

2004

Michelle Samantha Gatlin Nolan, Malualani B.  
Hoppiiianina Trust, Michael Gatlin v. Cuma S.  
Hoopiiaina, Malualani B. Hoopiiaina, Cuma S.  
Hoopiiaina, Marlin M. Forsyth, George K. Fadel,  
Michael Gatlin, ISG Resources Inc., Lisa Goodwill :  
Reply Brief

Utah Court of Appeals

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UTAH APPELLATE COURTS  
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IN THE UTAH COURT OF APPEALS

MICHELLE SAMANTHA GATLIN  
NOLAN, Successor Trustee of the  
MALUALANI B. HOOPHAINA TRUST;  
MICHELLE SAMANTHA GATLIN  
NOLAN, individually; and MICHAEL  
GATLIN, individually,

Plaintiffs/Appellants,

vs.

CUMA S. HOOPHAINA, Personal  
Representative of the Estate of  
MALUALANI B. HOOPHAINA, CUMA  
S. HOOPHAINA, individually, MARLIN  
M. FORSYTH, individually, GEORGE K.  
FADEL, individually, MICHAEL GATLIN,  
ISG RESOURCES INC., LISA  
GOODWILL, John Doe's 1 thru 10;

Defendants/Appellees.

-----  
IN THE MATTER OF THE

THE MALUALANI B. HOOPHAINA  
TRUST, aka THE LARAYNE J.  
HARTMAN TRUST and THE DONALD  
HARTMAN TRUST,

UTAH COURT OF APPEALS  
BRIEF

UTAH  
MENT

.A10

DOCKET NO. 20040309 CA

Civil No. 020910872 PR

Probate No. 023901215 TR

Appellate No. 20040309 CA

Honorable Anthony Quinn

REPLY BRIEF OF APPELLANTS

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### **ADDITIONAL RELEVANT FACTS**

1. Plaintiff, Michelle Samantha Gatlin Nolan, on November 18, 2003, filed her Affidavit in Opposition to Defendants' Motion for Summary Judgment and stated as follows: "That although I had been told by my mother there was a Trust, I never had any actual knowledge that a Trust existed until I was contacted by Robert Welling of Beehive Detective Agency Inc." (R. 327).

2. In response to Defendants' Statement of Fact, paragraph 15, Plaintiffs allege that George Fadel, Defendants' attorney, in his answer and interrogatories admitted that he had prepared the Trusts but that he had forgotten about the irrevocable Trusts when he talked to both Plaintiffs.

### **SUMMARY OF ARGUMENTS**

Defendants claim, "when a trustee denies the trust and assumes ownership of the trust property with the knowledge of the beneficiaries, the statute of limitation begin to run." This argument is without merit in that the settlor, Malualani B. Hoopiaina, had created an irrevocable Trust and specifically provided that he had no interest in the property and the Trust could not be repudiated without the consent of the beneficiaries. See Banks v. Means, 52 P.3d 1990 (Utah 2002).

Further, Defendants argue "that on July 7, 1997, Plaintiffs had all of the information necessary to know there had been a breach of the Trusts which were to convey the property to them." This argument is likewise without merit in that George Fadel, Defendants' attorney,

had specifically advised both Plaintiffs that there were no Trusts and they were to receive no property from their grandfather.

Finally, Defendants argue “that Plaintiffs failed to take action to protect their interest and their claim to the property was extinguished”. However, Defendants fail to mention that due to the acts of Defendants’ attorney, Plaintiffs were made to believe that there was no Trust, and Plaintiffs, when discovering the Trusts in August, 2002, took immediate action by filing a Petition to Appoint Successor Trustee and commencing this action to take possession of the Trust property.

## **ARGUMENT**

### **POINT I**

#### **THERE IS NO APPLICABLE STATUTE OF LIMITATIONS IN QUIET TITLE ACTIONS.**

Defendants in their response argue that the underlying action is barred by a four-year statute of limitations, although never disavowing that the Irrevocable Trust is not the fee owner of the two pieces of real property and that Plaintiffs are the beneficiaries of the Trust. Consequently, Plaintiff, Michelle Samantha Gatlin Nolan, as beneficiary of the trust, rightfully petitioned under Probate No. 023901215 TR to be appointed as Successor Trustee, and to quiet title to the Trust property. The Court of Appeals in Anderson v. Dean Witter Reynolds, 841 P.2d 742 (Utah 1992) stated:

Statute empowering Trustee to sue on behalf of beneficiary does not preclude beneficiary from suing in capacity as beneficiary.  
U.C.A. 1953, 75-7-402(3)(2).

In that case, the Trustee had failed to commence an action against Dean Witter for over 10 years and the Court ruled that the beneficiary had standing to bring an action.

Just as in that case, Plaintiffs here can show that the Irrevocable Trust is the fee owner of the property and that Plaintiffs are the beneficiaries of the Trust and are entitled to have ownership and possession of the real property.

Defendants further claim, “The Trial Court took no steps to determine the ownership of the property which is vested in Defendants, pursuant to the Deeds of Distribution of Malu’s Estate.”

This argument is wholly without merit since the property is vested in the Irrevocable Trusts and the Deeds of Distribution conveyed nothing in that the Estate of Malualani Hoopiaina had no interest in the property in that it had been irrevocably conveyed to the Trust in 1974.

In granting summary judgment, the Court simply determined it was not interested in who owned the property and did not attempt to determine the validity of the clouds on the title.

Defendants state in their argument that, “The Summary Judgment ruling defines the property that is owned by the Trusts and what the Trustee will have to administer. There is no reason why a successor Trustee cannot be appointed.”

This again is without merit in that the Court has erroneously ruled that the Statute of Limitations has run on the beneficiaries’ rights to receive the property from the Trust.

The Court consolidated the probate case which was Plaintiffs’ Petition to be appointed Successor Trustee with the civil case and based on the fact this appointment was to be ruled upon



at trial, Defendants would be required to defend Plaintiffs' right to be the Successor Trustee.

Defendants have not filed a defense to the Petition to Appoint Plaintiff Successor Trustee.

## **POINT II**

### **THERE IS NO APPLICABLE STATUTE OF LIMITATIONS ON IRREVOCABLE TRUSTS.**

Defendants also argue that the cases cited by Defendants all involve revocable trusts and have no application in the case before this Court. It is undisputed that the Trusts which are the subject of these proceedings are irrevocable Trusts where the Settlor specifically provided, "at no time shall any beneficial interest in the Trust property inure to the Settlor".

The law is very clear that an irrevocable Trust cannot be repudiated without the consent of the beneficiaries.

In Banks v. Means, 52 P.3rd 1990 (Utah 2002), the Court ruled as follows:

"Once the settlor has created a trust he is no longer the owner of the trust property and has only such ability to deal with it as is expressly reserved to him in the trust instrument".

"A settlor has the power to modify or revoke a trust only if and to the extent that such power is explicitly reserved by the terms of the trust".

"The creation of a trust involves the transfer of property interest in the trust subject-matter of the beneficiaries, and these interests cannot be taken from the beneficiaries except in accordance with a provision of the trust instrument."

The Defendants further argue:

"Malu's will breached his obligation as Trustee for Trusts by ownership of the property. Plaintiffs knew of the breach of Malu's obligation to them when they received copies of the will and

realized that the property was bequeathed to Defendants. Upon this realization, the requirement for the imposition of the statute of limitation began to run.”

This argument is again without merit based upon the following: (a) Malu as Trustee could not assume ownership of property in that he had irrevocably conveyed the property (Banks v. Means, 52 P.3d 1990 (Utah 2002)); (b) Trusts have no statute of limitations; (c) the beneficiary, Michael Gatlin, never saw a will; and (d) neither Plaintiffs had knowledge as to where the Trusts were located or what property was in the Trusts.

Plaintiffs’ action was brought to determine the Trusts were the owner of certain real property and Plaintiffs’ purpose was not to obtain affirmative relief, rather was brought to quiet title to the Trust property. The property was being occupied by a lessee of Defendants, and Defendants had placed a cloud on the Title by filing Deeds of Distribution and Lis Pendens against the Trust property. Plaintiffs requested the Court to determine that the clouds on the title were void and to determine that Plaintiffs, as the surviving beneficiaries of the Trust, were the fee owners of the property. All of the actions requested by Plaintiffs involved only requests to the Court to quiet title to the property in Plaintiffs and to remove all clouds on that title.

Utah Code Ann. §78-12-25(3) is not applicable in that the Court in its ruling stated that it did not think it was applicable, but then signed a judgment that it was applicable (Court Transcript. P. 2, L. 9-14). The Defendants have cited the case of Snow v. Rudd, 998 P.2d 262 (Utah 2000), which was an action to impose a constructive Trust that was held in mother’s Trust and sold by father, as Trustee, to beneficiary’s sister. This was a Revocable Trust. This was an

action against Successor Trustee where Plaintiff had knowledge of the sale of the home which initially was in Trust. In the case before the Court, no Successor Trustee has been appointed.

Utah Code Ann. §75-3-1006 is not applicable for several reasons:

- a. A trust has no Statute of Limitations until 6 months after property has been distributed to beneficiaries (Utah Code Ann. §75-7-307).
- b. The property before the Court was not estate property. Malualani Hoopiaina had divested himself of any ownership or right to property when he signed and recorded the Irrevocable Trusts in 1974.
- c. The Deeds of Distribution by Personal Representative conveyed nothing as the Estate had no interest in the property and, therefore, the Deeds were only a cloud on the title.

Utah Code Ann. §78-12-19 was not used by the Court in its summary judgment order, rather only §78-12-25 and §75-3-1006.

Even assuming the Court had used §78-12-19, it is not applicable in that it provides for property “sold” or in other words a third party is involved and is the one protected. In this case Defendant Cuma Hoopiaina as personal representative conveyed to herself and her son wherein the estate had no interest in the property.

Defendants also argue that pursuant to Utah Code Ann. §78-12-19, “When the personal representative of Malu’s estate conveyed the property to Defendants, the conveyance constituted a ‘sale’ under the terms of the statute.” However, the Court below never addressed the applicability of §78-12-19, and the intent of that section was to protect innocent buyers of property from estates, not personal representatives.

Also, the conveyance by the personal representative of the trust property to herself had no legal affect in that the estate had no interest or title to the trust properties.

### **POINT III**

#### **THE DISCOVERY RULE HAS APPLICATION IN THIS CASE.**

Defendants argue that the discovery rule does not apply in this case for the reason that there is no concealment or no exceptional circumstances to justify the discovery rule. Defendants' argument is without merit in that the Court in its opinion specifically provided as follows: "It's also my tentative view that the discovery rule would be applicable and the discovery rule is primarily or most often, a decision of fact". (Court Transcript, P. 4, L. 19-22).

Plaintiffs were advised by George Fadel, who had prepared the trust for Malualani B. Hoopiiaina and who was the attorney for Defendants, that no trust existed and that they had no right, title and interest in the real property of Malualani B. Hoopiiaina.

Defendants further argue: "The dismissal of George Fadel as a Defendant must be considered by the Court to be a waiver of the claim of concealment as to George Fadel."

This again is not true in that the Complaint against George Fadel was based on fraud, and pursuant to discovery, Plaintiffs determined that George Fadel had not fraudulently withheld the information about the Trusts, but that he had forgotten he had prepared the Trusts until they were discovered by Plaintiffs' attorney. George Fadel had the obligation to determine if Trusts existed when questions were raised by Plaintiffs in that he was the attorney for Defendants and the Estate of Malualani Hoopiiaina, and had prepared the Trusts, which was concealment by Defendants by and through their attorney.

There was concealment by Defendants. The Defendants and their attorney were well aware that the property was in the name of the trust by reason of Court of Appeals ruling in Civil No. 920906000, Court of Appeals No. 93078-CA of January 31, 1995 (R-151-160). This information was likewise concealed by Defendants and their attorney, George Fadel.

Plaintiffs had been told there were Trusts by their mother, but had no knowledge as to the location of the Trusts, or whether the Trusts contained real or personal property.

Plaintiff, Michael Gatlin, was never in the State of Utah, was homeless, and had no knowledge of anything except his conversation with George Fadel, Defendants' attorney, who advised him that there were no Trusts, his grandfather had disinherited him, and he was to receive nothing.

Plaintiff, Michelle Samantha Gatlin Nolan, had no actual knowledge of any Trusts, only statements by her mother when she was young that a Trust existed; however, based on Ms. Nolan believing George Fadel, she determined that no Trusts existed and that she had been disinherited by her grandfather.

The Discovery Rule is not required because there is no statute of limitations on Trusts and no statute of limitations to quiet title to real property; however, the discovery rule would be applicable if needed based on arguments set forth herein.


Defendants argue that even if it is applicable, the statute of limitations expired. This claim is totally without merit based on the purpose of the discovery rule where concealment and special circumstances exist, as set forth herein. Both Plaintiffs believed there were no Trusts and that

they had no inheritance, until such time as the Trusts were discovered by Plaintiffs' counsel in 2002

### **CONCLUSION**

Plaintiffs request this Court to vacate the Order Granting Defendants' Summary Judgment and remand the case with instructions as set forth in Plaintiffs' Brief of Appellant previously filed in the above-entitled matter

DATED this 15<sup>th</sup> day of December, 2004

  
\_\_\_\_\_  
NOLAN J. OLSEN  
Attorney for Plaintiffs/Appellants

**CERTIFICATE OF MAILING**

I hereby certify that on the 1 day of December, 2004, I mailed a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT**, postage prepaid thereon, to the following:

Ralph C. Petty, Esq.  
BERRETT & ASSOCIATES, L.C.  
Attorneys for Defendants/Appellees  
Key Bank Tower, Suite 530  
50 South Main Street  
Salt Lake City, Utah 84144

A handwritten signature in black ink, appearing to read "R. C. Petty", is written over a horizontal line.