

2004

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

Utah Court of Appeals

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Nolan J. Olsen; Attorney for Appellants.

Ralph C. Petty; Berrett and Associates; Attorney for Appellees.

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#### Recommended Citation

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UTAH APPELLATE COURTS

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DOCKET NO. 20040309CA

MICHELLE SAMANTHA GATLIN	:	<b>ADDENDUM TO BRIEF OF</b>
NOLAN, Successor Trustee of the	:	<b>APPELLANT</b>
MALUALANI B. HOOPIAINA TRUST;	:	
MICHELLE SAMANTHA GATLIN	:	
NOLAN, individually; and MICHAEL	:	
GATLIN, individually,	:	
	:	
Plaintiffs/Appellants,	:	
vs.	:	Appellate Case No. 20040309 CA
	:	
CUMA S. HOOPIAINA, Personal	:	Civil No. 020910872 PR
Representative of the Estate of	:	and
MALUALANI B. HOOPIAINA, CUMA	:	Probate No. 023901215 TR
S. HOOPIAINA , individually, MARLIN	:	
M. FORSYTH, individually, GEORGE K.	:	
FADEL, individually, MICHAEL GATLIN,	:	
ISG RESOURCES INC., LISA	:	
GOODWILL, John Doe's 1 thru 10;	:	
	:	
Defendants/Appellees.	:	Honorable Anthony Quinn
-----	:	
IN THE MATTER OF THE	:	
	:	
THE MALUALANI B. HOOPIAINA	:	
TRUST, aka THE LARAYNE J.	:	
HARTMAN TRUST and THE DONALD	:	
HARTMAN TRUST.	:	

MICHELLE SAMANTHA GATLIN NOLAN, Successor Trustee of the  
MALUALANI B. HOOPIIAINA TRUST; MICHELLE SAMANTHA GATLIN NOLAN,  
individually; and MICHAEL GATLIN, individually, appeals the decision of  
Hon. Anthony Quinn, Third District Court, Salt Lake County

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

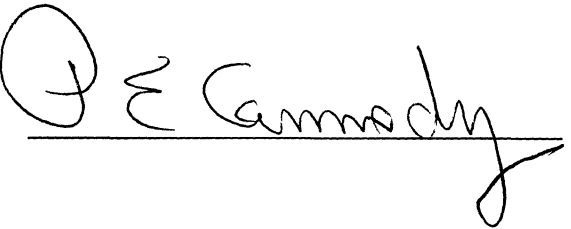
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1. Order Granting Defendants' Motion For Summary Judgment
2. Transcript from hearing of November 26, 2003, on Defendants' Motion For Summary Judgment

**CERTIFICATE OF MAILING**

I hereby certify that on the 17<sup>th</sup> day of July, 2004, I mailed a true and correct copy of the foregoing **ADDENDUM TO BRIEF OF APPELLANT**, postage prepaid thereon, to the following:

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

  
\_\_\_\_\_

**FILED DISTRICT COURT**  
Third Judicial District

FEB 04 2004

SALT LAKE COUNTY

Deputy Clerk

Ralph C. Petty, #2595, of counsel with  
**BERRETT & ASSOCIATES, L.C.**  
Attorney for Defendants Cuma S. Hoopiaina and Marlin M. Forsyth  
Key Bank Tower, Suite 530  
50 South Main Street  
Salt Lake City, Utah 84144  
Telephone: (801) 531-7733  
Fax: (801) 531-7711

**IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR**  
**SALT LAKE COUNTY, STATE OF UTAH**

MICHELLE SAMANTHA GATLIN  
NOLAN, Successor Trustee of the  
MALUALANI B. HOOPIAINA TRUST  
a.k.a. the LARAYNE J. HARTMAN TRUST,  
and MICHELLE SAMANTHA GATLIN  
NOLAN, individually;

Plaintiffs,

vs.

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

Defendants.

In the matter of:

THE MALUALANI B. HOOPIAINA  
TRUST, aka The LaRAYNE J. HARTMAN  
TRUST and THE DONALD HARTMAN  
TRUST.

**ORDER GRANTING DEFENDANTS'**  
**MOTION FOR SUMMARY JUDGMENT**

Civil No.: 020910872  
Probate No. 023901215TR

Judge Anthony Quinn

The above entitled matter came on regularly before the Honorable Judge Anthony Quinn on November 26, 2003 at the hour of 8:00 a.m. pursuant to the Defendants' Motion for Summary Judgment. The Court having reviewed the files and records herein, having reviewed the Memorandum in Support of the Motion for Summary Judgment, Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Answer Objecting to Defendants' Motion for Summary Judgment, and the Defendants' Reply Memorandum in Support of the Motion for Summary Judgment, having received the arguments of counsel, and for good cause appearing therefore, specifically finds the following facts as undisputed:

#### **UNDISPUTED FACTS**

1. Paragraph 11 of the Affidavit of Samantha Gatlin, a.k.a. Michelle Samantha Gatlin Nolan, states:

11. That affiant's grandfather, Malualani B. Hoopiiaina, had on many occasions advised affiant that affiant's mother, affiant, and affiant's brother were the beneficiaries of a Trust as to the above-described real property located at 349 West 700 South, Salt Lake City, Utah, as described above.

2. From the time Samantha was a young girl, she was told by her mother that she and her brother Michael were beneficiaries of a trust established by her grandfather, Malualani B. Hoopiiaina. Deposition of Michelle Samantha Inez Gatlin Nolan (hereinafter "Deposition"), p. 29-33.

3. Malualani B. Hoopiiaina died on May 20, 1997.

4. Both Plaintiff and Michael Gatlin knew that their grandfather owned the land at both 349 West 700 South and 345 West 700 South, Salt Lake City, Utah. Deposition, p. 39,

Letter of Michael Gatlin.

5. Prior to the time that Plaintiff received notice of the probate proceeding relating to her grandfather's death, Plaintiff went to the county clerk's office and received a copy of the holographic will that was on file there. Deposition at p. 58-59.

6. When Plaintiff realized that she had been written out of the will and that the will made no reference to the trust, she contacted and met with Phil Dyer, an attorney in Salt Lake City. *Id.* at p. 62-63. At the meeting with Mr. Dyer, Plaintiff spoke to him about the trust as well as the will. *Id.* at p. 88.

7. At the time of the probate hearing on her grandfather's will, on June 25, 1977, Plaintiff appeared before the probate court and voiced her objection to the proceedings. *Id.* at p. 75, 78. After a discussion with Mr. Fadel, the attorney for Malualani B. Hoopiiaina's estate, Plaintiff returned with Mr. Fadel to the judge's chambers and waived her objection. *Id.* at p. 81.

8. Despite the proceeding at the probate court, Plaintiff still believed that there was a trust in which she had an interest and that nothing had changed. *Id.* at p. 83.

9. Michael Gatlin wrote a letter in relation to this proceeding. In the body of the letter, he indicates that approximately 6 weeks after the death of his grandfather, on or about July 7, 1997, Michael called George Fadel concerning notice of his grandfather's death and the trust.

10. This action was brought on October 10, 2002.

11. The holographic will of Malualani B. Hoopiiaina, dated March 6, 1996, was the will which was probated and found to be Malualani B. Hoopiiaina's last will and testament. Before being notified of her grandfather's death, Samantha sought and acquired a copy of the

will from the court clerk's office. Deposition at p. 57-61.

12. The codicil of the holographic will states:

Codicil -

My daughter Inez Gatlin having died, I remove all provisions for Inez and her children. May 23, 1996. Malualani B. Hoopiiaina.

Codicil -

Marlin Forsyth to share in the 349 West properties 700 South with his mother Cuma equally (50-50). Marlin will receive apartment # 10 Casa de Encidero, Hawaii, free and clear and unit # 106 will be free and clear to mother Cuma.

13. When Plaintiff read the will and realized that she had been written out of the will, she cried. Deposition at p. 58.

14. Plaintiff does not believe that George Fadel intended to misrepresent anything relating to the trust agreement. In her Deposition she states:

Q. Do you have any information that leads you to conclude or believe that George Fadel intended to misrepresent to you anything relating to the trust agreements you seek to enforce in this lawsuit?

Mr. Olsen: I have no objection to that.

The Witness: That he purposefully?

Q. (By Mr. Gibbs) Um - hum.

A. No, I think what he told me at the probate hearing, I believe he was very sincere.

Deposition at p. 92-93.

15. Inez Gatlin died in April of 1996. Deposition p. 12.

16. The trust documents relating to the 700 South properties were recorded in the Salt Lake County Recorder's office on April 18, 1974.



17. During the pendency of this action, rents have been paid into the Court which belong to the owner of the property.

### **LEGAL ANALYSIS**

18. The Court finds that either the three year statute of limitation applies to this action pursuant to Utah Code Ann. § 75-3-1006 or 78-12-25(3), or the four year statute of limitations applies to this claim pursuant to Utah Code Ann. § 78-12-25. In either event, the Court finds that the Plaintiff and her brother knew of the trust and knew they should reasonably have taken appropriate steps to protect their interest in relation to the trust on June 25, 1997.

19. This action was not filed until October 10, 2002, more than 5 years after Plaintiff and her brother knew that they were not receiving the property that they had been promised.

20. The discovery rule under the terms of the statute of limitations applies, but the Court finds that the Plaintiff and her brother, as a matter of law, had knowledge as of June 25, 1997 of all the facts necessary to put them on notice to inquire as to whether their failure to receive the 700 South properties breached the trust. Plaintiff and her brother knew nothing in 2002 that they did not know in 1997. This is a clear case of Plaintiff and her brother sitting on their rights.

21. The Court does not find that Plaintiff and her brother are asserting a claim for breach of fiduciary duty by a successor under Utah Code Ann. § 75-3-1005, and this statute is therefore not applicable.

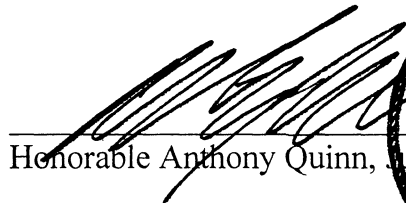
### **JUDGMENT**

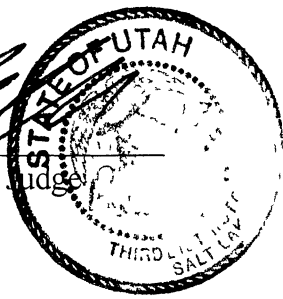
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant's Motion

for Summary Judgment is granted dismissing the claims of Plaintiff and her brother, Michael Gatlin, in their entirety and on the merits because their claim was not timely brought under the statute of limitations. The rents that have been received by the Court are released to Defendants Cuma Hoopiaina and Marlin Forsyth, or their Counsel.

Dated this 23<sup>rd</sup> day of Feb January, 2004

BY THE COURT:

  
\_\_\_\_\_  
Honorable Anthony Quinn, Judge



**MAILING CERTIFICATE**

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing to the following, this 23 day of January, 2004.

Nolan J. Olsen  
OLSEN & OLSEN  
8142 S. State Street  
Midvale, UT 84047

  
\_\_\_\_\_

MICHELLE SAMANTHA GATLIN :  
NOLAN, Successor Trustee of the : Civil No. 020910872 PR  
MALUALANI B. HOOPIIAINA : and  
TRUST, et al., : Probate No. 023901215 PR  
:   
Plaintiffs, :   
:   
v :   
:   
CUMA S. HOOPIIAINA, Personal :   
Representative of the Estate of :   
MALUALANI B. HOOPIIAINA, et al., :   
:   
Defendants. :

THE HONORABLE ANTHONY B. QUINN

By BW SALT LAKE COUNTY  
Deputy Clerk

# 1964

APPEARANCES

For the Plaintiff:

NOLAN J. OLSEN  
OLSEN & OLSEN, L.L.C.

For the Defendant:

RALPH C. PETTY  
BERRETT & ASSOCIATES. L.C.

\* \* \*

1 SALT LAKE CITY, UTAH - NOVEMBER 26, 2003

2 JUDGE ANTHONY QUINN PRESIDING

3 P R O C E E D I N G S

4 THE COURT: This is the matter of Gatlin et. al v.  
5 Hoopiaina et. al. We're set this morning for argument on a  
6 number of motions including defendant's motion for summary  
7 judgment; defendant's motion to strike a portion of plaintiff's  
8 affidavit and also defendant's motion to strike the witness  
9 list and exhibit list filed by the plaintiffs.

10 Let me give you my tentative views on this case  
11 before I take any argument. First of all with respect to the  
12 motion to strike paragraph 7 of the plaintiff's affidavit, my  
13 inclination would be to deny that motion. The reason would be  
14 even though that it does relate to a conversation that took  
15 place out of court, it's not being offered for the truth of  
16 that conversation. In fact, it would now be plaintiff's  
17 position that what was related in that conversation wasn't true  
18 but it was simply - the conversation is simply offered to the  
19 Court as evidence that the conversation took place, not for the  
20 truth of anything that's asserted in it. So for that reason  
21 I'd be inclined to deny that motion.

22 With respect to the motion for summary judgment  
23 itself, I've got to say I found this to be a very interesting  
24 issue and not one where I've been able to find a lot of clear  
25 guidance. I appreciate your briefs and the courtesy copies of

1 the briefs. I've tried to read those carefully.

2 Before I go any further, I state whose here.  
3 Plaintiff is represented by Nolan Olsen and defendants are  
4 represented by Mr. Ralph Petty.

5 As I indicated, I tried to read those briefs  
6 carefully and I really think that it's important first to  
7 determine what is the applicable statute of limitations in this  
8 case and I wasn't particularly persuaded by the arguments of  
9 either counsel in their briefs. This is a very different case.  
10 It strikes me that the Snow case, Snow v. Rudd I think it was  
11 called, that's relied upon by Mr. Petty for a four year statute  
12 of limitation, that was a case against a trustee for what  
13 amounts to breach of fiduciary duty. That is not the case we  
14 have before us. That's not to say that necessarily the same  
15 statute of limitations wouldn't apply but I can't get that from  
16 that case alone.

17 I did some additional research and tried to determine  
18 what statute of limitations governs a case to quiet title, an  
19 action to quiet title, and I found the case of Bratling v. Salt  
20 Lake City which is an old case. It was decided 1915 but I  
21 haven't found anything more recent that attempts to set forth  
22 what is the statute of limitations for a quiet title case.  
23 What that case in essence says is that if a quiet title case is  
24 filed simply to remove a cloud on the title, in other words the  
25 owner's in possession of a property, has record ownership of

1 the property, but there's some cloud on the title, there is in  
2 essence no statute of limitations on an action to clear a cloud  
3 to the title. But if you are seeking any kind of affirmative  
4 relief, then the statute of limitations would be the statute  
5 that relates to that affirmative relief. Quoting the case "We  
6 are clearly of the opinion that while actions by which nothing  
7 is sought except to remove a cloud from or quiet title to real  
8 property as against a parent or stale claims, are not barred by  
9 the statute of limitations, yet we are also clear that all  
10 actions in which the principle purpose is to obtain some  
11 affirmative relief" as was the case here, "clearly come within  
12 the provisions of 28-83" which is a reference that doesn't mean  
13 anything in our current code. "Respondent's cause of action if  
14 any had therefore accrued and the proceedings complained of  
15 culminated in the making of the assessment and the levying of  
16 the tax in question" and it goes on to say the claim is barred.

17 The underlying claim in this case, in addition to  
18 being one to quiet title, if you read the complaint is in  
19 essence an action to declare that the conveyance from the  
20 personal representative to the defendants in this case was null  
21 and void and that they are in fact the owners of the property.  
22 I'm unpersuaded by plaintiff's argument that there is no  
23 statute of limitations on such a claim.

24 I'll give you a chance to argue after I've stated my  
25 tentative rulings. And so that's why I called yesterday. I

1 had been searching, trying to determine what statute best fit  
2 that kind of a claim and it seemed to me that it was that  
3 statute that I related to you although it's not a perfect fit,  
4 but it was the statute of limitations found at Actions to  
5 Recover Estates Sold by Executor Administrator. The only thing  
6 that would make that not a fit, it seems to me, is that this  
7 wasn't sold out of the estate. It was really just conveyed out  
8 of the estate.

9 Mr. Petty has provided me this morning with a  
10 reference to the Uniform Probate Code, Limitations on Actions  
11 and Proceedings Against Distributees which on its face seems to  
12 be a pretty good fit. Both of those have three-year statute of  
13 limitations; however, 78-12-19 explicitly includes the  
14 discovery rule. In order to find the discovery rule applicable  
15 in 75-3-1006, I'd have to find that there is special  
16 circumstances which there may well be in this case.

17 But even if the discovery rule - so it's my tentative  
18 view that whether it's under either one of those statutes that  
19 it would be a three-year statute that applies and it's also my  
20 tentative view that the discovery rule would be applicable and  
21 the discovery rule is primarily, or most often, a question of  
22 fact. But in this case it strikes me that there really is no  
23 question of fact that the plaintiffs had knowledge of the trust  
24 and knowledge that this property was conveyed outside the  
25 trust. What they lacked is the trust documents. They had been



1 told their whole lives that such a trust existed and this  
2 property had been put in a trust for their benefit. What they  
3 lacked was proof and I don't think that the absence of proof  
4 tolls the statute of limitations, it's whether you've got  
5 knowledge. The knowledge that you need to have is not  
6 knowledge of everything but sufficient information to appraise  
7 the plaintiff of the underlying cause of action so as to put  
8 them on notice to make further inquiry if they harbor doubts or  
9 questions about the defendant's actions. They certainly had  
10 enough information that they were put on notice inquiry from  
11 the time that this property was conveyed outside the estate.  
12 They both knew that to be the case. So based on all that it  
13 would be my tentative view that this claim is time barred by  
14 the statute of limitations.

15 Go ahead, Mr. Olsen.

16 MR. OLSEN: There's two statutes that really are the  
17 ones that are applicable are the limitations - the estate was  
18 never closed. I brought the estate up here. The estate has  
19 never been closed. I've probated hundreds of estates, Your  
20 Honor, and basically what is normally done, this estate they  
21 did nothing. They did not file a - the probate court, if  
22 you're familiar with the new probate court, it requires various  
23 things. It requires that you file a preliminary within 30  
24 days, a list of the assets.

25 Now when I probate estates and there's real property,

1 it's my obligation in probating that whether I'm the executor,  
2 and I've been executor on numerous estates, big estates, and  
3 I've probated hundreds of estates. It's my obligation to find  
4 out what those properties are and what is the condition of  
5 their title. That title would have shown had she of run a  
6 title report as I eventually did, had she run a title report,  
7 she would have found that it was in a trustee's name. That  
8 allows a suit for six months against the personal  
9 representative and my suit is against the personal  
10 representative for six months after its closed. That's never  
11 been closed. She did nothing in regard to that probate  
12 whatsoever. She simply filed it.

13 Even Mr. George Fadel in his answers to  
14 interrogatories says I - the normal circumstances, Your Honor,  
15 is that you don't transfer the property until you close the  
16 estate and George Fadel says, "I don't know who prepared those  
17 deeds, I didn't. My clients had no knowledge about it. All  
18 they had was a rumor or had been told that there was a trust.  
19 They didn't find a trust." The defendant, or yeah the  
20 defendants, Mrs. Hoppiiaina and her son in their  
21 interrogatories said, "We had no knowledge about this trust  
22 until Mr. Olsen notified Mr. Fadel that he had found it." They  
23 had no knowledge of it. They had no knowledge. My clients had  
24 just had a - they had no actual knowledge. I'm going to give  
25 you a lot of stuff because when you called yesterday, I went

1 back and researched just everything and to begin with, the  
2 trust, you brought up here the petition. I think you've got it  
3 here, the petition of my client, Ms. Nolan, to be successor  
4 trustee. Did you have that?

5 THE COURT: I'm not sure what you're asking.

6 MR. OLSEN: When I went to get the three files  
7 applicable, they said that - and I think the clerk said you had  
8 one of these.

9 THE COURT: One of the probate files?

10 MR. OLSEN: Uh-huh (affirmative).

11 THE COURT: Yeah, I do.

12 MR. OLSEN: As soon as we found out and I found Mrs.  
13 Nolan, we filed a petition to have her appointed successor  
14 trustee. That was later set aside because notice was not given  
15 to Ms. Hoopiaina but we likewise did a determination of heirs  
16 which in fact at this point in time has never been contested  
17 and one-third of that property is over to the children now, to  
18 Mrs. Nolan and Gatlin.

19 In addition to the statute I just gave you on  
20 probates, what the statute on limitations on probates are,  
21 there's one on trusts. The one on trusts specifically says  
22 this, same thing as that one, unless previously barred by  
23 adjudication, same thing, six months after you close the trust  
24 is when the statute of limitations run on trusts. The trust  
25 has never been closed. We've never even got it admitted yet.

1 We've never got a successor trustee.

2 Judge Henriod consolidated that question of trustee,  
3 successor trustee, with this case, said it would go right along  
4 because you could hear the information the same. The  
5 defendants never filed any claim or answer, written answer  
6 against her being successor trustee. The trust statute of  
7 limitations will not run until six months after we close the  
8 trust. That probate will not close until six months after they  
9 close the probate.

10 What is required to close a probate? It requires a  
11 lot of things. You've got to show you didn't owe any  
12 inheritance tax. You've got to show that everything was  
13 distributed. You've got to show an accounting. It hasn't been  
14 closed. We can bring an action against a personal  
15 representative any time under that statute. These other  
16 statutes totally don't apply. They have nothing to do with it.

17 Let me tell you about 19 -

18 THE COURT: Let me explore that with you for a  
19 second. Now here you've got a specific statute of limitations  
20 that deals with actions against distributees. In this case  
21 your client is really not against the personal representative  
22 although I guess you could assert a claim against the personal  
23 representative for breach of its duty but your claim is to the  
24 property which is in the hands of the distributees. So why-

25 MR. OLSEN: It's not really in the hands of the

1 distributees. I mean, it's not really in their hands. They  
2 had no - let me give you the law-

3 THE COURT: What do you mean it's not in their hands?

4 MR. OLSEN: Because the monies that have been going  
5 in this ever since - to the court ever since the lawsuit  
6 started.

7 THE COURT: Whose got possession of the property?

8 MR. OLSEN: A lessee, nobody other than the lessee.  
9 I'm going to give you - I went down and pulled the AMJUR in the  
10 trust deal in relation to changing a trust.

11 MR. PETTY: Can I have a copy of that first statute  
12 that you gave the Court?

13 MR. OLSEN: Sure. I've got so many things here, Your  
14 Honor. Oh, it's right here.

15 The statute of limitations is the same on trusts. In  
16 other words, there's no really question of statute of  
17 limitation in this case. Let me give you a law review that's  
18 included on that one you claimed, you know, the three-year one?  
19 I went down and pulled the law review deal on that, recent  
20 developments were attached to that, and that specifically  
21 provides that the discovery rules applies to this particular  
22 statute but let me tell you what the statute is.

23 I've been involved with this statute before so I know  
24 what it is and why - you notice it's in the real property  
25 section. It isn't in the probate section. What it is is this,

1 I'll give you a good example. I'm the administrator or the  
2 personal representative of the estate and I sell you a piece of  
3 property for \$50,000 and I notify all of the heirs that I'm  
4 selling it to you for \$50,000. If none of those heirs do  
5 anything for three years, this is an action, that particular  
6 statute is only a statute to recover the property back and put  
7 it back in the estate. That's the only purpose of it so that  
8 if I know and all the heirs know, they cannot - once that guy's  
9 had that three years statute of limitations, I mean three-year  
10 property, we cannot get the property back. The administrator  
11 or the personal rep can still be sued because he sold it for  
12 \$50,000 when it was worth \$250,000. He sells it to his pals  
13 for \$50,000 but the discovery rule applies pursuant to that  
14 article and if I didn't know that he'd even sold it, it's three  
15 years after I discover he sold it and it only has to do with  
16 getting property back into the estate. It has nothing to do  
17 with claims against the personal representative and/or to  
18 determine title to property by reason of the personal  
19 representative.

20 In this case, all of that work I gave you right  
21 there, specifically says - and I'm going to give you this -  
22 that you can't change a trust. This is an irrevokable - if you  
23 understand trusts-

24 THE COURT: I understand that but-

25 MR. OLSEN: It's an irrevokable trust. You can't -

1 he had no interest. There was no interest that ever went into  
2 the - that law will specifically if you read it, it will  
3 specifically tell you, the one I just give you says this, Your  
4 Honor, the terms of a latter will basically our case right  
5 here, "cannot control disposition under a trust agreement  
6 previously executed. To allow subsequent declarations of  
7 intent to control construction of a trust instrument would  
8 allow a settler to revoke or modify a trust at his pleasure in  
9 direct contravention of the rule that a trust cannot be revoked  
10 or modified unless such a power is expressly reserved in the  
11 instrument." You've read the trust I presume?

12 THE COURT: I understand this argument but this  
13 doesn't apply. This is the discussion we had yesterday. This  
14 doesn't mean that there's no statute of limitations on your  
15 efforts -

16 MR. OLSEN: The only statute of limitations is the  
17 ones in the probate court in relations to the will and in  
18 relations to the trust. That's the only statute and that's six  
19 months after they're closed. No other statute applies. There  
20 is no other statute.

21 And when you say they had knowledge, they were told  
22 something. They had no idea where it was. They were told by  
23 Mr. - and I've got that here - they were told by Mr. Fadel  
24 there was no trust. He admits that he'd forgot about the  
25 trust. He didn't remember. In his interrogatories he says, "I

1 don't remember about the trust." The defendant, Mrs.  
2 Hoopiaina says, "I didn't know anything about the trust."  
3 Nobody knew anything about this trust. Mrs. Hoopiaina would  
4 have certainly known about the trust if she had followed the  
5 probate code and filed or got her title research done and filed  
6 their preliminary list of assets. There was about eight pieces  
7 of property in this trust I found out through - but she hasn't  
8 filed it and she hasn't closed this estate and that is the only  
9 statute that's applicable to this is in the probate code.

10 I mean, I've gone through this a hundred times but  
11 these others have nothing to do with it. I give you some law  
12 in regard to other law that the trust does not really - I'm so  
13 dry this morning - terminate until the beneficiaries have  
14 received what they're to receive in the trust. There can't be  
15 a four-year statute. There can't be a three-year. That  
16 statute is totally inapplicable. That has to do with real  
17 property not to trusts and you have to go to the section we're  
18 talking about and what section are we talking about? Trusts  
19 and wills. That's all we're talking about. We've talking  
20 about probate and trusts.

21 This Court has jurisdiction under that filing for her  
22 to be the successor trustee until such time as it's closed and  
23 six months thereafter. We haven't even got to our point of  
24 successor trustee yet. You see what I'm - you're taking a  
25 total different idea that doesn't really have anything to do



1 with this case, at least in my opinion. I mean if you grant  
2 summary judgment - even the article says, it's a question of  
3 fact in relation on that particular statute, the three-year one  
4 that you've got to determine whether they really had the  
5 information. That case law specifically - all the case law  
6 says it needs to be actual fact.

7 THE COURT: The inquiry notice is what the case law  
8 says.

9 MR. OLSEN: No, well, there's some case law that says  
10 there must be actual knowledge.

11 THE COURT: That's the case that you cited to me that  
12 says inquiry notice.

13 MR. OLSEN: Well, there has to be - you have to have  
14 something more than somebody telling you there isn't any trust.  
15 Just because grandpa and momma said there's a trust somewhere,  
16 as you know, very seldom are trusts recorded. They're just not  
17 recorded and if you can't find a trust, what have you got?  
18 Nothing. Until you find the trust, you've got nothing.

19 THE COURT: All right. Thank you, Mr. Olsen.  
20 Let me hear from Mr. Petty.

21 MR. PETTY: Your Honor -

22 MR. OLSEN: One other - did I give you the citation  
23 on the trust statute of limitations?

24 THE COURT: You did.

25 MR. OLSEN: 75-53-1005.

1           MR. PETTY: Your Honor, the first thing I'd point out  
2 as to the facts is the statement made by Samantha in paragraph  
3 11 of her affidavit that Affiant's grandfather, Malualani B.  
4 Hoopiaina had on many occasions, advised Affiant that  
5 Affiant's mother, Affiant, and Affiant's brother were the  
6 beneficiaries of a trust as to the above described property  
7 located at 349 West 700 South, Salt Lake City, Utah as  
8 described above." The statement is on many occasions through  
9 her life, she knew about the trust. She knew the trust related  
10 to the 700 South property and the Court is correct that when  
11 she realized that her grandfather had died and she knew about  
12 the trust and the property on 7<sup>th</sup> South was promised to her and  
13 she picked up the will from the clerk's office and she attended  
14 the probate hearing to object to it and she talked to Mr. Fadel  
15 there to try to gather information about it and then when she  
16 got her own attorney, these are actions of a person that knows  
17 that she is required, based on inquiry notice, to explore and  
18 protect her own position. She knew it. She knew it  
19 sufficiently to get an attorney and to know that the trust that  
20 she alleged existed related to the 700 South property. All she  
21 had to do and the reason for the objection to the statement in  
22 the affidavit, why I asked that to be stricken, was so that we  
23 wouldn't get mired in a misrepresentation and malpractice by  
24 the attorney she met who said, without the trust, what do you  
25 do? But she knew better. It's not when you don't have the

1 trust you have nothing. When you know that trust relates to  
2 property, you better go check out the property and she should  
3 have, that attorney should have guided her there. She went to  
4 him and she should have gotten those trust documents at that  
5 point in time. She knew they existed. She knew that they  
6 related to that property. She knew the property was suppose to  
7 come to her.

8           Now as far as the statute of limitations. I  
9 appreciate the Court's examination of this situation and the  
10 research and so let me say simply for whatever it's worth, the  
11 Snow v. Rudd, I believed or understood that case to be a case  
12 where one daughter was challenging the other daughter and not  
13 suing for a fiduciary duty breach although that may be an  
14 aspect of it but saying, "Look, I was part of this trust; I'm  
15 entitled to the proceeds of that trust; and let me have them."  
16 And that case interestingly says, doesn't matter if they told  
17 you it didn't exist. What matters is if you knew. If you knew  
18 you had an interest in the property, you should have pursued  
19 it.

20           Now, I think that 75-3-1006 limits the actions  
21 against the distributees. Now that's what we've got here.  
22 Whether the probate estate is closed or not, what the Court has  
23 to recognize in this case is that the claim in the complaint  
24 doesn't ask for money damages. It asks for this property to be  
25 returned to the plaintiffs. So, because there's no request for

1 money damages and it's truly a quiet title action, then it  
2 falls under 75-3-1006 which says "the claim of any claimant to  
3 recover from a distributee who is liable to pay the claim," now  
4 obviously, the plaintiffs believe that the defendants are  
5 liable to pay the claim because they're the distributees,  
6 they've received the property. The property is in the  
7 possession of the distributees and the lease is granted by the  
8 distributees to the tenant. So, when they're liable to pay  
9 that claim, then the action is barred if at the latter of three  
10 years or one year after the time the distribution thereof.  
11 Three years, okay? And it's been five years by the time this  
12 action was filed.

13           So I guess my approach was, whether it's three years  
14 or four years, it's one of those two. I think Snow v. Rudd is  
15 really good authority and so I'll rely on that at a minimum.  
16 But 75-3-1006 does in fact establish that the claim that is  
17 being pursued now, the claim to receive that property back from  
18 the distributees is barred and we would ask that that action  
19 for quiet title be barred by the statute of limitations and the  
20 summary judgment be granted.

21           Are there any questions, Your Honor?

22           THE COURT: No questions. Thank you, Mr. Petty.

23           MR. OLSEN: We are suing for damages because we own  
24 the property and we're suing for damages.

25           THE COURT: Right. That's your third claim is for

1 the property, it's on the property. I understand that.

2 Anything else, Mr. Olsen?

3 MR. OLSEN: I've got some other law here but it's all  
4 basically the same that a trust is a trust and is an  
5 irrevokable trust. The estate had no interest in that property  
6 whatsoever. It had no interest in the property. That's the  
7 law.

8 THE COURT: So you view is, it wouldn't matter, you  
9 could wait 20 years and bring this (inaudible)?

10 MR. OLSEN: That's right. You could wait 20 years.  
11 In fact, a lot of trusts go a lot longer than the 20 years, you  
12 understand. I have a trust that - my own trust is going until  
13 my daughter dies because I've provided that she get so much  
14 money a month until she dies. So it could go 30, 40 years, 50  
15 years. A trust can go as long as they need to go until the  
16 property is distributed. That's the law of the probate court.

17 THE COURT: So if you had a claim for personal injury  
18 and you put that asset in your trust, it would last forever?

19 MR. OLSEN: No. That's not a trust. But the trust  
20 itself, this is a trust where -

21 THE COURT: I understand a trust can go for a long  
22 time but we're talking about the life of a claim here.

23 MR. OLSEN: We're not talking about the life of a  
24 claim. We're talking about a trust and the probate of that  
25 trust.

1           THE COURT: All right. I'm going to rule consistent  
2 with my tentative views I expressed at the outset. There still  
3 comes some confusion in my own mind whether the applicable  
4 statute of limitations is 75-3-1006 or 78-12-19, but in either  
5 case, it's a three-year statute of limitations. In either  
6 case, I would apply the discovery rule but I find that the  
7 facts are undisputed in this case that the plaintiffs had  
8 sufficient knowledge to be on inquiry notice of their claims in  
9 this case more than three years prior to the filing of this  
10 action.

11           The statute that's proposed by Mr. Olsen, 75-3-1005  
12 doesn't apply I find because this is not a claim against a  
13 personal representative for breach of fiduciary duty which is  
14 what this statute applies to. It says, "Unless previously  
15 barred by adjudication, except as provided in the closing  
16 statements, the rights of successors and creditors whose claims  
17 have not otherwise been barred against the personal  
18 representative for breach of fiduciary duty are barred unless  
19 they're proceeding to assert the same is commenced within six  
20 months of the filing of the closing statement." That is not  
21 what we've got in this case.

22           Mr. Petty, would you prepare an appropriate order?

23           MR. PETTY: I will, Your Honor.

24           THE COURT: We'll be in recess.


25           (Whereupon the hearing was concluded)

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CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge Anthony Quinn was transcribed by me from a video recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 28<sup>th</sup> day of December, 2003 in Sandy, Utah.

  
Carolyn Erickson  
Certified Shorthand Reporter  
Certified Court Transcriber

My Commission expires May 4, 2006

