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# Phyllis Lang v. J. Robert Lang : Brief of Appellants

Utah Supreme Court


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# IN THE SUPREME COURT OF THE STATE OF UTAH

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PHYLLIS LANG,
*Plaintiff-Appellant,*

vs.

J. ROBERT LANG,
*Defendant,*

SAMUEL J. CARTER,
*Intervenor-Respondent.*

Case No. 10225



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# APPELLANTS' BRIEF

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**Appeal from the Judgment of the Third District Court for Salt Lake County**
**Hon. Ray Van Cott, Jr., Judge**



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## APPELLANTS' BRIEF

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### STATEMENT OF THE KIND OF CASE

This is an action for a garnishee judgment against a Utah resident who has been appointed by the California Court, executor of the estate of a California decedent, and who holds money in Utah which the California Court has ordered to be paid to Defendant.

## DISPOSITION IN LOWER COURT

Plaintiff and Appellant, Phyllis Lang, obtained a garnishee judgment against Intervenor and Respondent, Samuel J. Carter, executor, pursuant to Mr. Carter's answers to a garnishment duly served upon him. Intervenor and Respondent moved the court to set aside the garnishee judgment. The Court, the Honorable Ray Van Cott Jr. presiding, granted the motion. From the order setting aside the garnishee judgment Plaintiff appeals.

## RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the order setting aside the garnishee judgment.

## STATEMENT OF FACTS

Pursuant to judgments in the aggregate amounts of $13,480.00, garnishments were issued, (R-1&2), to Plaintiff and duly served February 27, 1964 upon Intervenor, Samuel J. Carter, both individually and as executor, (R-3). Mr. Carter answered one of the garnishments, (R-1), stating that he had in his possession $9,375.00 owing to Defendant, J. Robert Lang. A garnishee judgment, (R-4), was obtained against Mr. Carter and a garnishee execution was issued, (R-5), and duly served upon him on February 28, 1964, (R-6). On March 5, 1964, (R-20-6), Mr. Carter filed a com-

plaint in Interpleader, (R-20-1), and served the same on Plaintiff, (R-20-8). Mr. Carter stated that he was appointed Executor of the Estate of John Lang, deceased, by the California Court, (R-20-1), and that that court had made and entered its order directing Mr. Carter to pay the sum of $19,500.00 to Defendant, (R-20-2). Mr. Carter admitted, (R-20-3), that he claimed no beneficial interest in the subject money and that he had already paid of this sum $10,125.00 to an attorney in Salt Lake City, one Wilford Burton, at the direction of Defendant, (R-20-4). Mr. Burton was joined by Mr. Carter as a party Defendant in the Interpleader Action, (R-20-9), and moved to dismiss, (R-20-16). Argument on this motion was had before the Hon. Judge Aldon J. Anderson, (R-13), at which time Franklin Riter, Esq., representing Mr. Carter, stated that the subject funds were in Utah, that a final order had been entered by the California Court directing Mr. Carter to pay the money to Defendant and that Mr. Carter was a mere stakeholder and was therefore competent to institute an action in Interpleader in the Utah Courts as a foreign executor. The Hon. Judge Aldon J. Anderson denied the motion to dismiss, (R-20-26). At this point Tracy-Collins Bank & Trust Co. was granted leave to intervene, both in the subject case, (R-8), and in the companion Interpleader Case, (R-20-28). Intervenor, Tracy-Collins Bank & Trust Co., maintained that Defendant had assigned the subject money to it, (R-20-29), by instrument dated February 29, 1964, (R-20-34); this alle-

gation Mr. Carter readily conceded, (R-20-37). Mr. Carter then moved the Court to set aside the garnishee judgment, (R-10), on the grounds that the District Court of Salt Lake County, State of Utah, had no jurisdiction over him in his capacity as foreign executor, (R-11). The Court, the Hon. Ray Van Cott Jr. presiding, granted the motion, (R-15). From this order Plaintiff appeals, (R-17).

## ARGUMENT

### POINT I.

### ONCE A DISTRIBUTIVE SHARE OF AN ESTATE HAS BEEN ASCERTAINED AND ORDERED PAID, THE PROPERTY MAY BE REACHED BY A JUDGMENT CREDITOR OF AN HEIR IN A GARNISHMENT PROCEEDING.

It is well settled that once a distributive share of an estate has been ascertained and ordered paid, the property is no longer in *custodia legis* and may be garnished by a judgment creditor of the heir. 4 *Bancroft Probate Practice 2nd,* Vol. 4, p. 504; 59 *ALR* 777; 6 *Am Jur 2nd, Attach. & Garn. par.* 214.

Prior to the order of distribution, the general rule is that a distributive share of an heir will not be subject to garnishment while in the hands of the court-appointed administrator or executor. The California Court

in *Dunsmoor v. Furstenfeldt,* (Cal.), 26 Pac. 518, states the reason for this rule and the rule that pertains *following an order of distribution:*

> "The only reason assigned by the authorities for the rule prohibiting the attachment of property in the custody of the law is that such attachment would generally delay and embarrass judicial and other official proceedings in the administration of such property and that this is a sufficient reason for the rule, as applied to all judicial proceedings in regard to such property, is generally admitted; and to this extent the weight of authority admits no exception to the rule. ***But, according to a great preponderance of the modern cases, there are some exceptions to the rule applied to property in the custody of purely executive officers, based on the maxim that the rule should not be applied when the reason of the rule ceases*** . . . (Emphasis Supplied) . . .
>
> . . . When defendant has a right to a certain distributive share of the fund in the hands of a receiver, master in chancery, or trustee of the court, the officer may be effectually garnished by a creditor of the party so entitled, after the court has ordered it to be paid.
>
> "The authorities seem to concur in holding receivers and similar officers liable to garnishment when they have in their hands a definite sum to which the defendant or judgment debtor is clearly entitled, and the officer has nothing more to do with the fund than to pay it over. Some of them may go beyond, but none, so far as they have been examined, fall short of this conclusion."

The language used in 59 *ALR* 778 in noting the Illinois Case, *Bartell v. Baumann,* 12 Ill. App. 450, is typical of that used by the courts in most jurisdictions:

> "Subsequently to the decree of distribution, each share is finally and definitely ascertained, and a cause of action exists, therefore, against the representative in his individual capacity in favor of the distributee."

Wherever this point has arisen in the western states, the courts have followed this line of reasoning; thus the California Court said *In Re Nerac,* 35 Cal. 392, at page 397:

> "By the decree each share is finally and definitely ascertained, and a cause of action thereafter exists against the administrator in favor of the distributee, and we are unable to perceive why, on the score of public policy, or anything else, the money thus judicially determined to be due from the administrator to the distributee should not be within the reach of the creditors of the latter . . . We consider it clear that, after distribution has been decreed, an executor or administrator may be garnished . . . "

Similarly, the Colorado court said in *Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank & Trust Co.,* (Colo.) 226 Pac. 293, at page 294:

> "It is said that the widow's allowance was in *custodia legis.* Not so. It had been ordered by the court to be paid to her, and the administrator had no duty but to pay it. It was a debt from him to her."

And the Oregon Court held in *Harrington v. LaRocque*, (Ore.) 10 Pac. 498:

> "It may be considered clear that when the distributive share of an heir has been ascertained, and ordered to be paid by the court, it is no longer regarded as in the custody of the law. The right to it has become fixed, and the executor ceases to hold in his representative, but in his personal, capacity. After distribution has been decreed, it may, therefore, be garnished in the hands of the executor."

In the instant case, Respondent, Mr. Carter, admits that he was appointed executor of the estate of John Lang by the California Court, and that the court had made and entered its order, directing Mr. Carter to pay the sum of $19,500.00 to Defendant, J. Robert Lang. Mr. Carter further admits that he paid, of this sum, $10,235.00 to an attorney, Wilford Burton, in Salt Lake City, Utah, at the direction of Defendant, J. Robert Lang. On February 28, 1964, Mr. Carter answered a garnishment under oath, stating that he had remaining of the original $19,500.00 owing to Defendant, J. Robert Lang, in his possession $9,375.00. There is no qualification to the answer. It is therefore, obvious that the funds held by Mr. Carter for the Defendant were no longer part of the assets of the estate of the California decedent and not in custody of the law of the California court, but were the unconditional property of the Defendant and as such were subject to garnishment by the Plaintiff. Indeed, as set forth above, Mr. Carter admitted paying out of the

fund $10,125.00 to a Utah attorney at the direction of the Defendant. As a matter of fact, Mr. Carter obviously feels that the Defendant could, two days following Plaintiff's garnishment, assign the balance of the funds to the Intervenor, Tracy-Collins Bank & Trust Company. It is indeed strange that Mr. Carter would press upon this court the anomalous situation that funds in his possession in Utah could be assigned by a non-resident to a Utah attorney and a Utah bank but could not be garnished by a Utah resident-creditor of the non-resident Defendant.

## POINT II.

## FOREIGN EXECUTORS MAY SUE OR BE SUED UNDER CERTAIN CIRCUMSTANCES.

The courts generally follow the law as stated in the *Restatement of the Law, Conflict of Laws,* Par. 512, p. 617:

> "No action can be maintained against any administrator outside the state of his appointment *upon a claim against the estate of the decedent.*" (Emphasis supplied).

The rationale given is as follows:

> "The administrator holds the assets of the decedent which come into his possession subject to the directions of the court which appointed him, and is responsible only to that court. For a court in another state to order payment *from*

*assets of the decedent* in the hands of the foreign administrator *would be an improper interference with the administration by the court in the first state.*" (Emphasis supplied).

In *Wilcox v. District Court of Salt Lake County,* 2 Utah 2nd 227, 272 Pac. 2nd 157, this court said:

> "We adhere to the principle enunciated in the Restatement which appears to cover the case before us."

Respondent, Mr. Carter, and, indeed, the lower court relied on the Wilcox Case for the blanket proposition that a foreign executor had no standing in the courts of Utah under any circumstances. It is respectfully submitted that such is not the law. This writer has noted that the cases following the general rule, (Wilcox Case), are uniform in that at least one of the following is present:

(1) The action is against the Defendant in his representative capacity as executor or administrator, as in the Wilcox Case.

(2) The foreign administrator is sought to be substituted for the deceased, as in the Wilcox Case.

(3) The foreign administrator is not personally within the state nor personally served within the state, as in the Wilcox Case.

(4) The property of the estate is not within the forum, as in the Wilcox Case.

(5) The assets of the estate are being attacked, as in the Wilcox Case.

In the subject case the proceeding is not against Mr. Carter in his representative capacity as executor of the estate of John Lang, but rather in his capacity as a personal debtor to the Defendant.

In the subject case no attempt is being made to substitute Mr. Carter as a party for the deceased.

In the subject case Mr. Carter is within the State of Utah and has been properly served within the State of Utah.

In the subject case the assets of the estate of the deceased are not being attacked, but rather funds that were ordered by the California Court to be paid by Mr. Carter to Defendant, J. Robert Lang.

A review of cases following the general rule indicates that there is not a single instance wherein the rule is applied to suits attacking a distributive share held by an executor after a decree of distribution, for in such an action a foreign executor is not acting in his representative capacity in behalf of a foreign estate, but as a mere stakeholder of the distributive shaire.

Even when an action is brought against a foreign executor in his representative capacity and against the general assets of an estate before a decree of distribution, the courts have allowed certain exceptions to the general rule. For instance, (1) where a failure of justice would follow if equity withheld relief, or (2) where the foriegn representative had put himself in the position of an individual wrongdoer, or (3) *where*

*there was a res within the jurisdiction* to be disposed of or preserved, the courts have realistically excepted the general rule. 53 *ALR* 2nd 325; *McAndrews v. Krause,* (Minn.), 71 NW 2nd 153; *Allsup v. Allsup,* 18 Tenn. 283; *Cerrone v. Trans World Airlines,* (N.Y.), 148 NYS 2nd 162.

In *McAndrews v. Krause supra,* the court explained:

> "As a general rule, a foreign representative in his capacity as representative of an estate may not be sued in any jurisdiction outside of the state in which he was appointed . . . There is an exception to this rule, however, when under certain circumstances assets are within the forum's jurisdiction and the action is of an equitable nature . . .
>
> "The Plaintiffs presently find themselves in such a position that they would be unable to get jurisdiction over Krause were they to commence a proceeding in Iowa because he is a Minnesota resident, and also because a substantial portion of the assets are in Minnesota. Under such circumstances an equity court will recognize an exception to the general rule.
>
> " . . . In actions in equity, where it is necessary to prevent a failure of justice, jurisdiction will be assumed *at least so far as the relief to be secured relates to property in the jurisdiction of the court.'*
>
> "The rule in Virginia is to the same effect. *Sylvania Industries Corporation v. Lilienfelds Estate,* 132 Fed. 2nd 887, 890, 145 ALR 612.
>
> *"Since Executor Krause is a resident of Min-*

*nesota and since there is property within the state over which this state's power extends, we* hold that the personal service of the summons and complaint in this action is sufficient to enable the district court to acquire personal jurisdiction over him as representative of the estate at least insofar as property in this state is concerned." (Emphasis supplied).

It will be noted that in the above case an action was allowed against the foreign executor *in his representative capacity,* against the *general assets of the estate* within the forum, and *before a decree of distribution;* in the subject case the action is against a foreign executor *in his individual capacity as a mere stakeholder* against an *adjudicated share after* the court has ordered the amount to be paid. There is no "interference with the administration by the court" of California.

## POINT III.

## A FOREIGN EXECUTOR IS NOT A REAL PARTY IN INTEREST WHEN A MERE STAKEHOLDER. JURISDICTION IS OBTAINED BY STRICT ADHERENCE TO GARNISHMENT STATUTES.

As seen above, many courts have spoken of an administrator and executor as having doffed his official robes after the court which appointed him has ordered him to pay specific funds to specific persons; at that moment he becomes rather a personal debtor of that person designated by the court to be paid by the rep-

resentative of the estate. There is no contention by Mr. Carter that he is other than a stakeholder or that he has any beneficial interest in the funds which are the subject of this case.

For the purpose of determining diversity of citizenship, Federal Courts have held that an interpleader is a custodian or stakeholder of property and is merely a nominal party whose citizenship does not affect the question of jurisdiction; that the claimants of the funds held by the stakeholder are the real contestants and their citizenship and not that of the stakeholder determines jurisdiction. *Cramer v. Phoenix Mutual Life Ins. Co. of Hartford, Conn., et al.,* (8th Cir.), 91 Fed 2nd 141; *Federal Reserve Bank v. Omaha National Bank,* (8th Cir.), 45 Fed. 2nd 511. Similarly, Mr. Carter's official citizenship as an executor in a California Court does not affect the jurisdiction of the Utah Courts, when Mr. Carter is acting as a mere stockholder. [sic]

A garnishment is a proceeding *quasi in rem,* 38 CJS 205. Moneys not in *custodia legis* and within the four corners of the forum are therefore liable to a proceeding *quasi in rem* even without personal jurisdiction, 87 ALR 485. The statutory requirements in the subject case were strictly adhered to as regards the service of the garnishment and the subsequent judgment, and therefore jurisdiction was obtained over the subject money, regardless of whether or not the voluntary answers of Mr. Carter to the garnishment gave this court jurisdiction over his person, as held in *Graham*

*v. Hidden Lake Copper Company,* 53 Utah 230, 178 Pac. 64.

## CONCLUSION

It is mete and right, that the law as we know it have broad guidelines and general, well-established principles which to follow. However, in each individual case, the court should search the interstices ofthe law as pertains to the set of facts before it. There are many well known exceptions to the so-called hard and fast rules of law, such as, exceptions in cases that would seem at first blush to come under the statute of frauds. The case at hand is one in point. The fact that Mr. Carter is labeled a foreign executor does not change the fact that he is a mere debtor of Defendant, having in his possession in Utah money which he admits owing the Defendant. Mr. Carter is able and, it would appear, eager to pay that money to someone—someone other than the Plaintiff. It is neither just nor equitable that this court should compel a Utah resident to go out of this jurisdiction to satisfy Utah judgments in a foreign court when the money in controversy is no longer of any interest to that court and in fact is in Utah and part of which has been assigned to other Utah residents by the non-resident debtor of Plaintiff.

The order of the lower court setting aside the garnishee judgment should be reversed.

Respectfully submitted,

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