

1967

John Elwood Dennett v. First Security Bank Of Utah, N.A., In Its Capacity As Administrator Of The Estate Of Jacob R. Green, Deceased, And Jacob R. Green II Original Administrator Of The Estate Of Jacob R. Green I, Deceased : Appellant's Brief

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

ELWOOD DENNETT,

Plaintiff and Respondent

VS.

FIRST SECURITY BANK OF UTAH, N.A.,
in capacity as Administrator of the
estate of Jacob R. Green, deceased,
JACOB R. GREEN II original adminis-
trator of the estate of Jacob R.
Green I, deceased,

Defendants and Appellants.

No.
10912

APPELLANT'S BRIEF

Appeal from the Order of the Third District Court
for Salt Lake County
Hon. Joseph G. Jeppson, Judge

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TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	12
POINT I. THE PLAINTIFF'S CLAIM IN HIS COMPLAINT IS RES JUDICATA. THE DECREE OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, ADJUDICATING THE AMOUNT OF FEE TO WHICH PLAINTIFF WAS ENTITLED FOR HIS SERVICES TO DEFENDANTS IS CONCLUSIVE.	12
POINT II. THE PLAINTIFF IS ESTOPPED FROM COLLATERALLY ATTACKING THE DECREE OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, WHEREIN HE IS AWARDED FEES FOR LEGAL SERVICES RENDERED TO DEFENDANTS	20
POINT III. PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR ANYTHING OTHER THAN A REASONABLE ATTORNEY'S FEE FOR SERVICES RENDERED WHICH HAS BEEN ADJUDICATED AND WHICH MUST BE RECOVERED BY PROCEEDINGS SUPPLEMENTARY TO THE DECREE AWARDING HIM HIS FEE	22
CONCLUSION	23

AUTHORITIES CITED

Cases :

Erickson v. McCullough, 91 U. 159, 63 P.2d 595, 109 A.L.R. 332 (1937)	21
In Re Agee's Estate, 69 U. 130, 252 P. 891 (1927)	12
In Re Rice's Estate, 111 U. 428, 182 P.2d 111 (1947)	20

Statutes :

75-9-27 U.C.A., 1953.	23
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Texts :

7 Am.Jur.2d, §§ 235, 250, pp. 183, 187	22
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IN THE
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OF THE
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JOHN ELWOOD DENNETT,

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vs.

FIRST SECURITY BANK OF UTAH, N.A.,
in its capacity as Administrator of the
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trator of the estate of Jacob R.
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APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for attorney's fees against the admin-
istrator and original administrator of the *Estate of Jacob*
R. Green I.

DISPOSITION IN LOWER COURT

Defendants moved to dismiss plaintiff's complaint on
the ground that the merits of this case had been adjudicated

by the Third Judicial District Court in and for Salt Lake County, State of Utah, in the matter of the *Estate of Jacob R. Green I*. The trial court ordered that the record in the matter of the *Estate of Jacob R. Green I* be made a part of the record in this case. The trial court denied defendants' motion to dismiss. The defendants' petition for an intermediate appeal to the court was granted.

RELIEF SOUGHT ON APPEAL

The defendants seek a reversal of the order denying their motion to dismiss.

STATEMENT OF FACTS

John Elwood Dennett appearing *pro se* filed a complaint (R-1-4) in which he alleges in substance as follows:

Jacob R. Green II as administrator of the estate of Jacob R. Green I originally contracted with plaintiff for his services as attorney. First Security Bank of Utah, N.A. was successor administrator and became bound to the original administrator's obligations for plaintiff's attorney's fees. The compensation the plaintiff was to receive "while not discussed in terms of percentages, was to be a contingent compensation, with nothing to be owed by the heirs in case of an unsuccessful attempt, and with the plaintiff to recover a reasonable percentage in case the plaintiff was successful in achieving disallowance of the will and an intestacy probate." A fee of one-third of the estate would be reasonable under the circumstances.

In plaintiff's complaint he prays for judgment against the defendants as administrators of the estate of Jacob R. Green I in the amount of \$6,750.00 for extraordinary serv-

ices rendered, together with \$970.00 usual probate fee awarded for the services rendered by decree of the Third Judicial District Court in and for Salt Lake County, State of Utah, in the matter of the *Estate of Jacob R. Green I.*

The defendants moved to dismiss plaintiff's complaint upon the grounds of failure to state a claim upon which relief may be granted, *res judicata* and collateral estoppel. (R-5-9)

In support of defendants' motion, defendants caused the record in the matter of the *Estate of Jacob R. Green I* to be made a part of the record in this case. (R-10)

In the matter of the *Estate of Jacob R. Green I* there was a contest between the defendants and the plaintiff concerning the amount of plaintiff's fees. In a petition by the plaintiff for allowance of extraordinary fees to the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, the plaintiff, *pro se*, asserted a claim the same as he, *pro se*, asserts in the complaint in the case at bar (R130-132). At hearings on his petition for attorney's fees he said:

"The petition, that is myself acting in this capacity as a petitioner, rests." (R-181)

The defendant, First Security Bank of Utah, N.A., as administrator of the estate of Jacob R. Green I, filed an amended petition for third and final account including therein an answer to the plaintiff's petition. That answer contained an admission and denial of plaintiff's petition. The defendant, First Security Bank, as administrator, alleged:

IX

“That the normal and usual fee for the services rendered by counsel would be \$970.00, that with respect to this amount, the administrator acknowledges the estate’s liability . . .

X

“That certain extraordinary services were rendered by the estate’s counsel, the extent and value of which are not entirely known to the administrator, and with respect to which the court should make a determination which would be fair and equitable to both counsel and the heirs of the estate. A separate petition has been filed by counsel detailing the services he claims.” (R-135-136)

At the hearings on the petition of John Elwood Dennett and answer of First Security Bank of Utah, N.A. as administrator, the defendant, Jacob R. Green II was present. (R-154 & 157). The plaintiff testified in support of the allegations he made in his verified petition. (R-158-176) Mr. Dennett called an expert witness to support his petition. He was Mr. Richard Bird, Jr., Esq. whose firm subsequently appeared at a hearing as Mr. Dennett’s attorneys. (R-176 & 185) The defendant, First Security Bank of Utah, N.A., as administrator appeared through its trust officer, Mr. Brent Hortin. (R-154) Jacob R. Green II appeared and objected to Mr. Dennett’s claim (R-157) and consented to the court’s hearing the issue of Mr. Dennett’s attorney’s fees. (R-183) All of the parties in the case at bar were present at the hearings on Mr. Dennett’s petition for attorney’s fees in the matter of the *Estate of Jacob R. Green I*. All of the parties

submitted to the jurisdiction of that court for the adjudication of reasonable attorney's fees. (R-183)

The court, Judge Bryant H. Croft presiding, made findings of fact and conclusions of law and entered a decree. (R-149-151) The plaintiff was awarded a regular fee of \$970.00 and extraordinary fee of \$985.00. (R-150)

At the last hearing on the petition of the plaintiff concerning attorney's fees Mr. William D. Oswald, Esq. of the same firm as Mr. Richard Bird, Jr. appeared as one of Mr. Dennett's attorneys.

Mr. Dennett's attorney represented to the court:

"... It is my understanding in my conversation with him (Mr. Dennett) he discussed with you (the Judge) the possibility of changing your finding to show that the attorneys fee allowed Mr. Dennett will be changed to show that they were allowed to the administrator of the estate. And now it's our feeling that our best course would be to appeal to the Supreme Court without changing any of the findings. . . . (W)e do not wish to make any change in the findings or decree." (R-185)

The court responded (R-185):

"Oh, that's fine. I would like to make a statement into the record so that there will be something for your guidance as well as that of the Supreme Court and in regards to the ruling I made concerning the allowance of attorneys fees in this case.

"There were two aspects of the case that formed a basis for the allowance of the attorney's fee. One was the fact that some work was done in the State of Iowa to recover a portion of the estate of the decedent that was in that state for the heirs. It's my

understanding that the — as a consequence of the efforts to some extent of Mr. Dennett, to some extent of the First Security Bank as administrator of the estate of Jacob R. Green in Utah, and largely through the efforts of Attorney Ed Dailey in Iowa, they were able to effect a settlement there and recover for the heirs an estate that was not left to the heirs of some \$6,935.85. They paid to Attorney Ed Dailey the sum of \$1,000.00 attorney's fee, so that it would appear that the recovery through the action in Iowa totaled \$7,935.85 counting the \$1,000.00 attorney's fee that was paid to Ed Dailey.

“Now the issue there as here, to a lesser degree, was the competency of Jacob R. Green to make the will, he having been declared an incompetent by the court in Salt Lake County, this court, long before he made the wills involved. At the time he made the wills involved, he was the ward of a guardian under a guardianship proceeding in this court, and consequently when he moved to Iowa, after having been declared an incompetent by this court, where he died, they attempted to probate a will that he had executed after he had been declared mentally incompetent.

“In a negotiated settlement, I believe between Mr. Dailey and the attorneys for the administrator in Iowa, the heirs received, as I indicated, some \$6,935.85 in assets, and Dailey was paid a Thousand Dollars. Now just how much work Mr. Dennett did on that case, I'm not sure. In his testimony, and his testimony was very general in nature, he spoke of many hours of work and nothing really to support it. The bank, as a matter of fact, did a lot of the negotiations with Ed Dailey in Iowa as the administrator out here. Be that as it may, in fixing a fee, I viewed the Iowa recovery as, in effect, an accomplishment of recovering something like you might in a judgment, and so I computed Mr. Dennett's fee on the basis of

twenty-five per cent of the amount the heirs in Utah received from the Iowa estate plus a Thousand Dollars paid to Mr. Dailey to come up with an attorney's fee of \$1,984.00. And from that, of course, I deducted the \$1,000.00 paid Dailey leaving Mr. Dennett \$984.00 of the fee.

"Now what that is, of course, is a twenty-five per cent fee on the recovery divided between two attorneys, Mr. Dailey doing most of the work in Iowa, and Mr. Dennett doing some part of the work here in Utah.

"Now with respect to the estate in Utah, the fee I allowed Mr. Dennett here based upon an estate that is slightly less than \$20,000.00 was the standard fee fixed by the State Bar Association for an estate of this size. And the reason I didn't allow any additional extraordinary fee on the Utah estate was because from my review of the file it was apparent to me that there wasn't any extraordinary effort required in probating the estate. There was a petition filed to have the will declared void because Green was incompetent at the time he executed it, and the court entered a default judgment because the Iowa administrator didn't make an appearance when the time was set for trial and declared the will invalid. Well, I don't view that particular effort on the part of Mr. Dennett as being a great extraordinary service because he merely had to file a petition asking that the will be declared void because Green was incompetent when he executed it as declared by this court. And, of course, that was the decree that this court entered. When I say, 'this court,' I don't mean me. I mean the District Court of Salt Lake County entering—declaring the will of Jacob R. Green void because he was, in fact, incompetent and under a guardianship of this court at the time he executed the will.

"Now under the circumstances, I don't see that the achievement, if it can be called an achievement, of having this will declared void by this court was one that required any extraordinary services on the part of Mr. Dennett.

"The petition for the probate of the estate in Utah was filed on November 14, 1961. He filed a petition on behalf of Jacob R. Green II asking that Jacob R. Green be appointed administrator of the estate here. The administrator of the estate in the Iowa court in Des Moines had, in fact, filed an Answer to this petition.

"On April 13, 1962, Judge Van Cott signed an Order directing that the trial of the issues of the estate in Utah be held on April 24, 1962, and that a copy of this order be served on the attorney for the estate in Iowa, the Answer filed by the Iowa administrator having asked for ancillary proceedings in Utah. Of course, the Iowa administrator did not appear on April 24th, and the court appointed Jacob R. Green, II the administrator of the estate here. This order was finally presented to Judge Van Cott for signature on July 27, 1962.

On January 23, 1963, the bank filed a consent to serve as a substitute administrator, and the bank was appointed substitute administrator pursuant to a petition filed by Mr. Dennett on behalf of the estate. At least, I assume it was filed by Mr. Dennett. His signature doesn't appear upon it, but it is signed by Jacob R. Green.

"Now a Petition for First and Final Accounting, Petition for Approval of Administration, for Ratification of Disbursement and Acts, and for Release and Discharge as Administrator was filed March 21, 1963 and prepared by Mr. Dennett, I'm

sure. It's a one-page petition with a typewritten schedule attached.

"There was an Order signed approving that account by Judge Hansen on April 8, 1963. A Notice to Creditors was not published until May 17, 1963, the last date of publication being June 7, 1963, and I believe that was published at the — through the effort of the administrator.

"It's my understanding from Mr. Hortin at the bank that the inventory and appraisement was prepared by the bank when filed October 31, 1963, about two years after the original petition was filed.

"There was a subsequent Petition for First Accounting Approval and for Leave to Make Partial Distribution filed November 30, 1965. A Decree of Partial Distribution was entered December 21, 1965.

"There is an Order signed granting Leave to Contract with respect to Real Property that was signed in May — May 26th of 1966. And then, of course, the final amended Petition of the Administrator for Approval of Third and Final Account which was originally prepared by Mr. Dennett and which I, personally, almost rewrote myself and told him what he would have to put in it before I would approve it.

"I fail to see in this estate in Utah that there was any great amount of work involved. It was a simple estate for less than \$20,000.00, had no complications whatsoever as far as I can see, and I couldn't see any justification whatsoever for any extraordinary fee in this estate.

"Now I don't know what Mr. Dennett may have done — and I heard his testimony — and, again, with respect to his activities here, it was very general. He

talked in terms of many, many hours, but he didn't have any records to back up what he was saying. And my review of the file, as far as I am concerned, does not reflect a complicated case that justifies an extraordinary fee. I don't think in any sense of the word that he, in effect, recovered a \$20,000.00 estate for the heirs in Utah. We had \$20,000.00 — a \$20,000.00 estate left in Utah by Jacob Green subject to probate here, which was probated in routine fashion albeit drug out over more than a five-year period, or at least a five-year period.

"Now after reviewing the file carefully and hearing the bank, and the bank as administrator testified, as I recall, at least there is something in the record to indicate, that they had done a substantial amount of the work required to get the inventory ready and filed as well as efforts that were put forth afterwards to get the estate closed. And I am not convinced at all that this is an estate that required any great amount of work over and above the routine work required of any attorney in probate of an estate of this size. And the fact that he has filed three accountings in this estate doesn't suggest to me that it required a great effort on his part, but, rather, it was a rather indifferent handling of the estate, because I see nothing in the proceedings here at all that was complicated or that required any five-year drag out of getting the estate administered and closed.

"For those reasons, and I say to you, I reviewed the file from cover to cover and outlined it making notes, I came to the conclusion that the ordinary fee allowable by the State Bar Schedule as far as the Utah estate was concerned was all that he was entitled to.

"I might say that he was the attorney for the guardian prior to the time that Jacob Green died for

a brief period of time. I think for less than a year, at least if my memory serves me.

"I reviewed the guardianship file also in connection with this case, and, of course, he was paid another fee for his work in the guardianship estate. So all of the work he did prior to the death of Jacob Green as attorney for the guardianship estate, I think he was paid in that estate, and I think a substantial amount of the work that he did in the Jacob Green matter involved work that he did as attorney for the guardian rather than attorney for the estate.

"There was some complaint made when we had the hearing here that heirs of Jacob Green made many efforts to try and contact him. They would go down to his office and rather than see them, he would go out the back door and not see them. Well, he had his explanation for it, but I don't see, in any sense of the word, he is entitled to any extraordinary fee of the estate probated in this court.

"Now I have taken the time to give you that information and the reason that was back of the allowance of the fee that I made in this case because otherwise I think the Supreme Court is in no position to know what was back of the fee. Now I don't know whether you would propose in taking this matter to the Supreme Court to include what I have put into the record today as my reasons for determining the fee that I did or not, but I dare say that if you don't, the bank will, and I think the Supreme Court is entitled to know the reasons why I came up with the fee that I did in this case.

"Now if you have any questions, I will be glad to answer them."

"MR. OSWALD: No, Your Honor."

A R G U M E N T

P O I N T I

THE PLAINTIFF'S CLAIM IN HIS COMPLAINT IS *RES JUDICATA*. THE DECREE OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, ADJUDICATING THE AMOUNT OF FEE TO WHICH PLAINTIFF WAS ENTITLED FOR HIS SERVICES TO DEFENDANTS IS CONCLUSIVE.

A review of the record for comparing the parties and issues in the matter of the *Estate of Jacob R. Green I* and in the complaint on file in the case at bar reveals:

- (a) Identical cause of action
- (b) Identical persons and parties to the actions
- (c) Identical persons for or against whom claims are made
- (d) Adjudication by the Third Judicial District Court in and for Salt Lake County, State of Utah, of plaintiff's claim in the matter of the *Estate of Jacob R. Green I* prior to his filing the complaint in the case at bar.
- (e) Adjudication by a court of competent jurisdiction

The enumerated elements of *res judicata* are clearly contained within the record in the case at bar. The judicial power and jurisdiction of the District Court to adjudicate plaintiff's claim in the matter of the *Estate of Jacob R. Green I* are not in doubt.

In a previous decision by this court, *in re Agee's Estate*, 69 U. 130, 252 P. 891 (1927), the probate division of a Utah

District Court was found to have the same constitutionally vested judicial power and jurisdiction as the other divisions, if any, of a District Court. In that case an attorney for the administrator of an estate filed a petition with the District Court's probate division as follows: to fix and allow certain amounts as fees, to approve and allow certain costs advanced, to direct the administrator to pay forthwith to the petitioner his fees for legal services rendered and to impress a lien on certain amounts in favor of petitioner. The administrator filed a pleading in the nature of a demurrer which challenged the sufficiency of the attorney's petition on the ground that the District Court's probate division had no jurisdiction over the subject matter. The District Court dismissed the petition of the attorney. This court reversed and remanded with directions to the District Court. The rationale of this court in that case squarely applies to the issues in the case at bar. It is the landmark Utah case concerning these issues. This court said:

"Respondent makes the further contention that appellant's cause of action, if any he has, is against the administrator personally, and not against the estate. Such, no doubt, is the rule in ordinary cases of administration. Upon this point respondent's counsel call our attention to many cases . . . The exceptions to the rule are also stated . . ."

". . . we are convinced that this is a case in which the fund is primarily liable for whatever amount is reasonably due the appellant for his services, in its behalf, and that appellant is entitled to maintain an action therefor against the administrator of the estate as such.

"This brings us to the last and perhaps most important question in the case. It is contended by re-

spondent that the district court in a probate proceeding was without jurisdiction to hear and determine the cause. . . . Is the district court, in the exercise of probate powers, a court of competent jurisdiction?

* * * *

“. . . we will quote another passage from Woerner, vol. 2, p. 1185:

‘In view of the ultimate liability of the estate for the disbursements made in its behalf by the executor or administrator, and of the duty incumbent upon the probate court to pass upon the question of the reasonableness of the charges, as well as of the liability of the estate, it would seem that original jurisdiction to adjudicate between executors or administrators and their creditors for services in respect of the estate should, on principle, be vested in the probate courts, to avoid circuity of action and unnecessary costs and delay, and there seems to be legislative and judicial tendency in that direction, particularly in the western states.’

‘The cases cited sustain the text.

‘The sections of the Probate Code referred to are as follows:

‘7872. [75-14-17] All issues of fact joined in probate and guardianship proceedings must be tried in conformity with the requirements of the Code of Civil Procedure, and in all such proceedings the party affirming is the plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions.’

‘7873. [75-14-18] If no jury is demanded the court or judge must try the issues joined. If on writ-

ten demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court may direct the preparation of more specific pleadings, or, on due notice to the opposite party, may settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury. If the trial of the issues joined requires the examination of an account, the court or judge must try the matter or refer it, and no jury can be called.'

"As further illustrating the powers of the court in probate proceedings, we quote the following sec-

'7558. [75-1-6] The district and Supreme Courts and the judges thereof sitting in probate and guardianship matters shall exercise all such powers, consistent with the provisions of this title, as are or may be conferred upon those courts or judges, respectively, in other proceedings; and, except as otherwise provided in this title, the provisions of the Code of Civil Procedure shall be applicable to and constitute the rules of practice in probate and guardianship proceedings.'

* * * *

"In the Hazlett Case the syllabus is as follows:

'Attorneys, who under employment by executors of a will, render necessary services beneficial to the testator's estate in the settlement thereof, may, in a proper case, file with the county court an itemized bill for their compensation, and the county court has authority to allow a reasonable amount for that purpose as a claim against the estate, where those in control of it refuse to pay the claim and object to any allowance therefor.'

"In the state of Nebraska, under the Constitution and statutes of the state, the county court, in the

settlement of estates of decedents, has the powers of a court of chancery. See *Hazlett Case*, page 591 (89 Neb. 372). In this state the district court is a court of general jurisdiction. It exercises probate powers, which, in most jurisdictions of the country, are exercised separately by another court. The jurisdiction of our district courts is lucidly explained by Mr. Justice Frick in the case of *Weyant v. Utah Sav. & Trust Co.*, 54 Utah 181, 182 P.189 9 A.L.R. 1119. Counsel for appellant quote from the opinion the following language, found on pages 203, 204 (182 P. 198).

“There is, however, no such court as a probate court in this state. The only courts having general—we may say universal—original jurisdiction are the district courts, all of which are created by our Constitution. Upon those courts, in the language of article 8, section 7, of our Constitution, is conferred “original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law.” Neither the Constitution or the laws of this state prohibit those courts from exercising original jurisdiction to any extent. * * *

“The district courts of this state are therefore invested with jurisdiction in probate matters precisely the same as they are invested with all other civil and criminal jurisdiction. They transact probate business as they do all other civil business. True, in administering estates they follow the established law and rules of procedure applicable to those matters, the same as they follow the established law and rules of procedure applicable to so-called equity or law cases. Moreover, our Constitution provides that “there shall be but one form of action, and law and equity may be administered in the same action.” We therefore have . . . courts possessed of general original jurisdiction, which are known as district courts. The district courts of this state, therefore, admin-

ister the estates of decedents as a part of their original jurisdiction, the same as they hear and enter judgments on promissory notes, or enter decrees in equity, foreclosing mortgages or quieting titles.'

* * *

"In the case of *In re Reiser's Estate*, 57 Utah 434, 195 P. 317, the jurisdiction of the district court in a probate proceeding was challenged by the administratrix of an estate, who claimed that the matter in controversy had not been theretofore adjudicated . . .

* * * *

"In the course of the opinion, the court, at page 441 (195 P. 320) says:

'Without denying the power of the district court to hear and determine a question of this kind, even when exercising the powers of a probate court, we feel compelled to hold that there should be some appropriate pleading to invoke the jurisdiction and power of the court.'

"The court then quotes the following excerpt from *In re Tripp's Estate*, 51 Utah, 359, 170 P. 975:

* * * *

'There seems to be no reason, under our Constitution and laws, why a district court in a probate proceeding may not when necessary to a due administration of an estate exercise powers which ordinarily pertain to equity jurisdiction so that the business may proceed without interruption or unnecessary delay.'

"While the identical question presented here has not been heretofore determined by this court, it must be conceded from the legislation and decisions to which we have referred that the tendency is in the

direction of disregarding mere technical distinctions relating to the powers of a district court when exercising jurisdiction in probate proceedings.

"... The court, has thus far found no substantial reasons for holding that the district courts, in the exercise of probate powers, may not determine such questions as they arise during the course of administration. It is held, however, that the pleadings in such cases must be such as to invoke the jurisdiction of the court. Section 7873, *supra*, of the Probate Code contemplates recasting the pleadings when necessary for the trial of such questions as arise under section 7872.

* * *

"... it is our opinion that it was the manifest intention of the legislature, in enacting the Probate Code, to simplify our judicial procedure so as to avoid unnecessary circuitry of actions in administering the estates of decedents.

"The judgment is therefore reversed . . . Appellant to recover costs.

"GIDEON, C. J., and FRICK, J. concur.

"CHERRY, J. I. concur in the result. The doctrine that claims for services rendered in the administration of the estates of deceased persons, at the instance and request of administrators, are merely claims against the administrator individually, and cannot be made charges upon the estate of the deceased except indirectly through the administrator, is an artificial doctrine, resting on no substantial basis. Its practical application often results in delay, circuitry of action, uncertainty, and injustice. Many courts have rejected it. . . . I think the doctrine inconsistent with the Probate Code of this state. Comp. Laws Utah 1917, §§ 7643, 7644 and 7666, very clearly

imply that expenses of administration are not only charges but preferred charges against the estate. The matter of the lien asserted by petitioner is immaterial. If the petitioner has a claim at all against the estate, it is for expenses of administration, which, by the statute, has preference in the order of payment.

“... There is very respectable authority for the proposition that claims for attorney’s fees for services performed in the course of administration may be allowed by the probate court and ordered paid directly to the attorney performing the service. In addition to *Hazlett v. Moore*, 89 Neb. 372, 131 N.W. 589, cited in the majority opinion, see *U.S.P. & G. Co. v. People*, 44 Colo. 557, 98 P. 828; *People v. El Paso Co. Ct.*, 74 Colo. 123, 219 P. 215; in *re McLure’s Estate*, 68 Mont. 556, 220 P. 527; *Knight v. Hamaker*, 40 Or. 424, 67 P. 107. In California, the proceeding is authorized by statute. *Kerr’s Cyc. Codes*, Cal. 1616. This form of proceedings is simple, direct, and sensible, and ought to have judicial sanction, especially since this court is not committed to the contrary. This does not mean that the scope of probate proceedings may be enlarged to include the adjudication of disputes relating to contracts with or claims against the deceased or to controversies over the title or possession of estate property. Because the matter in hand relates to expenses of administration, a subject directly connected with and arising out of the proceedings over which the probate court has control, and which it must adjudicate in any event with the administrator, it becomes a peculiar and appropriate subject of cognizance in the probate proceedings, for which reasons I approve the reversal of the judgment.

“STRAUP, J., concurs in the views expressed by CHERRY, J.”

This court reaffirmed its rationale in *Agee's Estate* and followed it in *Rice's Estate*, 111 U. 428, 182 P.2d 111 (1947).

This author prefers the position of Justices Straub and Cherry in *Agee's Estate*, supra. Whether this court follows the majority or the concurring opinion in that case, it is clear from the record that the Third Judicial District Court's probate division was a court of competent jurisdiction. Its jurisdiction was invoked by John Elwood Dennett's petition for attorney's fees answered by admissions and denials by First Security Bank and by the appearance of the defendant, Jacob R. Green II at the hearing on Mr. Dennett's claim wherein he objected to Dennett's petition and consented to submitting himself to the jurisdiction of the court to adjudicate the issue after being thoroughly advised by the court that he could have a continuance for the purposes of obtaining legal counsel. (R-157-183)

All of the elements of *res judicata* existed within the proceedings on Mr. Dennett's petition for attorney's fees in the matter of the *Estate of Jacob R. Green I*. The plaintiff's claim in his complaint in the case at bar is *res judicata*.

POINT II

THE PLAINTIFF IS ESTOPPED FROM COLLATERALLY ATTACKING THE DECREE OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, WHEREIN HE IS AWARDED FEES FOR LEGAL SERVICES RENDERED TO DEFENDANTS

The decree of the District Court, probate division, in the matter of the *Estate of Jacob R. Green I* is not subject to collateral attack. The controlling case decided by this court is *Erickson v. McCullough*, 91 U. 159, 63 P.2d 595, 109 A.L.R. 332 (1937). In that case the plaintiff, Erickson, a minor, by his guardian ad litem, Tanner, took action against Salt Lake attorneys, McCullough & Callister. Said attorneys had been employed by the minor's mother to prosecute a claim for the minor against Arctic Ice Company. The guardian ad litem in the case against the ice company was the mother. After tentative settlement of the claim with the defendant, Arctic Ice Company, the mother petitioned for letters of guardianship and authority as general guardian to pay attorneys fees to McCullough & Callister in the sum of \$3,708.00. The plaintiff, Erickson, by his guardian ad litem, Tanner, sought to cancel the allowance of attorneys fees in the guardianship proceeding and sought judgment against the attorneys for the amount of fees they had received or attorneys fees which had been allowed. Plaintiff contended that the attorneys fees were excessive, illegal, inequitable and unconscionable. The defendant's attorneys, McCullough & Callister, demurred to the plaintiff's complaint. This court held that the award of attorneys fees in guardianship and probate matters is not subject to collateral attack except for jurisdictional reasons. The court said:

“Appellant, however, further submits questions relating to the contract for attorneys' fees and the power of the guardian ad litem to bind the infant. The court having acquired jurisdiction of the person and estate of the minor, these questions become collateral and may be successfully urged in a collateral attack only if the order making the appointment of

the guardian of the minor is void for want of jurisdiction. It is contended that the probate court made an order allowing an attorneys' fee without hearing or taking any evidence relative to the value of the services. The probate court having acquired jurisdiction of a cause, its orders and judgments are presumed to be based upon evidence, stipulations or proceedings sufficient to support such orders or judgments."

POINT III

PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR ANYTHING OTHER THAN A REASONABLE ATTORNEYS FEE FOR SERVICES RENDERED WHICH HAS BEEN ADJUDICATED AND WHICH MUST BE RECOVERED BY PROCEEDINGS SUPPLEMENTARY TO THE DECREE AWARDING HIM HIS FEE

It is elementary hornbook law that when a contract does not contain an essential term such as the amount of compensation for attorney's services and the attorney renders services, the amount of compensation is implied. It is a reasonable amount. 7 Am.Jur.2d §§ 235, 250, pp. 183, 187

In his complaint Mr. Dennett alleges :

"While not discussed in terms of percentages, the (Mr. Dennett's) compensation was to be a contingent compensation, . . ."

No allegation appearing in the complaint of a definite term of compensation for legal services, the only basis of compensation can be reasonableness. In the *Estate of Jacob*

P. Green I, the Third Judicial District Court in and for Salt Lake County, State of Utah, adjudicated what constitutes a reasonable attorney's fee. *Res Judicata pro veritate accipitur*.

The defendants have tendered Mr. Dennett the fee the District Court awarded to him. Even if defendants failed to tender the fee to him, Mr. Dennett's recourse is not his action in the case at bar but supplementary proceedings to the decree. 75-9-27 U.C.A., 1953.

CONCLUSION

The plaintiff is barred and estopped from any relief upon his complaint.

Respectfully submitted,

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