in order to “intentionally to preserve and protect Karen Wood’s interest in the home and real property.” *R. 41-45. 46-65, 66-85.*

In her memorandum of points and authorities in opposition to the personal representative’s motion for summary judgment in the quiet title action Karen Wood agreed that because she and Raymond Wood were divorced that she was not an heir of his estate. She asserted that she was not a creditor of Raymond Wood’s estate and that the probate court is without jurisdiction to hear or determine a suit to quiet title to the real property the personal

representative was claiming belonged to Raymond Wood's estate, and thus was not *res judicate* and that the probate action and the quiet title action could not be consolidated. *R. 46-52.*

Karen Wood in opposition to the personal representatives motion for summary judgment disputed the personal representatives facts and argued that the divorce proceeding did not terminate nor sever the joint tenancy and the right of survivorship to the real property. *R. 52.* She asserted (at *R. 43-44.*), and argued (at *R. 46-65.*), that she and Raymond Wood had intended and agreed that the home and real property should remain in joint tenancy until she had been fully paid her equity therein and that the Quit Claim Deed held by her counsel, Michael Harrison, would not be delivered to Raymond Wood until he had paid Karen Wood in full for her interest in the marital residence and real property.

She asserted that Raymond Wood the deceased had never paid her the monies he owed her and that he had committed suicide. *R. 52-53.* She asserted that the deed was never delivered to Raymond Wood because he had not paid her the monies he owed her. *R. 52-53.*

Karen Wood asserted that questions of disputed fact existed as to the intention of she and Raymond Wood upon the question of whether she was divested of her interest in her home and real property and cited in support of her contention the Stipulation in the divorce action that the quit claim deed would not be delivered to Raymond Wood until Karen Wood had been paid in full for her equity in the marital property. *R. 52-65.* Karen Wood also asserted that the affidavits in support of the motion for summary judgment were fatally defective because there was no showing of the personal knowledge and competency of the

affiant, Coleen Wood, to testify to the facts in the divorce action. *R. 54-65.*

The trial court in quiet title action granted the personal representatives motion for consolidation on January 22, 2003. *R. 98.* On January 22, 2003, the probate court granted the personal representative's motion for summary judgment upon the basis that the decision in the probate matter is res judicata upon the issues raised in Karen Wood's quiet title action. The probate court ruled that Karen Wood became a creditor of Raymond Wood when she agreed to a sum certain in the divorce action and that "All of her rights, title or interest, in the property were modified from a property interest to a secured creditor's interest." The probate court then ruled that Karen Wood "failed to timely perfect a creditor's claim [which] now prevents her from seeking to do indirectly what she was prevented from doing directly." The probate Court granted the personal representative's motion for summary judgment and dismissed the quiet title action of Karen Wood. *R. 100-102.*

Karen Wood filed her Notice of Appeal on February 18, 2003. *R. 103-104.*

SUMMARY OF THE ARGUMENTS

The Utah Probate Code, Section 75-1-201(6), in defining a creditor's claim states "Claims" does not include ... demands or disputes regarding title of a decedent ... to specific assets alleged to be included in the estate.

The Utah Supreme Court held in *In re Estate of Malliet*, 649 P.2d 18, 19 (Utah 1982), that a "creditor's claim" does not involve 'demands or disputes regarding the title of a decedent ... to specific assets.'

Thus, Karen Wood's assertion of her right to quiet title to the residence and real

property which she held in joint tenancy at the time of the death of Raymond Wood was not a “claim” of a creditor. Indeed, Karen Wood asserted that she was not a creditor in the estate action but asserted that she owned the real property by virtue of the joint tenancy which, by operation of law, transferred the real property to her upon the death of Raymond Wood. The summary judgment of the trial court finding that Karen Wood was a creditor of the estate of Raymond Wood had had not timely perfected her “creditor’s claim” should be reversed.

The probate court was without jurisdiction to determine the right of Karen Wood in her marital residence and real property and thus, because the claim could not be raised in the probate court, it is not *res judicata* and this action could not be consolidated with the probate proceeding as was requested by the Defendant personal representative and Appellee below. Thus, the summary judgment of the trial court that Karen Wood’s quiet title action was a previously adjudicated creditor’s claim, which she did not perfect within the statutory three month period and thus was *res judicata*, in the quiet title action should be reversed.

The divorce of Raymond Wood and Karen Wood did not sever nor terminate the joint tenancy with the right of survivorship in the marital residence and real property because the parties thereto and their counsel has specifically agreed in the divorce Stipulation that the deed would not be delivered to Raymond Wood until Karen Wood was paid in full.

The Utah Probate Code, Section 75-2-804(2), provides that “Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate... the divorce...,” severs the interests of the former spouses in property held by them at the time of the divorce ...as joint tenants.

The marital home and real property of the Plaintiff, Karen Wood, and her former husband, Raymond Wood, remained in the names of both parties “as joint tenants with full rights of survivorship and not as tenants in common,” until the death of Raymond Wood. At the time of Raymond Wood’s death the marital home and real property became the sole and exclusive property of Karen Wood, because she held the right of survivorship pursuant to the Stipulation of Raymond Wood, Karen Wood and their respective counsel in the divorce action. The Stipulation in the divorce action requiring Michael Harrison, counsel for Karen Wood, to not deliver the deed to Raymond Wood until Karen Wood was paid in full excepted the severance of the joint tenancy upon the divorce as provided in the statute. The Plaintiff in the quiet title action, Karen Wood, should have been granted summary judgment and declared to be the sole, undisputed owner of the subject marital residence and real property because the real property transferred to her by operation of law upon the death of Raymond Wood.

Rule 56(e), of the Utah Rules of Civil Procedure requires that affidavits made in support of a motion for summary judgment shall be made upon the personal knowledge of the affiant, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify as to the matters set forth therein.

The affidavits of the Defendant personal representative, offered in support of her motion for summary judgment, were fatally defective. The personal representative did not make and there was no showing that the affidavits are based upon the personal knowledge of the affiant personal representative. A supporting affidavit must be based upon the affiant’s personal knowledge, and an affidavit based merely on unsubstantiated opinions and beliefs is

insufficient. *Treloggan v. Treloggan*, 699 P.2d 747 (Utah 1985). The personal representative's affidavits were wholly insufficient because they are not based upon her personal knowledge and do not demonstrate her competence to testify as to the facts she asserts therein.

A motion for summary judgment should be denied where the evidence presents a genuine issue of material fact which if resolved in the favor of the nonmoving party, would entitle him to judgment as a matter of law. *Jackson v. Dabney*, 645 P.2d 613 (Utah 1982). In this action, Karen Wood asserted that it was the intention of Raymond Wood, and his counsel, she and her counsel, Michael Harrison, that the real property would remain in joint tenancy with the right of survivorship until Karen Wood had been fully paid the monies Raymond Wood owed her from the marital estate. Resolving this fact in favor of Karen Wood, the nonmoving party, Karen Wood would be entitled to summary judgment quieting the title in the real property in her. Karen Wood asserted her and Raymond Wood's intention to keep the real property in joint tenancy. The Stipulation in the divorce case supported her assertion because it made delivery of the quit claim deed by Michael Harrison to Raymond Wood upon full payment of monies owed the operative action which would sever the joint tenancy. It was undisputed by the personal representative that Raymond Wood had not paid Karen Wood. It was undisputed that Michael Harrison did not deliver the deed to Raymond Wood prior to his death. It was undisputed that Karen Wood believed the real property to be hers upon the death of Raymond Wood and transferred the real property into her sole name following his death. Karen Woods assertion that she and Raymond Wood, and their respective counsel in the divorce action, intended for the real property to remain in joint tenancy until she was paid in

full was undisputed in the record. Accepting these facts in the light most favorable to the nonmoving party or the losing party, here Karen Wood, the probate court was precluded from entering summary judgment against Karen Wood in the quiet title action.

ARGUMENT

THE PLAINTIFF IS NOT AN HEIR OF THE ESTATE NOR IS SHE A CREDITOR OF THE ESTATE OF RAYMOND WOOD

The personal representative's argument in the proceedings below was essentially that the Plaintiff, Karen Wood, and Raymond Wood, were divorced by the trial Court in April, 1987, and thus Karen Wood was not entitled to inherit from the Raymond Wood estate but is a creditor of the estate. The personal representative also claimed that the issue is res judicata because the probate court denied Karen Wood's "creditor's claim."

Karen Wood assert in her complaint in the quiet title action and in the probate proceeding that title to her marital residence and real property should be quieted in her. She asserted that she did not stand in the position of a creditor in the estate proceeding. Moreover, there was not proof of publication of a notice to creditors in the probate court's record. *Harris v. Turner*, 85 P.2d 824 (Utah 1938). The first notice to Karen Wood that the personal representative was seeking the title to the real property held in joint tenancy until Raymond Wood's death (whereupon it transferred to Karen Wood by operation of law *R. 64-65.*), was on June 6, 2001, when the personal representative sought to compel her to deliver the quit claim deed held by Michael Harrison, long after the three month period for filing claims had expired. *R. 1-70*. There is evidence in the probate court's file that the personal representative

and her counsel knew that Karen Wood claimed ownership of the real property. *R. 111-112.*

The Utah Probate Code, Section 75-1-201(6), in defining a creditor's claim states "Claims" does not include ... demands or disputes regarding title of a decedent ... to specific assets alleged to be included in the estate.

The Utah Supreme Court held in *In re Estate of Malliet*, 649 P.2d 18, 19 (Utah 1982), that a "creditor's claim" does not involve 'demands or disputes regarding the title of a decedent ... to specific assets.'

Thus, Karen Wood's assertion of her right to quiet title to the residence and real property which she held in joint tenancy at the time of the death of Raymond Wood was not a "claim" of a creditor. Indeed, Karen Wood asserted that she was not a creditor in the estate action but asserted that she owned the real property by virtue of the joint tenancy which, by operation of law, transferred the real property to her upon the death of Raymond Wood. The summary judgment of the trial court finding that Karen Wood was a creditor of the estate of Raymond Wood had not timely perfected her "creditor's claim" should be reversed.

**THE PROBATE COURT IS WITHOUT JURISDICTION TO
DETERMINE THE KAREN WOOD'S CLAIM TO REAL PROPERTY
AND THE QUIET TITLE ACTION WAS NOT RES JUDICATA
NOR COULD IT BE CONSOLIDATED WITH THE PROBATE ACTION**

The Utah Supreme Court and the Utah Court of Appeals, in a long-standing line of cases, has determined that a probate Court is without jurisdiction to hear or determine a suit to quiet title to real property claimed to belong to an estate, and that the dispute cannot be resolved by filing and processing a claim against the estate under the Uniform Probate Code.

In Re Rogers' Estate, 75 Utah 290, 284 P. 992 (Utah 1930) (The probate court is without jurisdiction to hear a suit by a stranger to the probate action to quiet title to property claimed to belong to the estate.); *Rogers v. West*, 82 Utah 525, 25 P.2d 971 (Utah 1933)(the probate court had no jurisdiction to determine an administratrix sought to cancel a contract between the deceased and a third party who sought specific performance.); *In re Estate of Malliet*, 649 P.2d 18 (Utah 1982). See also: *In re Estate of Shepley*, 645 P.2d 605 (Utah 1982); *Bradshaw v. McBride*, 649 P.2d 74 (Utah 1982); and *In re Estate of Sharp*, 537 P.2d 1034 (Utah 1975).

The probate court was without jurisdiction to determine the right of Karen Wood in her marital residence and real property and thus, because the claim could not be raised in the probate court, it is not res judicata and this action could not be consolidated with the probate proceeding as was requested by the Defendant personal representative and Appellee below. Thus, the summary judgment of the trial court that Karen Wood's quiet title action was a previously adjudicated creditor's claim, which she did not perfect within the statutory three month period and thus was *res judicata*, in the quiet title action should be reversed.

**THE DIVORCE PROCEEDING DID NOT SEVER THE
JOINT TENANCY AND THE RIGHT OF SURVIVORSHIP
BUT SPECIFICALLY PRESERVED IT**

The personal representative and Appellee argued upon her motion for summary judgment that the divorce proceeding severed and terminated the parties joint tenancy and the right of survivorship in the real property. The Plaintiff and Appellant, Karen Wood, in her affidavit filed in opposition to the Appellee's motion for summary judgment in the trial court, disputed the personal representative's facts and claims and offered proof to the contrary. On

April 25, 1997, Raymond Wood and Karen Wood, and their respective counsel, entered into a written Stipulation in the divorce action. Pursuant to the written stipulation the real property was to remain in joint tenancy until Raymond Wood paid Karen Wood in full for her interest in her marital residence and real property. A quit claim deed was placed with Karen Wood's counsel, Michael A. Harrison, to be delivered to Raymond Wood upon the payment of all sums due under the Stipulation. *Stipulation paragraph 3*. The parties to the divorce, Karen Wood and Raymond Wood, and their respective counsel, intentionally kept the marital residence and real property in joint tenancy to secure the payment of Karen Wood's equity to her. Raymond Wood, now deceased, never paid Karen Wood the monies for her share of the marital residence and real property. In July, 2000, Raymond Wood committed suicide because the Defendant, Colleen (Wood) Davis was divorcing him. The quit claim deed was never delivered to Raymond Wood because he did not pay all sums due Karen Wood as had been stipulated to in the divorce action.

The Utah Probate Code, Section 75-2-804(2)(b), provides:

Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

....

(b) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship, transforming the interests of the former spouses into tenancies in common.

The personal representative argued in the trial court that the divorce between Karen Wood and Raymond Wood severed and terminated the joint tenancy in the real property

citing to the trial court the statute quoted above. Karen wood argued in the trial court that even though she had been awarded a money judgment for her equity in the marital residence and real property in the divorce action that the property remained in joint tenancy with the right of survivorship because she and Raymond Wood and their respective counsel in the divorce action had intended and kept the real property in joint tenancy specifically to preserve and protect her interest therein. Karen Wood offered in support of her position a Stipulation in the divorce action which provided that a quit claim deed to the real property would be delivered to Raymond Wood by Michael Harrison, Karen Wood's counsel, upon the full payment of the monies owed to Karen Wood. The full payment of the marital estate monies owed to Karen Wood was the trigger for the delivery of the deed by her counsel by Michael Harrison to Raymond Wood. Karen Wood and Raymond Wood, and their respective counsel intended that the joint tenancy would be severed and terminated only when Mr. Harrison delivered the deed to Raymond Wood, and upon his full payment of the monies he owed to Karen Wood.

Raymond Wood, at the time of his death, had not paid the monies he owed to Karen Wood. Michael Harrison had not delivered the quit claim deed to Raymond Wood because he had not paid the money to Karen Wood that he owed her from the marital estate. A deed, to be operative as a transfer of ownership of land, or an interest or estate therein, must be delivered. *Wiggill v. Cheney*, 597 P.2d 1351 (Utah 1979). The deed could not be delivered after Raymond Wood's death, and if it had been it would not convey title to the property, or any part thereof. *Id.* The main object in construing a deed is to ascertain the intention of the parties, especially that of the grantor. *Hartman v. Potter*, 596 P.2d 653 (Utah 1979). In the

present action the grantor, Karen Wood, did not intend to deliver the quit claim deed to Raymond Wood until he had paid her for her equity in her marital residence and real property and the deed was never delivered to Raymond Wood because he had not paid Karen for her interest in the home. Delivery of a deed, or the absence of delivery is a question of fact. *Horton v. Horton*, 695 P.2d 102 (Utah 1984). In the instant case, the facts are undisputed as to the intention of both Raymond Wood and Karen Wood in the divorce action upon the question of whether the Plaintiff was divested of her interest in the real property and her home. Both Karen Wood and Raymond Wood, and their respective counsel, had stipulated in the divorce action that the home and real property would remain in joint tenancy until, and the quit claim deed would be delivered to Mr. Wood, only after Raymond Wood fully paid for Karen Wood's interest in the home.

The quit claim deed was prepared by the parties and their counsel, signed by Karen Wood, for delivery to Raymond Wood upon his full payment of Karen Wood's equity in the home. The parties to the divorce and their counsel intentionally preserved Mrs. Karen Wood's joint tenancy and the right of survivorship to ensure the payment of her interest in her marital residence. Raymond Wood did not pay Karen Wood her equity in the marital residence and when he died without having paid her equity, the home and real property passed to Karen Wood as the joint tenant. The Plaintiff did not deliver the quit claim deed because she had not been paid for her equity. *Nelson v. Davis*, 592 P.2d 594 (Utah 1979); *Poulsen v. Poulsen*, 672 P.2d 97 (Utah 1983).

The divorce of Raymond Wood and Karen Wood did not sever nor terminate the joint tenancy with the right of survivorship in the marital residence and real property because the parties thereto and their counsel has specifically agreed in the divorce Stipulation that the deed would not be delivered to Raymond Wood until Karen Wood was paid in full.

The Utah Probate Code, Section 75-2-804(2), provides that “Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate... the divorce...,” severs the interests of the former spouses in property held by them at the time of the divorce ...as joint tenants.

The marital home and real property of the Plaintiff, Karen Wood, and her former husband, Raymond Wood, remained in the names of both parties “as joint tenants with full rights of survivorship and not as tenants in common,” until the death of Raymond Wood. At the time of Raymond Wood’s death the marital home and real property became the sole and exclusive property of Karen Wood, because she held the right of survivorship pursuant to the Stipulation of Raymond Wood, Karen Wood and their respective counsel in the divorce action. The Stipulation in the divorce action requiring Michael Harrison, counsel for Karen Wood, to not deliver the deed to Raymond Wood until Karen Wood was paid in full excepted the severance of the joint tenancy upon the divorce as provided in the statute. The Plaintiff in the quiet title action, Karen Wood, should have been granted summary judgment and declared to be the sole, undisputed owner of the subject marital residence and real property because the real property transferred to her by operation of law upon the death of Raymond Wood.

**THE DEFENDANT'S AFFIDAVITS ARE DEFECTIVE
BECAUSE THEY ARE NOT MADE UPON HER PERSONAL KNOWLEDGE**

Rule 56(e), of the Utah Rules of Civil Procedure requires that affidavits made in support of a motion for summary judgment shall be made upon the personal knowledge of the affiant, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify as to the matters set forth therein.

The affidavits of the Defendant personal representative, offered in support of her motion for summary judgment, were fatally defective. The personal representative did not make and there was no showing that the affidavits are based upon the personal knowledge of the affiant personal representative. A supporting affidavit must be based upon the affiant's personal knowledge, and an affidavit based merely on unsubstantiated opinions and beliefs is insufficient. *Treloggan v. Treloggan*, 699 P.2d 747 (Utah 1985). The personal representative's affidavits were wholly insufficient because they are not based upon her personal knowledge and do not demonstrate her competence to testify as to the facts she asserts therein. The personal representative was not a party to the divorce action, nor did she assert personal knowledge of the facts in the divorce action giving rise to her argument that she should be awarded by summary judgment and the home and real property of the Plaintiff, Karen Wood. The personal representative cannot be competent to testify as to the facts of the divorce between the Plaintiff and Raymond Wood. She was not present to personally observe the proceedings nor was she a party to the divorce action. The affidavits of the personal representative are fatally defective and the summary judgment should be reversed.

**THE FACTS AS TO THE INTENTION OF THE PARTIES
TO THE DIVORCE ACTION WERE DISPUTED AND THE
PROBATE COURT SHOULD NOT HAVE ENTERED
SUMMARY JUDGMENT AGAINST KAREN WOOD**

A motion for summary judgment should be denied where the evidence presents a genuine issue of material fact which if resolved in the favor of the nonmoving party, would entitle him to judgment as a matter of law. *Jackson v. Dabney*, 645 P.2d 613 (Utah 1982). In this action, Karen Wood asserted that it was the intention of Raymond Wood, and his counsel, she and her counsel, Michael Harrison, that the real property would remain in joint tenancy with the right of survivorship until Karen Wood had been fully paid the monies Raymond Wood owed her from the marital estate. Resolving this fact in favor of Karen Wood, the nonmoving party, Karen Wood would be entitled to summary judgment quieting the title in the real property in her. Karen Wood asserted her and Raymond Wood's intention to keep the real property in joint tenancy. The Stipulation in the divorce case supported her assertion because it made delivery of the quit claim deed by Michael Harrison to Raymond Wood upon full payment of monies owed the operative action which would sever the joint tenancy. It was undisputed by the personal representative that Raymond Wood had not paid Karen Wood. It was undisputed that Michael Harrison did not deliver the deed to Raymond Wood prior to his death. It was undisputed that Karen Wood believed the real property to be hers upon the death of Raymond Wood and transferred the real property into her sole name following his death. Karen Woods assertion that she and Raymond Wood, and their respective counsel in the divorce action, intended for the real property to remain in joint tenancy until she was paid in

full was undisputed in the record. Accepting these facts in the light most favorable to the nonmoving party or the losing party, here Karen Wood, the probate court was precluded from entering summary judgment against Karen Wood in the quiet title action. Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Ehlers & Ehlers Architects v. Carbon County*, 805 P.2d 789 (Utah Ct. App. 1991). Here the intentions of Raymond Wood and Karen Wood and their counsel in the divorce action in entering into the Stipulation for Michael Harrison to hold the quit claim deed for delivery to Raymond Wood only upon full payment to Karen Wood of the monies owed her from the marital estate was a question of fact and the personal representative was not entitled to summary judgment as a matter of law.

The probate court's grant of summary judgment against Karen Wood and the dismissal of her quiet title action should be reversed.

CONCLUSION

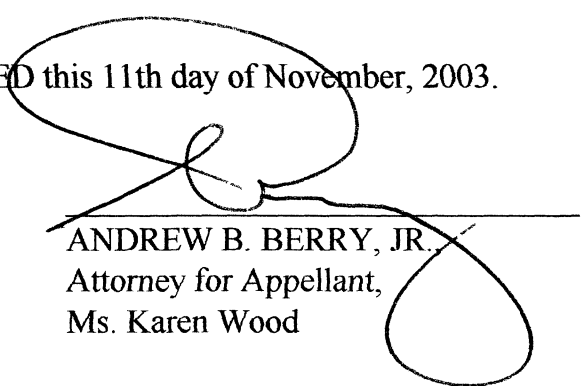
Karen Wood was not a creditor of the Estate of Raymond D. Wood and the quiet title action was not res judicated because of the divorce action nor because of the probate court's denial of a so called "creditor's claim" of Karen Wood. The divorce proceeding did not sever nor terminate the joint tenancy and her right of survivorship in the marital residence and real property but specifically protected and preserved it.

The probate court was without jurisdiction to resolve the issues in the quiet title action of Karen Wood to real property claimed by the estate. Thus, the quiet title action could not be consolidated with the probate action and the quiet title action was not res judicata.

The personal representative's motions for summary judgment and for consolidation with the probate action should have been denied. The Plaintiff, Karen Wood, should have been awarded summary judgment in her favor and this Honorable Court should declare the Karen Wood's marital home and real property her sole and exclusive property because she was a joint tenant with the full right of survivorship at the time of Raymond Wood's death.

The Appellant, Karen Wood, should be awarded her attorney fees incurred defending the personal representative's frivolous motion for summary judgment, for consolidation and upon this appeal. The affidavits of the Defendant do not comply with the mandatory requirements of Rule 56(e), and are fatally defective. The facts regarding the intentions of Raymond Wood, Karen Wood and their counsel in the divorce action were disputed. The summary judgment of the probate court should be reversed. The Plaintiff, Karen Wood, should be awarded her real property and her attorney fees and costs incurred herein.

RESPECTFULLY SUBMITTED this 11th day of November, 2003.

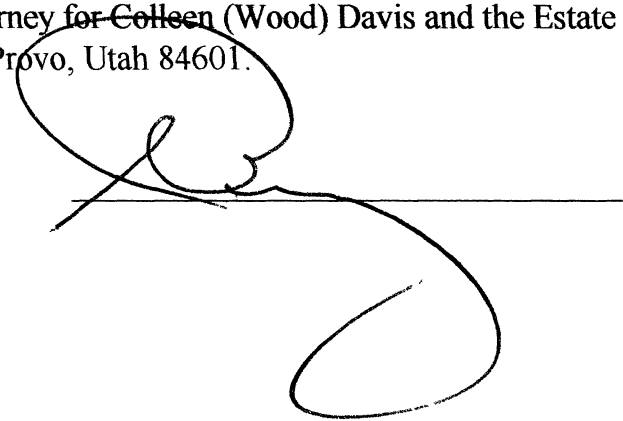


ANDREW B. BERRY, JR.
Attorney for Appellant,
Ms. Karen Wood

CERTIFICATE OF SERVICE AND MAILING

I HEREBY CERTIFY that on this 12th day of November, 2003, I served upon and mailed, postage prepaid and by first class mail, two (2), true and correct copies of the foregoing

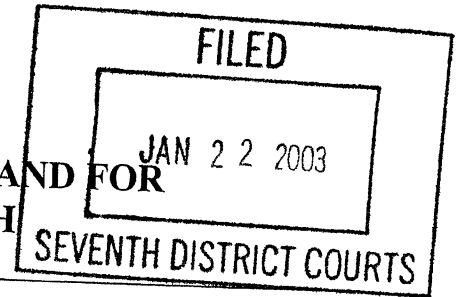
Brief Of Appellant to Michael K. Black, Attorney for Colleen (Wood) Davis and the Estate of Raymond D. Wood, at 39 West 300 North, Provo, Utah 84601.

A handwritten signature in black ink, featuring a large, stylized 'S' or 'C' shape that loops around and crosses itself. The signature is positioned above a horizontal line.

ADDENDUM

- A. RULING ON MOTION TO CONSOLIDATE filed in the trial court on January 22, 2003.
- B. ORDER OF DISMISSAL filed in the probate action on January 22, 2003.

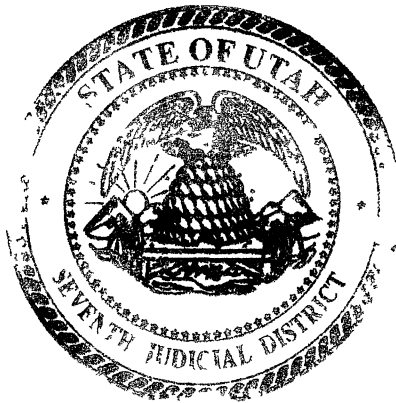
IN THE SEVENTH DISTRICT COURT IN AND FOR
EMERY COUNTY, STATE OF UTAH

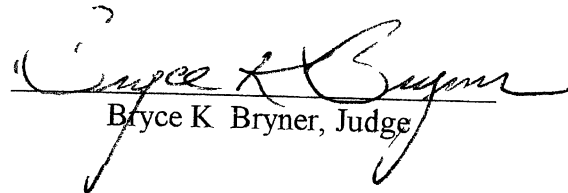


KAREN WOOD,)	RULING ON MOTION TO
)	CONSOLIDATE
Plaintiff,)	
VS)	
COLLEEN WOOD,)	Case No 010700169
)	
Defendant)	Judge Bryce K Bryner

The *Motion to Consolidate* the above entitled case with Probate No 00370013EI is granted in order to maintain consistency The *Motion for Summary Judgment* shall be ruled on by the Hon Bruce K Halliday, Judge of the Seventy District Court, who is hearing the said probate case

DATED this 19th day of December, 2002




Bryce K. Bryner, Judge


CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 010700169 by the method and on the date specified.

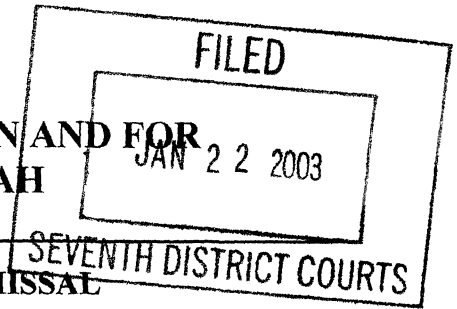
METHOD NAME

Mail	ANDREW B. BERRY ATTORNEY PLA 62 WEST MAIN STREET P. O. BOX 600 MORONI, UT 84646-0000
Mail	MICHAEL K BLACK ATTORNEY DEF 101 East 200 South Springville UT 84663

Dated this 22nd day of Jan, 2003.


Deputy Court Clerk

IN THE SEVENTH DISTRICT COURT IN AND FOR
EMERY COUNTY, STATE OF UTAH



KAREN WOOD,
Plaintiff,

vs.

COLLEEN WOOD,
Defendant.

ORDER OF DISMISSAL

Case No. 010700169

Judge Bruce K. Halliday

Judge Bryce K. Bryner has ordered this case #010700169, hereafter #169, consolidated with probate case #00370013, hereafter #13, and has requested that the judge handling the latter case, in an attempt to expedite efficient handling of the cases, rule on defendant's Motion For Summary Judgement in case #169. The Court has reviewed the pleadings, reviewed the decision which it made in the probate matter, and concludes that the Motion For Summary Judgement on the grounds of the decision in the probate matter was and is res judicata as to the ultimate issues raised in plaintiff's Petition to Quiet Title should be granted. I conclude that case #169 is merely an effort on the part of the plaintiff to circumvent the order in case #13 and avoid the operation of the statute of limitations question which underlies the decision in the probate matter. To allow such an effort would be a contravention of equity and justice herein

The Court previously concluded that the claim made by Karen Wood in #13 was untimely and denied that creditors claim. That decision is hereby confirmed and I conclude that the claim to Quiet Title in #169 is merely an effort to avoid my original ruling and reactivate the creditor's claim based upon the original and/or modified divorce decree.

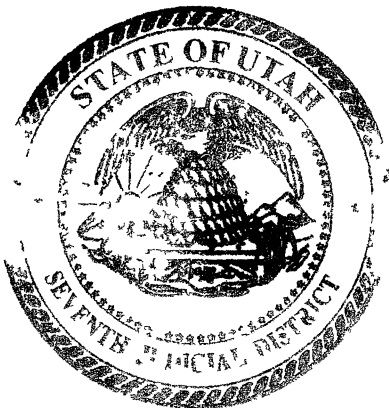
The Court concludes that the ex wife, Karen Wood, became a creditor of the decedent when she agreed to the sums certain in the divorce action. All of her rights, title or interest, in the property were modified from a property interest to a secured creditor's interest. The statute of limitations in the probate matter, where she failed to timely perfect a creditor's claim now prevents her from seeking to do indirectly what she was prevented from doing directly. The mere fact that the creditor's

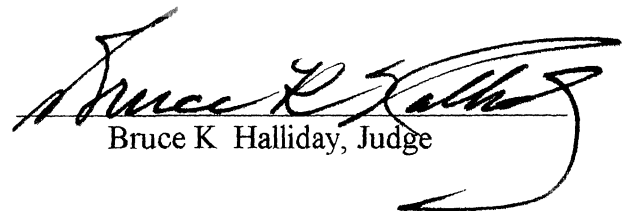
agent has or has not delivered the deed to the property to the deceased prior to the beginning of this law suit and/or the filing of a claim in the probate matter is a matter of the plaintiff's security interest and does not affect the statute of limitations problem which plaintiff, Karen Wood, has in this matter and in the probate matter which she cannot circumvent

For the foregoing reasons the Court grants the Motion For Summary Judgement and orders the Claim to Quiet Title in this case #010700169 be, and the same is HEREBY DISMISSED

Dated this 13 day of January, 2003

BY THE COURT:




Bruce K Halliday, Judge

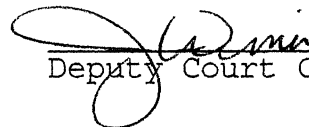
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 010700169 by the method and on the date specified.

METHOD NAME

Mail	ANDREW B. BERRY ATTORNEY PLA 62 WEST MAIN STREET P. O. BOX 600 MORONI, UT 84646-0000
Mail	MICHAEL K BLACK ATTORNEY DEF 101 East 200 South Springville UT 84663

Dated this 22nd day of Jan, 2023.


Deputy Court Clerk