

2004

Michelle Samantha Gatlin Nolan, Malualani B.  
Hoopiiaina Trust, the Larayne J. Hartman Trust v.  
Cuma Hoopiiaina, Malualani B. Hoopiiaina, Cuma  
S. Hoopiiaina, Marlin M. Forsyth, George K. Fadel  
,Michael Gatlin, IFG 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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UTAH COURT OF APPEALS

MICHELLE SAMANTHA GATLIN  
NOLAN, Successor Trustee of the  
MALUALANI B. HOOPIIAINA TRUST  
aka the LARAYNE J. HARTMAN  
TRUST, and MICHELLE SAMANTHA  
GATLIN NOLAN, individually;

Plaintiffs,

vs.

CUMA HOOPIIAINA, Personal  
Representative of the Estate of  
MALUALANI B. HOOPIIAINA, CUMA  
S. HOOPIIAINA, 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. HOOPIIAINA  
TRUST, aka THE LARAYNE J.  
HARTMAN TRUST

UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 2004 0309 CA

Civil No.: 020910872 PR

Probate No. 023901215 TR

Appellate No. 20040309 CA

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BRIEF OF APPELLANTS CUMA HOOPIIAINA AND MARLIN FORSYTH

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**UTAH COURT OF APPEALS**

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## **JURISDICTION**

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2, this action having come to the Supreme Court from the summary judgment granted to Defendants Hoopiiaina and Forsyth by Judge Anthony Quinn of the Third Judicial District Court of Salt Lake County. Pursuant to Utah Code Ann. § 78-2-2(4), the Supreme Court has the option to transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction. The Supreme Court exercised this option in this case and transferred this case to the Court of Appeals. The Court of Appeals therefore has jurisdiction over this case pursuant to Utah Code Ann. § 78-2a-3.

## **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

I. Whether the trial court erred in granting summary judgment against Plaintiffs because of their untimely filing of a quiet title action since the statute of limitations had passed barring Plaintiffs claims.

The Supreme Court reviews the district court's grant of summary judgment for correctness. *Davis County Solid Waste Management v. City of Bountiful*, 2002 UT 60. In reviewing a grant of summary judgment, the appellate court gives the trial court's legal decisions no deference, reviewing for correctness. *Kearns-Tribune Corp. v. Salt Lake County Commission*, 2001 UT 55, ¶ 7, 28 P.3d 686 (Utah 2001).



**CONSTITUTIONAL PROVISIONS,  
STATUTES AND RULES REQUIRING INTERPRETATION**

**UTAH STATUTES:**

78-40-1. Action to determine adverse claim to property - Authorized.

An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim.

75-3-1006. Limitations on actions and proceedings against distributees.

(1) Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is barred at the later of:

(a) as to a claim by a creditor of the decedent, one year after the decedent's death; and

(b) as to any other claimant and any heir or devisee, at the later of:

(i) three years after the decedent's death; or

(ii) one year after the time of distribution thereof.

(2) This section does not bar an action to recover property or value received as the result of fraud.

78-12-19. Actions to recover estate sold by executor or administrator.

No action for the recovery of any estate sold by an executor or administrator in the course of any probate proceeding can be maintained by any heir or other person claiming under the decedent, unless it is commenced within three years next after such sale. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud or other lawful grounds upon which the action is based.

78-12-25. Within four years.

An action may be brought within four years:

(1) upon a contract, obligation, or liability not founded upon an

instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received;

(2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1);

(3) for relief not otherwise provided for by law.

## **UTAH COURT RULES:**

Utah Rules of Civil Procedure Rule 56. Summary judgment.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

Plaintiffs filed a quiet title action in an attempt to acquire title to real property owned by Defendants. Defendants filed a quiet title counterclaim to eliminate Plaintiffs' claims. This case was consolidated with a probate action prosecuted by Plaintiffs to name a successor

trustee and attempt to convey the real property to Plaintiffs.

## **B. COURSE OF THE PROCEEDINGS**

Defendant, Cuma Hoopiiaina, individually and as personal representative of the estate of Malualani B. Hoopiiaina, and Defendant Marlin Forsyth filed a motion for summary judgment which was heard before the Honorable Judge Anthony Quinn on November 26, 2003.

## **C. DISPOSITION IN THE LOWER COURT**

The Honorable Judge Anthony Quinn granted Defendants' motion for summary judgment ruling that the statute of limitations barred Plaintiffs' claims and dismissed the Plaintiffs' cause of action.

## **D. STATEMENT OF FACTS**

1. On April 10, 1974 Malualani B. Hoopiiaina ("Malu") executed two trust agreements relating to real property located at 345 West 700 South and 349 West 700 South, Salt Lake City, Utah ("Property") and naming himself, his daughter Inez Gatlin, and LaRayne J. Harman and Donald Hartman as trustees. These trust documents were recorded in the Salt Lake County Recorder's office on April 18, 1974. The beneficiaries of these trusts were Malu's daughter, Inez Gatlin, and her children, Plaintiffs Samantha Gatlin and Michael Gatlin ("Plaintiffs"). (R. 12-15, 37-40).

2. On many occasions, Malu told his granddaughter Samantha, that she, her mother, and her brother would receive the Property represented by the trusts. In the Affidavit

of Samantha Gatlin she 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.

(R. 397, 378, ¶11)

3. From the time Samantha was a young girl, she was told by her mother that she and her brother Michael were beneficiaries of trusts established by her grandfather, Malu.

(R. 397).

4. Both Samantha and Michael knew that their grandfather owned the land at 349 West 700 South and 345 West 700 South, Salt Lake City, Utah. (R. 397).

5. Inez Gatlin died on April 24, 1996. (R. 399, 299). Malu died on May 20, 1997. (R. 397). Malu was the last living trustee of the trusts.

6. Prior to the time that Samantha received notice of the probate proceeding relating to her grandfather's death, Samantha went to the county clerk's office and received a copy of the holographic will that was on file there. (R. 398).

7. When Samantha 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. At the meeting with Mr. Dyer, Samantha spoke to him about the trusts as well as the will. (R. 398).

8. At the time of the probate hearing on her grandfather's will, on June 25, 1997,

Samantha appeared before the probate court and voiced her objection to the proceedings. After a discussion with Mr. Fadel, the attorney for Malu's estate, Samantha returned with Mr. Fadel to the judge's chambers and waived her objection. (R. 398).

9. Despite the proceeding at the probate court, Samantha still believed that there was a trust in which she had an interest and that nothing had changed. (R. 398).

10. Plaintiff Michael Gatlin also learned that he was not going to receive any of the Property he had been promised. On or about July 7, 1997, Michael called George Fadel concerning notice of his grandfather's death and the trusts and was informed that he would not be receiving any of the Property that he believed he had been promised. Thereafter, George Fadel sent a copy of the will to Michael. Michael then called Mr. Fadel and asked again about the trusts and was told that he would not receive any Property. (R. 299, 302).

11. This action was brought before the Third Judicial District Court on October 10, 2002. (R. 1).

12. Malu's holographic will, dated March 6, 1996, was found to be Malu's last will and testament. Samantha sought and acquired a copy of the will from the court clerk's office. (R. 398).

13. The codicils of the holographic will states:

Codicil -

My daughter Inez Gatlin having died, I remove all provisions for Inez and her children.

May 23, 1996.

/s/Malualani B. Hoopiaina.

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.

(R. 399).

14. When Samantha read the will and realized that she had been written out of the will, she cried. (R. 399).

15. Samantha 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.

(R. 399).

16. In Malu's probate proceeding, Defendant Cuma Hoopiiaina, personal representative, conveyed the Property pursuant to probate court order to Malu's heirs. (R. 22-24, 41-43)

17. Cuma Hoopiiaina was not aware of the of the April 18, 1974 trusts executed by Malu. (R. 460, p. 12)

18. George Fidel was a defendant in this action but was voluntarily dismissed by Plaintiffs on October 9, 2003. (R. 228).

### **SUMMARY OF ARGUMENTS**

In order for Plaintiffs to prevail in a quiet title action, they must establish their claim based on the strength of their own title, not the alleged weakness of the Defendants' title. Plaintiffs' claim that the statute of limitations does not apply to trusts is false. When a trustee denies the trust and assumes ownership of the trust property with the knowledge of the beneficiaries, the statute of limitations attaches and begins to run. When the Plaintiffs in a quiet title action seek affirmative relief, such as placing their name on title, invalidating the title of Defendants, terminating a lis pendens, and giving Plaintiffs possession of the Property, Plaintiffs' claim is subject to the statute of limitations. On July 7, 1997, Plaintiffs had all the information necessary to know that there had been a breach of the trusts which were to convey the Property to them. They knew that trusts had been established by their grandfather to give them the Property. They knew that their grandfather had died. They had copies of their grandfather's will. They knew that the Property was not coming to them but was being conveyed to Defendants. They knew that if they did not take some action to protect their claim in the Property, it may be lost. They, however, failed to take action to protect their interest and the statute of limitations expired.

At most, Plaintiffs had four years to bring their quiet title action from the time they discovered that their grandfather's will bequeathed the Property to Defendants and that they

were not receiving the Property. The discovery rule is not applicable to toll the statute of limitations because it is not mandated by statute, there was no concealment, and there were no exceptional circumstances. Even if the discovery rule applies, Plaintiffs knew that their interest and claim in the Property was jeopardized and that they should take action to protect their claim. When they failed to take timely action to protect their interests, their claim to the Property was extinguished.

## **ARGUMENT**

### **POINT I IN QUIET TITLE ACTIONS, PLAINTIFFS MUST PREVAIL ON THE STRENGTH OF THEIR OWN TITLE**

To succeed in an action to quiet title, the plaintiff must prevail on the strength of his own title. *Michael v. Salt Lake Investment Company*, 9 Utah 2d 370, 372, 345 P.2d 200, 201 (1959). It is not sufficient to show weakness in the title of the Defendant. *Olsen v. Park Daughters Investment Company*, 29 Utah 2d 421, 423, 511 P.2d 145, 146 (1973); *Mercur Coalition Mining Co. v. Cannon*, 112 Utah 13, 19, 184 P.2d 341, 343 (1947). To maintain the action, the plaintiff must in fact have the title or interest he is asserting. For a plaintiff not in possession to prevail, he must show good title in himself and not rely on or demonstrate a weakness or defect in the defendant's claim of record. *Home Owners Loan Corp. v. Dudley*, 105 Utah 208, 218, 141 P.2d 160, 166 (1943).

Plaintiffs argue that Defendants' title is void because the personal representative of Malu's estate could not validly convey the Property's title to Defendants. Plaintiffs' Brief,



p. 27-29. The Court should not consider Plaintiffs' claim to the extent that it is based on the alleged weakness of Defendants' title. In order for Plaintiffs to prevail, they must establish the validity of their own title. Plaintiffs' attacks on Defendants' title are irrelevant to these proceedings and cannot assist Plaintiffs in establishing the validity of their own title.

Plaintiffs assert that in granting Defendants' motion for summary judgment the trial court failed to determine the ownership of the Property. Plaintiffs' Brief, p. 28-29. The ownership of the Property was not an issue before the trial court when it granted Defendants' motion for summary judgment. The summary judgment motion was based exclusively on the statute of limitations and Plaintiffs' failure to timely file this action. The trial court took no steps to determine the ownership of the Property, which is vested in Defendants pursuant to the Deeds of Distribution from Malu's estate. (R. 148-50, 163-65).

Plaintiffs also assert that the trial court failed to consider the probate case and the appointment of a successor trustee when entering its summary judgment. Plaintiffs' Brief, p. 29. This is not the case. When the probate proceeding was first initiated, Samantha was named successor trustee and promptly conveyed the Property to herself, Michael, and their mother's estate. Defendants moved to set aside the trustee's deed, the appointment of the successor trustee, and the order to convey the Property to the beneficiaries of the trusts because Plaintiffs failed to give notice to Defendants. This motion was granted. In the court's minute entry, Plaintiffs were told that "... if the trust still needs a successor trustee, counsel is directed to provide notice as required by the statute." (Probate R. 157). Plaintiffs

have simply failed to request the appointment of a successor trustee since that ruling. The summary judgment ruling defines the property that is owned by the trusts and what the successor trustee will have to administer. There is no reason why a successor trustee cannot be appointed.

**POINT II**  
**THE APPLICABLE STATUTE OF**  
**LIMITATIONS IS 3 OR 4 YEARS**

**A. STATUTES OF LIMITATION LIMIT THE TIME WITHIN WHICH PLAINTIFFS CAN BRING THEIR ACTION**

Plaintiffs claim that no statutes of limitation apply to properties being held in an irrevocable trust. Plaintiffs and Defendants agree that between the trustee and beneficiary, the statutes of limitation do not operate so long as the trustee does not breach the trust. But when the trustee denies the trust or his liability or obligation under the trust, as in this case, the statutes of limitation attach and begin to run.

. . . it is well settled that, as between trustee and *cestui que trust*, the statute of limitations does not operate, in cases of express or direct trust, so long as such trusts continue. But when the trustee denies the trust and assumes ownership of the trust property, or denies his liability or obligation under the trust relation, in such a manner that the *cestui que trust* has actual, or even constructive, notice of the repudiation of the trust, then the statute of limitations attaches, and begins to run from that time, for such denial or adverse claim is an abandonment of the fiduciary character in which the trustee has stood to the property.

*Thomas v. Glendinning*, 13 Utah 47, 56, 44 P. 652, 654 (1896). The Utah Supreme Court has consistently held that statutes of limitation begins to run when the trustee denies his obligation to the trust:

The same result follows if we view the relationship . . . as a trust. The plaintiff's action would again be barred under U.C.A., 1953, sec. 78-12-25. Where the trustee denies the obligation of his trust and the beneficiary has notice of his repudiation, the statute [of limitations] begins to run. *Wood v. Fox*, 8 Utah 380, 32 P. 48 (1893); *Felkner v. Dooly*, 28 Utah 236, 78 P. 365 (1904); *Child v. Child*, 8 Utah 2d 261, 332 P.2d 981 (1958).

*Wasden v. Coltharp*, 631 P.2d 849, 851 (Utah 1981). Malu's will denied the trust, claimed to ownership of the Property, and denied his liability and obligation under the trust. When Plaintiffs learned that they would not receive the Property which they were promised, that their grandfather's will distributed the Property, and that the Property was conveyed by the personal representative to Defendants Cuma Hoopiaina and Marlin Forsyth, Plaintiffs claim to the Property became subject to the statutes of limitation. The statutes of limitation began to run when Plaintiffs learned that the Property was being conveyed to Defendants rather than to them.

Plaintiffs' claims to the Property are subject to the statutes of limitation because their grandfather, the last living trustee of the trusts, breached the trusts by claiming ownership of the Property and by bequeathing the Property to Defendants. Plaintiffs knew of this repudiation of the trusts because of the information Malu gave Plaintiffs since their childhood. Malu's communication with Plaintiffs could not have been more specific: he created trusts for Plaintiffs' benefit; both he and Plaintiffs' mother told Plaintiffs about the trust and about the Property that they would someday own. When Plaintiffs learned that their grandfather was bequeathing the Property in his will to Defendants and that the Property was not coming to them as promised, Plaintiffs knew they had an obligation to protect their

claims. Samantha consulted an attorney because she knew that she needed to take some action to avoid losing the Property she understood was to be hers. Plaintiffs' duty to protect their interests in the Property did not change when others told them that there was no trust or that their grandfather had disinherited them. Their duty to pursue their claim on the Property intensified because Plaintiffs knew that if they failed to take immediate steps to receive the Property, it may be lost forever. Plaintiffs simply failed to protect their interest and knowingly allowed the Property to be conveyed away.

Malu's will breached his obligation as trustee for the trusts by assuming 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 limitations was complete and the statute of limitations began to run.

**B. STATUTES OF LIMITATION ARE APPLICABLE IN QUIET TITLE ACTIONS WHERE AFFIRMATIVE RELIEF IS SOUGHT**

Plaintiffs assert that no statute of limitation is applicable in a quiet title action seeking to remove a cloud on one's title. As authority for this position, Plaintiffs cite *Branting v. Salt Lake City*, 47 Utah 296, 153 P. 995 (1915). However, the case states:

. . . We are very clearly of the opinion that, while actions by which nothing is sought except to remove a cloud from or to quiet the title to real property as against apparent or stale claims are not barred by the statute of limitations, yet we are also clear that all actions in which the principle purpose is to obtain some affirmative relief, as was the case here, clearly comes within the [statute of limitations] provisions of § 2883, *supra*.

*Id.* at 1001. In *Branting*, the plaintiff sought to set aside a lien imposed by Salt Lake City for the construction of sewer lines relating to plaintiff's property. The attempt to clear the lien imposed by the city upon plaintiff's title was an affirmative action for relief which was subject to the statute of limitations. Therefore, the plaintiff was unable to clear the lien because the statute of limitations barred his action. In the case at bar, Plaintiffs asked the trial court to validate their title to the Property and declare that Plaintiffs' title is superior to that of Defendants. (R. 132) Plaintiffs also requested that the court invalidate the Deed of Distribution conveying the Property from Malu's estate to Defendants, terminate the lis pendens filed by Defendants, invalidate the existing lease on the Property and grant Plaintiffs possession to the property. (R. 132) As shown in *Branting*, these requests seek affirmative relief. As such, Plaintiffs are subject to the statute of limitations.

**C. THE DISTRICT COURT APPROPRIATELY GRANTED SUMMARY JUDGMENT ON THE STATUTE OF LIMITATIONS**

The District Court appropriately ruled that the statute of limitations expired before Plaintiffs filed their action to quiet title in the Property. The trial court's ruling should be upheld because it is consistent with the applicable statutes of limitation and the policies underlying the statutes of limitation.

At the very most, Plaintiffs had four years within which to bring their action, as set forth in Utah Code Ann. § 78-12-25(3). That section states:

An action may be brought within four years:

...

(3) for relief not otherwise provided for by law.

If no other statute of limitations is applicable, Plaintiffs only have four years to bring their action. This statute of limitations was applied in similar actions including *Branting v. Salt Lake City*, 47 Utah 296, 153 P. 995 (1915) and *Snow v. Rudd*, 998 P.2d 262 (Utah 2000).

The trial court also considered Utah Code Ann. § 75-3-1006 and § 78-12-19 as applicable in this action. Utah Code Ann. § 75-3-1006 states:

75-3-1006. Limitations on actions and proceedings against distributees.

(1) Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is barred at the later of:

...

(b) as to any other claimant and any heir or devisee, at the later of:

(i) three years after the decedent's death; or

(ii) one year after the time of distribution thereof.

This statute of limitation is applicable because Plaintiffs' claims are against the distributees who received the Property pursuant to the will. This statute limits the Plaintiffs, as claimants and heirs under the will and devisees under the trusts, to the latter of three years after the decedent's death or one year after the time of distribution of the decedent's property, whichever is later. Malu died on May 20, 1997. As a result, Plaintiffs claims must have been brought on or before May 20, 2000. This action was not filed until October 10, 2002, almost a year and a half late. The distribution of the property from Malu's estate took place on August 20, 1998. One year after the date of distribution was August 20, 1999. This action, filed on October 10, 2002, was filed after the one year anniversary of the distribution.

Because May 20, 2000 is the latter of the two statutory dates, this is the latest date for the timely filing of this action. This action was filed on October 10, 2002. This action was not timely filed and the trial court's grant of summary judgment should be upheld.

Section 78-12-19 also provides a three year statute of limitations for an executor or administrator who transferred property in the course of a probate proceeding. Sections 78-12-19 states:

No action for the recovery of any estate sold by an executor or administrator in the course of any probate proceeding can be maintained by any heir or other person claiming under the decedent, unless it is commenced within three years next after such sale. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud or other lawful grounds upon which the action is based.

This section also imposes a three years statute of limitations upon Plaintiffs. When the personal representative of Malu's estate conveyed the Property to Defendants, the conveyance constituted a "sale" under the terms of the statute. Because the Plaintiffs did not bring this action until more than 5 years after learning that Malu had treated the as Property his own in his will and conveyed it to Defendants and not to Plaintiffs, the Plaintiffs did not bring this action in a timely manner and the case must be dismissed.

Regardless of which of these statutes of limitation applies, Plaintiffs were late in filing their claim. Therefore, Plaintiffs' claims are barred by the statute of limitations and the trial court's grant of summary judgment should be upheld.

#### **D. APPLICABILITY OF THE DISCOVERY RULE**

Generally, a cause of action accrues "upon the happening of the last event necessary

to complete the cause of action.” *Berenda v. Langford*, 914 P.2d 45, 50 (Utah 1996) (quoting *Myers v. MacDonald*, 635 P.2d 84, 86 (Utah 1981)). In certain circumstances, however, the court will apply a “discovery rule” “which benefits a plaintiff by operating to toll the period of limitations ‘until the discovery of facts forming the basis for the cause of action.’” *Snow v. Rudd*, 998 P.2d 262, 265 (Utah 2000) (quoting *Walker Drug Co. v. LaSal Oil Co.*, 902 P.2d 1229, 1231 (Utah 1995)). The discovery rule is applied “. . . only when required by statute, when a defendant has affirmatively concealed a plaintiff’s cause of action, or when exceptional circumstances exist.” *Id.* at 266.

**1. THE DISCOVERY RULE IS NOT REQUIRED BY STATUTE**

Defendants find no statutes requiring the application of the discovery rule to the Plaintiffs’ causes of action.

**2. THERE IS NO CONCEALMENT JUSTIFYING THE DISCOVERY RULE**

Plaintiffs assert that the “discovery rule” should extend the statute of limitations because of “concealment.” Plaintiffs have claimed that “Defendant has concealed Plaintiffs’ cause of action . . .” Plaintiffs’ Brief, p. 33. Defendants do not believe that the discovery rule applies. There is no concealment on the part of Defendants.

**a. GEORGE FIDEL IS NOT A DEFENDANT**

The discovery rule requires the Defendants to conceal Plaintiffs’ cause of action in order for the discovery rule to apply. *Berenda v. Langford*, 914 P.2d 45 (Utah 1996). In this case, George Fadel was a party defendant who was dismissed from the action by Plaintiffs



on October 9, 2003. (R. 228) While it is true that George Fidel prepared the trust documents in 1974 and represented Malu in the case No. 920906000 and the resulting appeal in 1993-1995, George Fidel simply did not remember the trusts at the time of Malu's probate proceedings in 1997. (R. 460, p. 11-12) This belief was the basis of his statements to Plaintiffs that there was no trust and that they were not receiving any of their grandfather's property pursuant to the will. The will instructed the Property to be conveyed to the Defendants equally. If Plaintiffs actually believed that George Fidel concealed Plaintiffs' cause of action from them, there would be no basis for dismissing him from the case. Samantha stated in her deposition that she did not believe that George Fidel intentionally mislead or concealed the status of the trust from Plaintiffs. (R.399, ¶ 14). It was on this basis that George Fadel was dismissed from this action and the dismissal must be considered by this Court to be a waiver of the claims of concealment as to George Fidel.

**b. THERE WAS NO CONCEALMENT BY DEFENDANTS**

Plaintiffs allege "It is undisputed that Defendants and their counsel were well aware that the properties were in the name of the Malualani B. Hoopiiaina trust by reason of the Court of Appeals ruling in [*Williams v. Hoopiiaina*] Civil No. 920906000, Court of Appeals No. 93078-CA of January 31, 1995." Plaintiffs' Brief, p. 34-35. This contradicts Plaintiffs' counsel's argument to the court at the summary judgment hearing. At that hearing, Mr. Olsen stated: "The Defendant, Mrs. Hoopiiaina says, 'I didn't know anything about the trust.' Nobody knew anything about the trust." (R. 460, p. 12) His claim that knowledge of the

trust was “undisputed” is clearly wrong.

In support of Plaintiffs “undisputed” claim, Plaintiffs cite the record to pages 151 through 160 to support this claim. These documents are the Findings of Fact and Conclusions of Law (R. 151-56), the Judgment and Decree (R. 157-58), and the Memorandum Decision by the Court of Appeals. (R. 159-60) The trial court documents, dated July 6, 1993, find that Malu was present at the proceedings and appeared with his attorney George K. Fadel. These documents establish that Malu defended this action. Plaintiffs’ conclusion that Defendants had knowledge of the trust based on Malu’s defense in this case does not follow. Plaintiffs establish no link between Malu’s actions and Defendants’ “knowledge” of the trusts. Malu’s personal participation does not imply that his wife and his step son knew that the Property was owned by trusts. The logical leap Plaintiffs take to accuse Defendants of knowing about the trusts is baseless.

To invoke the discovery rule, “the plaintiff must prove that the defendant concealed the wrong and that as a result the plaintiff could not, with due diligence, have discovered his claim sooner.” *Berenda v. Langford*, 914 P.2d 45, 52 (Utah 1996) (quoting Richard L. Markus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 Geo.L. J. 829, 855 (1983)). The *Berenda* court continued:

At its most basic level, the fraudulent concealment version of the discovery rule requires a determination of (i) when a plaintiff would reasonably be on notice to inquire into a defendant’s wrongdoing despite the defendant’s efforts to conceal it; and (ii) whether a plaintiff, once on notice, would reasonably have, with due diligence, discovered the facts forming the basis of the cause of action despite the defendant’s efforts to conceal those

facts.

*Id.* at 52. There is no evidence of concealment by Defendants Cuma Hoopiaina and Marlin Forsyth. Even if Defendants knew the Property was owned by the trusts, Plaintiffs make no assertion that Defendants took any steps to conceal that knowledge from Plaintiffs. In fact, Plaintiffs never contacted Defendants at the time of their grandfather's death or during the probate proceedings despite knowing that the Defendants were recipients of the Property which Plaintiffs believed they would receive. With no contact there is no concealment. Without concealment, the discovery rule is not applicable.

### **3. THERE WERE NO EXCEPTIONAL CIRCUMSTANCES JUSTIFYING THE DISCOVERY RULE**

There are no exceptional circumstances related to this case to justify the imposition of the discovery rule. In trust situations where the beneficiary claims misconduct against the trustee, the Utah Supreme Court has applied the exceptional circumstances rule, *Snow v. Rudd*, 998 P.2d 262, 266 (Utah 2000), but that is not the situation in this case. The beneficiaries of the trust are suing the devisees of the decedent's estate, not the trustee.

The *Snow* court found that the trustee owes the beneficiaries a fiduciary duty and the beneficiary may be less likely to question the actions and motives of the trustee when the trustee and the beneficiary have a familial relationship. The Defendants were not the trustee. The familial relationship between Plaintiffs (step-granddaughter and step-grandson) and Defendants (step-grandmother and step-uncle) is not a blood relationship. The Plaintiffs never lived with Defendants, had very little contact, and Plaintiffs had not even seen their

grandfather, much less their step-grandmother or step-uncle, for more than three years prior to Malu's death. Not until after this action was brought did Plaintiffs have contact with Defendants. This relationship is too remote to constitute a familial relationship. Defendants did not owe a fiduciary duty to Plaintiffs, did not have any familial relationship to maintain, and were not the trustee of the trusts.

No exceptional circumstances are asserted to justify the imposition of the discovery rule to toll the statute of limitations governing this case. As a result, the trial court's summary judgment, finding that the statute of limitations had expired before Plaintiffs' filing, should be upheld and the case dismissed.

#### **4. APPLICATION OF THE DISCOVERY RULE DOES NOT SAVE PLAINTIFFS CAUSE OF ACTION**

In the event this Court determines that the discovery rule applies, Plaintiffs nevertheless have failed to file their claim before the statute of limitations expired. As late as July 7, 1997, Plaintiffs knew about the trust and possessed the facts necessary to take action to protect their interest. They simply failed to do so.

From the time Samantha was a young girl she was told by her mother and grandfather that she and her brother Michael were beneficiaries of the trust established by their grandfather on the Property. Both Plaintiffs knew that their grandfather owned the Property and that it eventually would be theirs. Malu died on May 20, 1997. Upon Malu's death Samantha went to the county clerk's office and received a copy of the will which was being probated. When Samantha learned that she was not receiving the Property, she contacted and

met with Phil Dyre, a Salt Lake City attorney, and spoke with him about the trust and the will. On June 25, 1997, Samantha appeared before the probate court and voiced her objections to the proceeding. After a discussion with the estate's attorney, George Fidel, Samantha went to the judge's chambers and waived her objection. Despite the will and the probate proceedings, Samantha still believed that there was a trust relating to the Property in which she had an interest and that nothing relating to the trust had changed. After her grandfather's death, Samantha never attempted to contact Defendants. Samantha took no further action to determine the status of the Property until she was located by Robert Welling on August 16, 2002, for Plaintiffs' counsel.

When Michael learned of his grandfather's death and that he was not going to receive any of the Property which he had been promised, he called George Fadel, on or about July 7, 1997. In that conversation, Mr. Fadel informed Michael that he would not be receiving any of the Property that he had been promised. Mr. Fadel sent a copy of the will to Michael. In response, Michael again called Mr. Fadel and asked about the trust and was told that he would not be receiving any of the Property. After his grandfather's death, Michael never attempted to contact Defendants. Michael took no further action to determine the status of the Property until he was contacted by Plaintiffs' counsel.

Based on these facts, there can be no doubt that, as a matter of law, on or before July 7, 1997, the date of Michael's call to George Fidel, Plaintiffs had knowledge of all the facts necessary to put them on notice about the breached trust agreements. During the probate

proceeding and the several contacts Plaintiffs had with George Fadel, Plaintiffs acquired sufficient knowledge to understand that the promised trust Property was not being conveyed to them but was being conveyed to Defendants through their grandfather's will. Through reasonable investigation, the Plaintiffs could have determined that the Property was owned by the trusts and that they were named beneficiaries. Instead, Plaintiffs did nothing with their knowledge concerning the trust Property and acquiesced in its conveyance to Defendants. Plaintiffs knew that they should take steps to protect the Property on or before July 7, 1997.

The case at bar is similar to the case of *Snow v Rudd*, 998 P.2d 262 (Utah 2000). In that case, parents created the Snow Trust in 1976. The family home was conveyed to the trust which was designed to support the mother through her lifetime. The two daughters, Gloria and Lynda, if still living, were to receive equal shares of the trust upon the parents death. After the mother's death, the father asked Gloria to buy the family home, which she agreed to do. On May 8, 1978, the father entered into a real estate contract with Gloria purchasing the family home. In 1984, the father met with his daughters and an attorney concerning the family home and other property. In that meeting, the parties reaffirmed the sale of the home to Gloria. In March 1985, Lynda received a copy of the trust and all other documents relating to the house. When Lynda asked her father about the sale of the home to Gloria, he said that no sale really had taken place and that the terms of the real estate contract with Gloria were not being fulfilled. On May 18, 1993 the father died. Gloria listed the family home for sale. In January 1994, Lynda filed a claim to impose a constructive trust

on the proceeds of the sale of the family home. As a defense, Gloria claimed that the action had not been timely brought. The trial court considered whether the statute of limitations period began to run when Lynda received the trust document, less than a year before the suit was filed or earlier when she knew that Gloria was purchasing the family home. The court stated:

Here, the trial court held that the statute of limitations was tolled until 1993, when Lynda actually obtained a copy of the trust document and learned the details of its content. On appeal, Gloria argues that the statute of limitations period ran from either January of 1985, when Dr. Snow forgave Gloria's indebtedness, and Lynda contends the breach of trust occurred, or at the latest, in March 1985, when Lynda had information that would have put a reasonable person on notice to inquire. Gloria contends that because the four year period contained in § 78-12-25 of the code applies, the action is barred.

*Snow v. Rudd*, 998 P.2d 262, 265 (Utah 2000). The court held:

. . . there can be no doubt that, as a matter of law, [Lynda] had knowledge as of 1985 of all facts necessary to put her on notice to inquire as to whether the sale of the house to her sister breached the trust. She knew nothing in 1993 that she did not know in 1985, and when she acted on her knowledge in 1993 she quickly gained the trust instrument and all that she needed to file suit. This is a clear case of plaintiff simply sitting on her rights.

*Id.* Similar arguments are made by Plaintiffs in this case. Here, Plaintiffs argue that until they received the trust documents, the statutes of limitation does not begin to run. Plaintiffs also claim that the discovery rule should permit the statute to be tolled until they receive the trust documents because of the concealment version of the discovery rule. The *Snow* court held:

Even if [Lynda] was told that this trust did not exist any more, she was aware that the family home was sold from this trust. If she thought she at least had

a part interest in the family home, then she should have at least inquired as to why the family home was owned by the [trust].

*Id.* The same situation has occurred here. Even before receiving the actual trust documents, Plaintiffs knew that the Property was promised to them from their grandfather. When they learned that the Property was being conveyed in the probate proceeding to Defendants, Plaintiffs were on notice that their interest in the Property, as promised by their grandfather, was being denied. Any reasonable person who believed that they had an interest in the Property, pursuant to the promises of their grandfather, would have taken appropriate steps to discover whether they, in fact, did have an interest in the Property. Being aware that the Property was being conveyed to Defendants would put any reasonable person on notice that if they did not take immediate steps to protect their claims to the Property, that it could be lost forever. All Plaintiffs would have to have done was call the Salt Lake County Assessor's office and ask who owned the Property. They would have been told that the trusts owned the property and that copies of the conveyance documents were available at the recorder's office.

Having failed to assert their claims on a timely basis, despite their clear knowledge that the Property promised to them was being conveyed to Defendants, the Plaintiffs have failed to timely file their claim, the statute of limitations has expired, and their claim must be dismissed.

## **CONCLUSION**

Plaintiffs must prevail in a quiet title action on the strength of their own title, not the



alleged weakness of the Defendants' title. Plaintiffs' claim that the statute of limitations does not apply to the trusts is false. Trustees who deny the trust and assume ownership of the trust property with the knowledge of the beneficiaries subject the trust to the statute of limitations. Plaintiffs seek affirmative relief of the title in this quiet title action including placing their name on title, invalidating the claim of Defendants, terminating a lis pendens, and giving Plaintiffs possession of the Property. Plaintiffs' pursuit of affirmative relief renders their claims subject to the statute of limitations.

On or about July 7, 1997, Plaintiffs had all the information necessary to know that there had been a breach of the trust which was to convey the Property to them. They knew that a trust had been established by their grandfather to give them the Property. They knew that their grandfather had died. They had copies of their grandfather's will. They knew that the Property was not coming into their possession but was being conveyed to Defendants. They knew that if they did not take some action to protect their claim in the Property, that it may be lost. Having failed to take action to protect their interest in the Property, Plaintiffs' claims have expired.

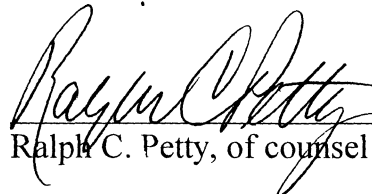
Plaintiffs had no more than four years to bring their action from the time they discovered that they were not receiving the Property and that their grandfather's will bequeathed the Property to Defendants. The discovery rule is not applicable to toll the statute of limitations because it is not mandated by statute, by concealment, or by exceptional circumstances. Defendants did not conceal the existence of Plaintiffs' claim to the Property

because they were not aware of the claim and because Plaintiffs did not contact or have any interaction with Defendants until after this action was brought. Even if the discovery rule applies, Plaintiffs knew that their claim in the Property was jeopardized and that they should take action to protect their claim. When they failed to take timely action to protect their interests, their claim to the Property was extinguished.

Utah Courts have held that parties cannot preserve their interest if they sit on their rights and do not pursue them. Such dilatory action violates public policy and seeks to revive claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. *Myers v. MacDonald*, 635 P.2d 84, 86 (quoting order of *R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49, 64 S. Ct. 582, 88 L. Ed. 788 (1944)). Utah statutes of limitation have been enacted to bring an end to stale and inactive claims. The trial court was satisfied that the statute of limitations had expired on Plaintiffs' claims. This Court should uphold the trial court's ruling and affirm the judgment.

Dated this 18 day of October, 2004.

BERRETT & ASSOCIATES, LC

  
Ralph C. Petty, of counsel

**MAILING CERTIFICATE**

I hereby certify that on this 18 day of October, 2004, I mailed, postage prepaid, a true and correct copy of the foregoing to the following:

Nolan J. Olsen  
Martin N. Olsen  
8142 S. State Street  
Midvale, UT 84047



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## **ADDENDUM**

1. Deed of Distribution by Personal Representative
2. Deed of Distribution by Personal Representative

7064-1001713  
08/21/15 11:52 AM 15.00  
NANCY WORKMAN  
RECORDER, SALT LAKE COUNTY, UTAH  
CUMA S HOOPIIAINA  
1767 S TEXAS ST  
SLC UT 84108  
REC BY:V ASHBY DEPUTY - WI

WHEN RECORDED, MAIL TO:

Cuma S. Hoopiiaina  
1767 So. Texas Street  
Salt Lake City, Utah 84108

Mail tax notice to Cuma S. Hoopiiaina at above address.

DEED OF DISTRIBUTION BY PERSONAL REPRESENTATIVE

This Deed is made by Cuma S. Hoopiiaina, as Personal Representative of the estate of Malualani B. Hoopiiaina, also known as Malualani Hoopiiaina, deceased, Grantor, to Cuma S. Hoopiiaina of Salt Lake County, Utah, and Marlin M. Forsyth of Davis County, Utah, Grantees.

WHEREAS Grantor is the qualified Personal Representative of said estate, filed as Probate No. 973900755 ES in the Third Judicial District Court of Salt Lake County, State of Utah, and

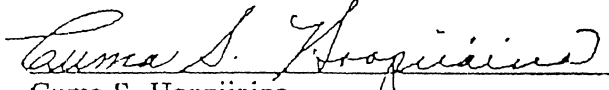
WHEREAS Grantees are entitled to distribution of the hereinafter described real property,

THEREFORE, for valuable consideration received, Grantor quitclaims, transfers and conveys to Grantees, as joint tenants with rights of survivorship, those tracts of land in Salt Lake County, State of Utah, more particularly described in Exhibit "A" which is attached hereto and made a part hereof, together with any and all buildings, improvements, appurtenances and water rights..

3165907.

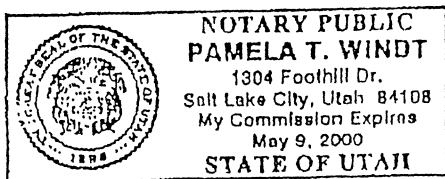
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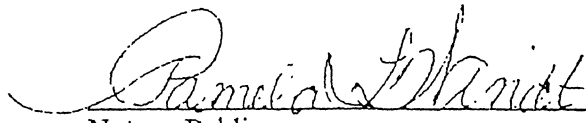
Executed this 20 day of August, 1998.

  
Cuma S. Hoopiaina  
Personal Representative of the Estate of  
Malualani B. Hoopiaina, also known as  
Malualani Hoopiiania, deceased

STATE OF UTAH                    )  
  : ss.  
COUNTY OF SALT LAKE )

The foregoing instrument was acknowledged before me this 20 day of  
August, 1998 by Cuma S. Hoopiaina as Personal Representative of the Estate of Malualani B.  
Hoopiaina, also known as Malualani Hoopiiania, deceased.



  
Notary Public

S  
E  
A  
L

EXHIBIT A

Those tracts of land in Salt Lake City, Salt Lake County, State of Utah,  
described as follows:

Commencing at the Northwest corner of Lot 6, Block 12, Plat  
"A", Salt Lake City Survey, and running thence East 78.5 feet,  
thence South 200 feet, thence East 13.2 feet, thence South 12  
feet, thence East 73.3 feet, thence South 118 feet, thence West  
10 rods, thence North 20 rods to the point of beginning.

Tax Parcel No. 15-12-130-002-0000

Beginning at a point 44 feet West and 212 feet South from the  
Northeast corner of Lot 6, Block 12, Plat "A", Salt Lake City  
Survey, and running thence North 27 feet, thence West 42.5 feet,  
thence South 15 feet, thence East 13.2 feet, thence South 12 feet,  
thence East 29.3 feet to the point of beginning.

Tax Parcel No. 15-12-130-004-0000

BK8071PG2644

7064914

WHEN RECORDED, MAIL TO:

Cuma S. Hoopiiaina  
1767 So. Texas Street  
Salt Lake City, Utah 84108

7064914  
08/21/98 11:52 AM 14.00  
NANCY WORKMAN  
RECORDER, SALT LAKE COUNTY, UTAH  
CUMA S HOOPIIAINA  
1767 S TEXAS ST  
SLC UT 84108  
REC BY:V ASHBY ,DEPUTY - WI

DEED OF DISTRIBUTION BY PERSONAL REPRESENTATIVE

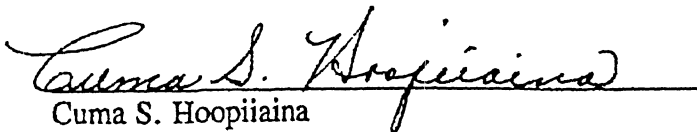
This Deed is made by Cuma S. Hoopiiaina, as Personal Representative of the estate of Malualani B. Hoopiiaina, also known as Malu B. Hoopiiaina, deceased, Grantor, to Cuma S. Hoopiiaina, individually, Grantee, whose address is 1767 So. Texas Street, Salt Lake City, Utah 84108.

WHEREAS Grantor is the qualified Personal Representative of said estate, filed as Probate No. 973900755 ES in the Third Judicial District Court of Salt Lake County, State of Utah, and

WHEREAS Grantee is entitled to distribution of the hereinafter described real property,

THEREFORE, for valuable consideration received, Grantor quitclaims, transfers and conveys to Grantee that tract of land in Salt Lake County, State of Utah, more particularly described in Exhibit "A" which is attached hereto and made a part hereof, together with any and all buildings, improvements, appurtenances and water rights..

Executed this 20 day of August, 1998.

  
Cuma S. Hoopiiaina  
Personal Representative of the Estate of  
Malualani B. Hoopiiaina, also known as  
Malu B. Hoopiiaina, deceased

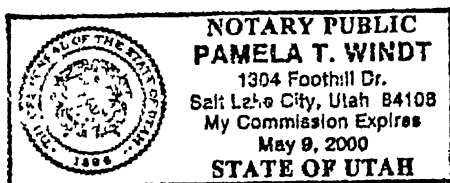
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16



STATE OF UTAH                    )  
  : ss.  
COUNTY OF SALT LAKE )

The foregoing instrument was acknowledged before me this 20 day of  
August, 1998 by Cuma S. Hoopiiaina as Personal Representative of the Estate of Malualani B.  
Hoopiiaina, also known as Malu B. Hoopiiaina, deceased.



  
\_\_\_\_\_  
Notary Public

S  
E  
A  
L

H:\WPDATA\DOCUMENT\DEED OF DISTRIBUTION-2.HOOPIAINA.WPD

EXHIBIT A

That tract of land in Salt Lake City, Salt Lake County, State of Utah, described

as follows:

Commencing 78.5 feet East from the Northwest corner of Lot 6,  
Block 12, Plat "A", Salt Lake City Survey; thence East 42.5 feet;  
thence South 185 feet; thence West 42.5 feet; thence North 185  
feet to the point of beginning.

Tax Parcel No. 15-12-130-003-0000

BK8071 PG2647