

2005

Michelle Samantha Gatlin Nolan, Successor  
Trustee of the Malualani B. Hoopiiianina Trust aka  
the Larayne J. Hartman Trust, and Michelle  
Samantha Gatlin Nolan, individually v. Cuma  
Hoopiiianina, Personal Representative of the Estate  
of Malualani B. Hoopiiaina, Cuma S. Hoopiiaina,  
individually, Marlin M. Forsyth, individually,  
George K. Fadel, individually, Michael Gatlin,  
individually, Michael Gatlin, IFG Resources Inc.,  
Lisa Goodwill, John Doe's 1 through 10 : Brief of  
Appellant

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law  
Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated  
OCR, may contain errors.

Nolan Olsen; Olsen & Olsen.

Ralph C. Petty.

---

#### Recommended Citation

Brief of Appellant, *Gatlin v. Hoopiiianina*, No. 20050619 (Utah Court of Appeals, 2005).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/5907](https://digitalcommons.law.byu.edu/byu_ca2/5907)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

**UTAH SUPREME COURT**

---

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

---

Case No. 20050619-SC

Appellate No. 20040309 CA

Civil No.: 020910872 PR

Probate No. 023901215 TR

---

**BRIEF OF APPELLANTS CUMA HOOPIIAINA AND MARLIN FORSYTH**

---

Nolan Olsen  
OLSEN & OLSEN  
8142 South State Street  
Midvale, Utah 84047

Ralph C. Petty  
Clift Building, Suite 800  
10 West Broadway  
Salt Lake City, Utah 84101

FILED  
UTAH APPELLATE COURTS  
NOV 07 2005

---

**UTAH SUPREME COURT**

---

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

---

Case No. 20050619-SC

Appellate No. 20040309 CA

Civil No.: 020910872 PR

Probate No. 023901215 TR

---

**BRIEF OF APPELLANTS CUMA HOOPIIAINA AND MARLIN FORSYTH**

---

Nolan Olsen  
OLSEN & OLSEN  
8142 South State Street  
Midvale, Utah 84047

Ralph C. Petty  
Clift Building, Suite 800  
10 West Broadway  
Salt Lake City, Utah 84101

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	ii
STATEMENT JURISDICTION . . . . .	1
STATEMENT OF ISSUES AND STANDARD OF REVIEW . . . . .	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES REQUIRING INTERPRETATION	
UTAH STATUTES . . . . .	1
UTAH COURT RULES . . . . .	3
STATEMENT OF THE CASE	
A. NATURE OF THE CASE . . . . .	3
B. COURSE OF THE PROCEEDINGS . . . . .	3
C. STATEMENT OF FACTS . . . . .	4
SUMMARY OF ARGUMENTS . . . . .	8
ARGUMENT	
THE STATUTE OF LIMITATIONS APPLIES TO THIS ACTION	
A. THE STATUTE OF LIMITATIONS APPLIES TO QUIET TITLE ACTIONS . . . . .	9
B. THE STATUTE OF LIMITATIONS APPLIES IN CASES WHERE TRUSTEE OF AN IRREVOCABLE TRUST BREACHES HIS TRUST . . . . .	14
CONCLUSION . . . . .	17
ADDENDUM	
1. DECISION OF THE UTAH COURT OF APPEALS . . . . .	20
2. DEEDS OF DISTRIBUTION BY THE PERSONAL REPRESENTATIVE . . . . .	21

## TABLE OF AUTHORITIES

### CASES:

<i>American Tierra Corp. v. City of West Jordan</i> , 840 P.2d 757, 760 (Utah 1992) . . . . .	11
<i>Appelbaum v. Ceres Land Co.</i> , 546 F. Supp. 17, 20 (D. Minn. 1981), <i>aff'd</i> , 687 F.2d 261 (8th Cir. 1982) . . . . .	12
<i>Battle Creek Bread Wrapping Mach. Co. v. Paramount Baking Co.</i> , 88 Utah 67, 74, 39 P.2d 323, 326 (1934) . . . . .	12
<i>Branting v. Salt Lake City</i> , 47 Utah 296, 153 P. 995 . . . . .	9, 10, 11, 13
<i>Brookside Mobile Home Park, Ltd. v. Peebles</i> , 2002 UT 48, P11, 48 P.3d 968. . . . .	1
<i>Crystal Lime &amp; Cement Co. v. Robbins</i> , 8 Utah 2d 389, 393, 335 P.2d 624, 626 (1959) . . . . .	12
<i>Daidsen v. Salt Lake City</i> , 95 Utah 347, 81 P.2d 374, 376 (1938) . . . . .	10
<i>Dow v. Gilroy</i> , 910 P.2d 1249, 1252 (Utah App. 1996) . . . . .	11
<i>Hammond v. Hopkins</i> , 143 U.S. 224, 252 (1892) . . . . .	15
<i>Hoopiiaina</i> , 2005 UT App. 272 . . . . .	1
<i>Jenkins v. Jensen</i> , 24 Utah 108, 66 P. 773, 778 (1901) . . . . .	16
<i>Longley v. Leucadia Fin. Corp.</i> , 2000 UT 69, ¶13, 9 P.3d 762. . . . .	1
<i>Logan City v. Utah Power &amp; Light Co.</i> , 86 Utah 354, 356, 44 P.2d 698 (1935) . . . . .	12
<i>Nolan v. Hoopiiaina</i> , 2005 UT App 272, ¶ 18 . . . . .	9, 13, 14, 15, 16, 17, 18
<i>Philippi v. Philippe</i> , 115 U.S. 151, 157 (1885) . . . . .	15
<i>Sharon Steel Corporation v. Aetna Casualty and Surety Company</i> , 931 P.2d 127, 132 (1997) . . . . .	11, 12
<i>State ex rel. Dep't of Soc. Servs. v. Santiago</i> , 590 P.2d 335, 337-38 (Utah 1979) . . . . .	9

<i>State ex rel. Egeland v. City Council</i> , 245 Mont. 484, 803 P.2d 609, 613 (Mont. 1990) . . . . .	12
<i>Thomas v. Glendinning</i> , 13 Utah 47, 56, 44 P. 652, 654 (1896) . . . . .	15, 16, 17
<i>United States ex rel. Bros. Builders Supply Co. v. Old World Artisans, Inc.</i> , 702 F. Supp. 1561, 1569-70 (N.D. Ga. 1988) . . . . .	12
<i>Wasden v. Coltharp</i> , 631 P.2d 849, 851 (Utah 1981) . . . . .	15, 17
<i>Wood v. Fox</i> , 8 Utah 380, 32 P. 48, 52 (1893) . . . . .	16, 17

**COURT RULES:**

Utah Rules of Civil Procedure Rule 56 . . . . .	3
---	---

**STATUTES:**

Utah Code Ann. § 75-3-1006 . . . . .	2
Utah Code Ann. § 78-2-2 . . . . .	1
Utah Code Ann. § 78-2-2(3)(a) . . . . .	1
Utah Code Ann. § 78-2-2(4) . . . . .	1
Utah Code Ann. § 78-12-19 . . . . .	2
Utah Code Ann. § 78-12-25 . . . . .	2
Utah Code Ann. § 78-40-1 . . . . .	1
Utah Code Ann. § 75-3-1006 . . . . .	2

**OTHER AUTHORITIES:**

76 Am Jur. 2d <i>Trusts</i> 654 (2005) . . . . .	15
90 C.J.S. <i>Trusts</i> § 125 (2002) . . . . .	15

## **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 (hereinafter “Appellants”) 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 transferred the case to the Court of Appeals. The Court of Appeals issued its opinion on June 16, 2005, reversing the ruling of the trial court. Appellants filed a Motion for Writ of Certiorari which was granted by this Court on September 21, 2005. Therefore, this Court retains its jurisdiction over this case pursuant to Utah Code Ann. § 78-2-2(3)(a).

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

Whether Appellees’ quiet title action is subject to applicable statutes of limitations. “When exercising our certiorari jurisdiction, we review the decision of the court of appeals and not that of the trial court.” *Longley v. Leucadia Fin. Corp.*, 2000 UT 69, ¶13, 9 P.3d 762. “On certiorari, we review the decision of the court of appeals for correctness.” *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, P11, 48 P.3d 968.

## **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 Rule 7. 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 and possession of 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**

In the trial court, 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. 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. This ruling was appealed by Plaintiffs to the Court of Appeals.

The Court of Appeals reversed, holding that the statute of limitations did not apply to quiet title actions and that the trustor of a trust may not breach the trust. Defendants filed a Petition for Writ of Certiorari, which was granted by the Supreme Court on September 21, 2005. This appeal is now pending before the Supreme Court of Utah.

### **C. 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 LaRayne J. Harman and Donald Hartman, respectively, and the remainder beneficiaries 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**

The Court of Appeals erred in holding that in a quiet title action the statute of limitations does not apply. The logical extension of this argument negates the statute of limitations in quiet title actions. The Court of Appeals ignored this Court's precedent in making this ruling, because the statute of limitations does apply if the parties seek affirmative relief when filing their quiet title action. In this case, the Respondents prayed for affirmative relief, including placing their name on title, invalidating the title of Appellants, terminating a lis pendens, and seeking possession of the Property. Respondents' remedies reflect their pursuit of affirmative relief, which subjects their claims to the statute of limitations. Because the statute of limitations is applicable to Respondents' claims, the Court of Appeals decision should be reversed.

The Court of Appeals erred in holding that a beneficiary's claim to enforce a trust is not subject to the statute of limitations because the trustee can only treat the trust property pursuant to the terms of the trust. This holding denies the applicability of the doctrines of breach and repudiation of the trusts by the trustee. When a trustee breaches or repudiates the trust and treats the trust property as his own, the beneficiary's claim is subject to a statute of limitations. Because the Court of Appeals failed to impose the applicable statute of limitations on Respondents' claims, its decision should be reversed.

**ARGUMENT**  
**THE STATUTE OF LIMITATIONS APPLIES TO THIS ACTION**

**A. THE STATUTE OF LIMITATIONS APPLIES TO QUIET TITLE ACTIONS**

In *Nolan v. Hoopiaina*, 2005 UT App 272, ¶ 18, the Court of Appeals’ decision below held that Respondents’ action against Appellants was not time barred despite quoting *Branting v. Salt Lake City*, 47 Utah 296, 153 P. 995, 1001 (1915), which holds that the statute of limitations applies if Respondents’ seek “affirmative relief” in their quiet title action:

. . . actions by which nothing is sought except to remove a cloud from or to quiet 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 . . . come within the [statute of limitations] . . .

Despite citing *Branting*, the Court of Appeals never addressed what constitutes “apparent or stale claims” or “affirmative relief” or how those standards should be applied.

The Court of Appeals held that no statute of limitations applied in this case since a quiet title action “. . . is premised upon the fact that a quiet title action, as its name connotes, is one to quiet an existing title . . . and not one brought to establish title. . . . [T]he effect of a decree quieting title is not to *vest* title but rather to *perfect* an existing title.” *Id.* at ¶ 18 (citing *State ex rel. Dep’t of Soc. Servs. v. Santiago*, 590 P.2d 335, 337-38 (Utah 1979)). In entering its decision, the Court of Appeals, without elaboration, equates an action to “perfect an existing title” with an action eliminating “apparent or stale claims.” *Id.* The ruling ignores the “affirmative relief” standard and essentially finds that as long as a claim is

brought as a “quiet title action,” that no statute of limitations will apply.

To assess the “affirmative relief” standard, a review of the facts of *Branting* and subsequent rulings citing *Branting* is helpful. In *Branting*, Salt Lake City ordered the construction of a sewer and a special tax was assessed to each of the benefitting property owners. After the sewer was constructed, the tax was assessed that constituted a lien on Branting’s property. Branting brought an action against Salt Lake City to have the tax assessment invalidated, remove the cloud on his title, and quiet title in his property. The *Branting* court held that Branting sought affirmative relief by filing a quiet title action which sought court assistance in declaring that the tax levied against Branting’s property was void and of no effect. Having determined that Branting had sought “affirmative relief,” the court held that because he had not brought his action to challenge the city’s right to assess the tax within four years, the statute of limitations had expired and his claim was barred.

The Utah Supreme Court relied on the “affirmative relief” standard of *Branting* when deciding *Daidsen v. Salt Lake City*, 95 Utah 347, 81 P.2d 374, 376 (1938). In *Daidsen*, plaintiff tendered land to the defendant city upon the condition that the city would make certain improvements to the property, including the installation of a sidewalk and curb and gutter. When the city refused to perform the improvements, plaintiff filed action to have the deed set aside because of fraud. The Utah Supreme Court held that seeking to have the deed to property invalidated, set aside, and possession delivered to plaintiff constituted “affirmative relief”:

This court has also held that, although 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 the statute [of limitations] does apply to actions in which the principal purpose is to obtain some affirmative relief. *Branting v. Salt Lake City*, 47 Utah 296, 153 P. 995. . . . Plaintiff here asks for affirmative relief other than removal of a cloud on his title. He is not in possession of the land. He asks that a deed which he executed to defendant be cancelled for fraud.

Based on its finding that Davidsen sought “affirmative relief,” the court held that his claim was barred by the statute of limitations.

The Utah Supreme Court again implemented the “affirmative relief” standard in *Dow v. Gilroy*, 910 P.2d 1249, 1252 (Utah App. 1996), by stating that “[a] statute [of limitations] ‘applied to all actions, both legal and equitable, in which affirmative relief is sought.’” (quoting *American Tierra Corp. v. City of West Jordan*, 840 P.2d 757, 760 (Utah 1992)). The court in *Dow* held that as long as affirmative relief was sought by a party to an action, then a statute of limitations applies. Therefore, only the quiet title cases seeking to eliminate “apparent or stale claims” are not subject to a statute of limitations.

The term “affirmative relief” connotes a pending action which seeks some relief from the court, whether embodied in a complaint or counterclaim. “Affirmative relief” is a claim that can be raised and pursued independent of the claim made by the opposing party. “Affirmative relief” is not in the manner of offset, recoupment, contribution, or indemnity, but seeks assistance from the court in righting an asserted wrong. *Sharon Steel Corporation v. Aetna Casualty and Surety Company*, 931 P.2d 127, 132 (1997). The Utah Supreme Court has

... distinguished between ... counterclaims and cross-claims "wherein the defendant seeks to reduce the amount a plaintiff can recover, such as by recoupment, contribution, or indemnity, and those wherein the defendant is seeking affirmative relief." *United States ex rel. Bros. Builders Supply Co. v. Old World Artisans, Inc.*, 702 F. Supp. 1561, 1569-70 (N.D. Ga. 1988); *see also Appelbaum v. Ceres Land Co.*, 546 F. Supp. 17, 20 (D. Minn. 1981), *aff'd*, 687 F.2d 261 (8th Cir. 1982); *State ex rel. Egeland v. City Council*, 245 Mont. 484, 803 P.2d 609, 613 (Mont. 1990). ... [W]here the defendant's claim is an "affirmative independent cause of action not in the nature of a defensive claim," then the claim must be filed within the applicable statutory period. *Old World Artisans*, 702 F. Supp. at 1569.

*Id.* *See also, Crystal Lime & Cement Co. v. Robbins*, 8 Utah 2d 389, 393, 335 P.2d 624, 626 (1959)(holding that an "... action asking that title be quieted in them and also asking that in the event title was not quieted in them that appellant herein be required to reimburse them the amounts they expended for taxes. [S]uch [is] affirmative relief ..."); *Logan City v. Utah Power & Light Co.*, 86 Utah 354, 356, 44 P.2d 698 (1935)(cancellation of a contract is affirmative relief); *Battle Creek Bread Wrapping Mach. Co. v. Paramount Baking Co.*, 88 Utah 67, 74, 39 P.2d 323, 326 (1934)("... affirmative relief may consist of a claim or claims in the nature of a lien upon the property the plaintiff seeks to recover.") "Affirmative relief," therefore, is any requested or prescribed remedy sought by a party which is not in the nature of recoupment, contribution, setoff, or indemnity.

In the case at bar, Respondents sought "affirmative relief" when they asked the trial court to validate their title to the Property, declare their title superior to that of Appellants, invalidate the Deed of Distribution conveying the Property from Malu's estate to Appellants, terminate the lis pendens filed by Appellants, invalidate the existing lease on the Property,

and grant Respondents possession to the Property. (R. 132) Since Respondents sought “affirmative relief” in their petition, Respondents’ claims are subject to the statute of limitations.

There have been no definitive definitions of what constitutes “apparent or stale claims.” In *Branting*, “apparent or stale claims” are those claims not subject to the statute of limitations. The dissent in *Nolan*, 2005 UT App. 272 (Judge Jackson), asserted that the determination of whether an action is “against apparent or stale claims” depends on whether there exists “an active battle between adverse parties.” *Id.* at ¶30. Judge Jackson concludes that “[i]n *Branting* itself and all of the cases that *Branting* cites on this point, the courts concluded that the parties sought affirmative relief where there were active, adverse claimants.” *Id.* Therefore, where adverse claimants seek an interest in property, there is likely to be an active battle between adverse parties. Conversely, apparent and stale claims are likely not to have adverse parties that seek an interest in property. For example, mortgages that are unenforceable because of the expiration of the statute of limitations may constitute “apparent and stale claims.” There is not likely to be a mortgage company seeking to enforce a mortgage that is unenforceable under the statute of limitations. As such, there would be no statute of limitations applicable to an action to remove such a mortgage from the title of property.<sup>1</sup>

---

<sup>1</sup> In the modern real estate sales practice, actions to remove expired mortgages from the titles of real property are rare. Title companies, which insure the transactions between buyer and seller and the condition of real property titles, recognize that stale

In the case at bar, Appellants and Respondents were energetically engaged in litigation to establish the validity of their claims. Appellants were “active, adverse claimants” of the Respondents. Therefore, the Respondents’ claims were not “against apparent or stale claims” and the statute of limitations is applicable.

The Court of Appeals ruling in *Nolan* failed to recognize that the statute of limitations was applicable to cases where “affirmative relief” was sought. The Court of Appeals failed to address whether Respondents’ claims were “against apparent and stale claims” or whether they sought “affirmative relief.” Based on the “affirmative relief” standard, Respondents sought “affirmative relief” in their claims against Appellants. Thus, Respondents’ claims are subject to the statute of limitations.

As a result of the analysis of the “affirmative relief” standard and the “apparent and stale claims” standard, the statute of limitations is applicable to Respondents’ claims in this action. This Court should therefore reverse the Court of Appeals decision.

**B. THE STATUTE OF LIMITATIONS APPLIES IN CASES WHERE TRUSTEE OF AN IRREVOCABLE TRUST BREACHES HIS TRUST**

In *Nolan v. Hoopiaina*, 2005 UT App 272, the Court of Appeals’ decision below held that no statute of limitations applied to Respondents’ claims since the settlor and trustee of the trusts, Malu:

. . . had no power to revoke the trusts and could deal with the trusts’ assets

---

mortgages are not encumbrances to title and the title companies simply insure that the title of real property is free and clear of expired mortgages.

only as provided in the trust instruments. Further, the beneficiaries had equitable title to the trusts' assets because the trust instruments provided no means for the trustees to take or transfer those assets from the beneficiaries without their consent.

*Id.* at ¶ 15. The Court of Appeals ignored Appellants' claim that Malu repudiated and breached the trusts by exercising dominion over the Property as if it were his own. Appellants further argued that when Malu repudiated and breached the trusts, the statutes of limitations applied. The Court of Appeals erred in failing to consider Appellants' claims of repudiation and breach of the trusts and in failing to impose the statute of limitations on Respondents' claims for possession to the Property.

The doctrines of breach and repudiation of the trusts are viable defenses asserted by Appellants. In his dissent, Judge Jackson, stated that the majority opinion had disregarded these doctrines of trust law:

The main opinion concludes that Malu "could not transfer the property in the trusts, as a trustee, other than as directed in the trusts." This evades the well-established principle that a trustee can breach the trust, thereby triggering the statute of limitations. *See* 90 C.J.S. *Trusts* § 125 (2002) ("The trust relationship may continue until it is terminated by a repudiation by the trustee . . ."); 76 Am Jur. 2d *Trusts* 654 (2005)(stating that the statute of limitations is tolled only "until the trustee openly repudiates the trust"). The United States Supreme Court and Utah's courts have both long recognized this rule. *See, Hammond v. Hopkins*, 143 U.S. 224, 252 (1892) ("[W]here a trustee [breaches the trust], the cestuis que trust are entitled to [take action] subject to the qualifications that the application for such relief must be made within reasonable time . . ."); *Philippi v. Philippe*, 115 U.S. 151, 157 (1885) ("[W]hen the trust is repudiated by . . . the trustee who claims to hold the trust property as his own, . . . statute of limitations will begin to run."); *Wasden v. Coltharp*, 631 P.2d 849, 851 (Utah 1981) (per curiam) ("Where the trustee denies the obligation of his trust and the beneficiary has notice of his repudiation, the statute begins to run."); *Thomas v. Glendinning*, 13 Utah 47,

56, 44 P, 652, 654 (1896) (“[W]hen the trustee denies the trust and assumes ownership of the trust property, . . . then the statute of limitations attaches.”); *Wood v. Fox*, 8 Utah 380, 32 P. 48, 52 (1893) (“The law is that the statute of limitations begins to run against a claim growing out of a trust from the time the trustee repudiates the trust and the cestui que trust has notice.”).

*Id.* at ¶ 29. The trustee’s repudiation and breach of the trusts triggers the application of the statute of limitations to Respondents’ claims. The Court of Appeals decision failed to even address these doctrines and failed to impose the statute of limitations on Respondents’ claims.

Respondents argue that there is no statute of limitations between the trustee and the *cestui que* trust. *Thomas v. Glendinning*, 13 Utah 47, 56, 44 P. 652, 654 (1896)(“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 trusts, so long as such trusts continue.”). Although this statement is accurate, it is inapplicable to this case. When the quiet title claim of the beneficiaries is against third parties, not members of the trust, then the statute of limitations is applicable to the quiet title action. *Jenkins v. Jensen*, 24 Utah 108, 66 P. 773, 778 (1901)(“The rule that the statute of limitations does not bar a trust estate holds only between *cestui que* trust and trustee, not as between *cestui que* trust and trustee on one side, and strangers on the other; for that would make the statute [of limitations] of no force at all . . .”).

Appellants assert that Malu repudiated and breached the trusts by seeking to assert an ownership interest in the trusts’ properties and by bequeathing the trusts’ properties pursuant

to his will. However, the Court of Appeals decision ignores Defendants' assertion of repudiation and breach. *Nolan v. Hoopiaina*, 2005 UT App 272, ¶¶ 13-16. The practical effect of the Court of Appeals decision denies defendants the right to assert breach and repudiation of the trusts as defenses to Respondents' claims. The issue of Malu's breach or repudiation of the trusts was not factually developed in the trial court. The Court of Appeals erred in eliminating repudiation and breach of the trusts as defenses when there has been no fact finding in relation to these issue. The Court of Appeals must therefore be reversed.

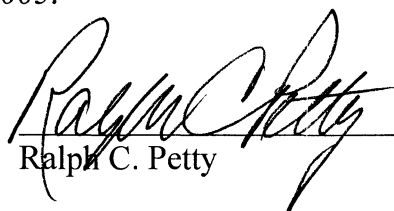
### CONCLUSION

The Court of Appeals' ruling essentially held that the statute of limitations does not apply to quiet title actions. This is contrary to the decisions of the Utah Supreme Court and the Court of Appeals should be reversed. Respondents sought "affirmative relief" in their petition to have the court validate their title to the Property, declare their title superior to Appellants, invalidate the Deed of Distribution conveying the Property from Malu's estate to Appellants, terminate the lis pendens filed by Appellants, invalidate the existing lease on the Property, and grant Respondents possession to the Property. (R. 132)

The Court of Appeals' holding that the trustee cannot repudiate and breach trust agreements contradicts this Court's opinions in *Wasden*, *Thomas*, and *Wood*. Repudiation and breach should not be eliminated as theories of this case when they are viable doctrines of trust law and when the Appellants have not had the opportunity to factually develop the facts relating to breach and repudiation.

The Court of Appeals' decision in *Nolan v. Hoopiaina*, 2005 UT App 272, contradicts established precedent of the Utah Supreme Court without sufficient explanation or justification. The Supreme Court should review the case, settle these disputed areas of the law, and relieve the litigants and the bar of the confusion that obviously accompanies these areas of statute of limitations and trust law by reversing the Court of Appeals.

DATED this 7<sup>th</sup> day of November, 2005.

  
Ralph C. Petty

**MAILING CERTIFICATE**

I hereby certify that on this 7<sup>th</sup> day of November, 2005, I mailed, postage prepaid, two true and correct copies of the foregoing to the following:

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



## **ADDENDUM**

1. Decision of the Utah Court of Appeals
2. Deeds of Distribution by Personal Representative

## **ADDENDUM 1**

Decision of the Utah Court of Appeals

***This opinion is subject to revision before  
publication in the Pacific Reporter.***

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

In the matter of the Malualani B. Hoopiaina Trusts  
aka the Larayne J. Hartman Trust and the Donald Hartman Trust.

---

Michelle Samantha Gatlin Nolan, successor trustee of the Malualani B.  
Hoopiaina Trusts; Michelle Samantha Gatlin Nolan, individually; and  
Michael Gatlin, individually,

Plaintiffs and Appellants,

v.

Cuma S. Hoopiaina, personal representative of the Estate of  
Malualani B. Hoopiaina;

Cuma S. Hoopiaina, individually; Marlin M. Forsyth, individually;  
George K. Fadel, individually; Michael Gatlin; ISG Resources

Ins.; Lisa Goodwill; and John Does 1 through 10,

Defendants and Appellees.

OPINION  
(For Official Publication)

Case No. 20040309-CA

F I L E D  
(June 16, 2005)

2005 UT App 272
-----------------

-----

Third District, Salt Lake Department, 020910872

The Honorable Anthony B. Quinn

Attorneys: Nolan J. Olsen, Midvale, for Appellants

Ralph C. Petty, Salt Lake City, for Appellees

-----

Before Judges Bench, Greenwood, and Jackson.

GREENWOOD, Judge:

¶1 Plaintiffs Michelle Samantha Gatlin Nolan (Michelle), both individually and as trustee for the Malualani B. Hoopiaina Trusts, and Michael Gatlin (Michael) appeal from the trial court's order of summary judgment in favor of Defendants Cuma S. Hoopiaina (Cuma), both individually and as personal representative of the Estate of Malualani B. Hoopiaina, et al. We reverse and remand.

#### BACKGROUND

¶2 "When reviewing a district court's grant of summary judgment, 'we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party,' here," Plaintiffs. Wayment v. Clear Channel Broad., Inc., 2005 UT 25, ¶3, 523 Utah Adv. Rep. 39 (citation omitted). "We recite the facts of this case accordingly." Id.

¶3 This intrafamily dispute pits the grandchildren of Malualani B. Hoopiaina (Malu)--Michelle and Michael--against Malu's widow, their stepgrandmother--Cuma--and Cuma's son, Marlin Forsyth.

¶4 In 1974, attorney George Fadel (Fadel) prepared two trust agreements for Malu. Malu executed those agreements, creating two irrevocable trusts (Trust I and Trust II). The first agreement conveyed title of real property located at 349 West 700 South, Salt Lake City, Utah, to Trust I. The second conveyed title of real property located at 345 West 700 South, Salt Lake City, Utah, and property related to a business located at that address to Trust II. These conveyances were recorded by the Salt Lake County Recorder shortly after they were executed. Additionally, both trust agreements provide that additional property or assets may be deposited into the trusts after their creation.

¶5 Both trusts had three trustees, including Malu and Inez Gatlin (Inez) <sup>(1)</sup> as trustees for both. Trust I included LaRayne J. Hartman as

a trustee and was to pay her \$400 a month from the time that she turned sixty-five until her death. Upon LaRayne J. Hartman's death, Inez, Michael, and Michelle would each receive one third of the income of the trust, until Michelle reached twenty-one years of age, at which point the trust was to terminate and the res would be divided equally among the three. Trust II included Donald Hartman as the third trustee and was to pay him \$300 a month from the time that he turned sixty-five until his death, at which time the res would be distributed in the same manner as Trust I. It is undisputed that LaRayne J. and Donald Hartman are deceased. Michelle has turned twenty-one, but the record does not disclose when that occurred.

¶6 Malu died on May 20, 1997. Inez and the other trustees had predeceased him. However, prior to his death, in 1996, Malu drafted a holographic will and codicils to it, making no mention of the trusts. However, one codicil bequeathed "the 349 West properties 700 South" to Cuma and her son. Another codicil stated, "My daughter Inez Gatlin having died, I remove all provisions for Inez and her children."

¶7 Malu's estate was probated in a hearing on June 25, 1997, and Cuma was appointed personal representative. Fadel, Malu's attorney from 1974, was involved in the proceedings. Though Michelle and Michael were children when their grandfather created the trusts, Michelle believed that the trusts existed because Inez had told her of the trusts' existence when Michelle was a child. Based on this belief, Michelle voiced an objection at the probate hearing, but Fadel told her that there were no trusts, that her grandfather had disinherited her, and that she had no interest in the estate. Following this conversation, Michelle waived her objection. Shortly after his grandfather's death, Michael also inquired of Fadel, and Fadel also told him that there were no trusts and that he had no interest in the estate.<sup>(2)</sup>

¶8 Though Inez signed the trust documents as a trustee, Plaintiffs never had access to the trust documents. Moreover, while Plaintiffs believed that a trust existed, there is no indication in the record that Plaintiffs had any specific knowledge of the details of the trusts, including the identity of the trustees or disposition of the trusts' assets.

¶9 On August 20, 1998, as personal representative of Malu's estate, Cuma deeded the property at issue to herself and her son. Sometime after the probate hearing, Michelle contacted an attorney who advised her that he could do nothing without the actual trust documents. Michelle took no further action until 2002, when she and Michael were contacted by a private detective and their present counsel, who informed them that they were beneficiaries of the trusts. Within a week, on August 26, 2002, Michelle filed a probate petition to have herself appointed as successor trustee for both

trusts and to transfer Inez's interest in the trusts' assets to Michelle and Michael. In September 2002, Judge Noel signed an order appointing Michelle as successor trustee as well as an order that distributed their mother's--Inez's--share of the trusts to Plaintiffs. As successor trustee, Michelle distributed the assets of the trusts to herself and Michael and recorded deeds to the properties on September 10, 2002.

¶10 Shortly thereafter, Cuma filed a motion to set aside the order appointing the successor trustee. On October 10, 2002, Michelle filed a civil suit, which was assigned to Judge Nehring, against Cuma, et al., to quiet title to the disputed real property, to recover other trust property, for damages, and for an accounting.<sup>(3)</sup> In January 2003, Judge Henriod ruled on Cuma's motion and set aside the appointment of Michelle as successor trustee. In March 2003, Judge Nehring ordered that Michelle's probate proceeding be consolidated with the civil suit.

¶11 Eventually, Cuma and her son moved for summary judgment, which Judge Quinn granted. Judge Quinn determined that either a three or four-year statute of limitations barred Plaintiffs' claims. See Utah Code Ann. §§ 75-3-1006 (1993), 78-12-25 (2002). Further, Judge Quinn ruled that while the discovery rule applied, Plaintiffs knew of the facts necessary to put them on notice to act. Plaintiffs appeal.

#### ISSUE AND STANDARD OF REVIEW

¶12 Plaintiffs appeal the trial court's grant of Defendants' motion for summary judgment. Summary judgment is proper when there is no genuine issue of material fact and "the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). We review a trial court's grant of summary judgment for correctness, affording no deference to their legal conclusions. See Wayment v. Clear Channel Broad., Inc., 2005 UT 25, ¶15, 523 Utah Adv. Rep. 39.

#### ANALYSIS

##### I. Violation of Trusts

¶13 Malu executed two trust agreements in 1974, creating irrevocable trusts, with Plaintiffs as the eventual sole beneficiaries when they each became twenty-one years old and the other named beneficiaries died. Trusts are succinctly described in Banks v. Means, 2002 UT 65, 52 P.3d 1190, as follows:

It is well settled that [a] trust is a form of ownership in which the legal title to property is vested in a trustee, who has equitable duties to hold and manage it for the benefit of the beneficiaries. Once the settlor has created the trust he is no longer the owner of the trust property and has only

such ability to deal with it as is expressly reserved to him in the trust instrument. Thus, a settlor has the power to modify or revoke a trust only if and to the extent that such power is explicitly reserved by the terms of the trust. Furthermore, the creation of a trust involves the transfer of property interests in the trust subject-matter to the beneficiaries. These interests cannot be taken from [the beneficiaries] except in accordance with a provision of the trust instrument.

Id. at ¶9 (alterations in original) (quotations and citations omitted).

¶14 Applying these principles to the trusts in this case, Malu, as settlor, did not reserve to himself the power to revoke or modify the trusts. Both trusts included a provision stating: "This Trust shall be irrevocable. At no time shall any beneficial interest in the Trust property inure to the Settlor." Accordingly, Malu could not revoke the trusts. See In re Flake, 2003 UT 17, ¶13, 71 P.3d 589 (stating "a settlor 'has the power to modify a trust only if and to the extent that such a power was reserved by the terms of the trust'" (quoting Kline v. Department of Health, 776 P.2d 57, 61 (Utah Ct. App. 1989))); Clayton v. Behle, 565 P.2d 1132, 1133 (Utah 1977) (noting the settlor may not revoke the trust if he has not reserved a power of revocation). An irrevocable trust may be revoked only if "all beneficiaries thereof consent." Clayton, 565 P.2d at 1133. There is no assertion in this case that the trusts' beneficiaries ever consented to revocation of the trusts.

¶15 As a trustee, Malu had no power to revoke the trusts and could deal with the trusts' assets only as provided in the trust instruments. Further, the beneficiaries had equitable title to the trusts' assets because the trust instruments provide no means for the trustees to take or transfer those assets from the beneficiaries without their consent.

¶16 Accordingly, title to the trusts' assets was vested in Plaintiffs, and Malu could not transfer title to those assets via his will. Cf. In re Estate of Jones, 259 F. Supp. 951, 952 (D.D.C. 1966) (mem.) (ruling property to which [a settlor] did not have a vested right at his death is not an asset of his estate). Thus, Malu's bequeathal of the property to Cuma and Cuma's subsequent transfer of the property to herself and her son were void and of no effect.

## II. Statutes of Limitation

¶17 The trial court held that Plaintiffs' claims were barred by either a three or four-year statute of limitations. The trial court's order referenced the three-year limitations in Utah Code Section 75-3-1006, see Utah Code Ann. § 75-3-1006 (1993) (actions against

probate distributions), and the four-year limitations contained in Utah Code section 78-12-25(1) and (3), see Utah Code Ann. § 78-12-25 (1), (3) (2002) (actions on an oral contract, etc., or relief not otherwise provided by law). The trial court also held that the discovery rule applied. Also, whichever statute applied, the trial court concluded that as of June 25, 1997, when Malu's estate was probated, Plaintiffs had sufficient knowledge of the facts to put them on notice to inquire, and that their failure to act until more than five years later resulted in their action being barred. While Defendants do not dispute the applicability of the discovery rule in this appeal, they argue it does not render Plaintiffs' action timely.

¶18 Plaintiffs sought various types of relief in their consolidated actions, including: quiet title, non-real property trust assets, damages, an accounting, and appointment of Michelle as successor trustee of the two trusts. The early Utah case of Branting v. Salt Lake City, 47 Utah 296, 153 P. 995 (1915), states that

We are very clearly of the opinion that . . . 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 . . . come within the [statute of limitations].

Id. at 1001; see also Davidson v. Salt Lake City, 95 Utah 347, 81 P.2d 374, 376 (1938) (reiterating the above-cited rule from Branting). This rule "is premised upon the fact that a quiet title action, as its name connotes, is one to quiet an existing title . . . and not one brought to establish title . . . . [T]he effect of a decree quieting title is not to vest title but rather is to perfect an existing title." State ex rel. Dep't of Soc. Servs. v. Santiago, 590 P.2d 335, 337-38 (Utah 1979).

¶19 Although Plaintiffs sought multiple forms of relief, they were primarily seeking to remove the cloud of Cuma's deed of the real property, as administrator of Malu's estate, to herself and her son. Further, the request that Michelle be named as successor trustee of the two trusts after the death of all named trustees, would not seem to be time barred. In order to wind up the trusts, as directed in the trust documents there must be a trustee with the legal authority to deed the properties to the named beneficiaries. Thus, the claims to appoint a successor trustee and to quiet title are not time barred.

¶20 The remaining claims for relief--personal property, damages, and an accounting--are, however, subject to limitation. While there is no dispute that the discovery rule applies, there is a question of whether it affords Plaintiffs relief from the statutory limitation periods. This rule was recently clarified in Russell Packard

Development, Inc. v. Carson, 2005 UT 14, 108 P.3d 741. In Russell Packard, the Utah Supreme Court identified two types of discovery rules: (1) an "internal discovery rule" where a statute of limitations specifically includes, by its own terms, application of the discovery rule, id. at ¶21; and (2) an "equitable discovery rule," where the "relevant statute of limitations provides only a fixed limitations period with no statutory discovery rule exception." Id. at ¶24.

¶21 None of the possible applicable statutes of limitation in this case contain an internal discovery rule. We must determine, therefore, if the trial court correctly applied the equitable discovery rule in determining that Plaintiffs' claims were barred. There are two situations in which the equitable discovery rule may toll a statute of limitations:

(1) "where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct," and (2) "where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action."

Id. at ¶25 (quoting Walker Drug Co. v. La Sal Oil Co., 902 P.2d 1229, 1231 (Utah 1995)). Plaintiffs' arguments are confined to the first situation, where concealment or misleading conduct is asserted. In examining a concealment claim, "the rule requires an evaluation of the reasonableness of a plaintiff's conduct in light of the defendant's fraudulent or misleading conduct." Id. at ¶26. A party seeking an enlargement of time under the equitable discovery rule must show that he or she "has acted in a reasonable and diligent manner" and that "'given the defendant's actions, a reasonable plaintiff would not have brought suit within the statutory period.'" Id. (quoting Warren v. Provo City Corp., 838 P.2d 1125, 1129-30 (Utah 1992)).<sup>(4)</sup>

¶22 Viewing the facts in the light most favorable to Plaintiffs, see Wayment v. Clear Channel Broad., Inc., 2005 UT 25, ¶3, 523 Utah Adv. Rep. 39: Plaintiffs did not know the details of the trusts created by their grandfather when they were very young, much less know if they were irrevocable, assuming they would have understood the import of that term. Plaintiffs never saw copies of the trust agreements. After Malu's death, Defendants, through Fadel, told Plaintiffs that the trusts no longer existed and that they had no interest in Malu's estate. They believed what Fadel told them. After learning the true status of the trusts, they did not think that Fadel had intentionally deceived them, but that he had either forgotten or was mistaken about the law. Nevertheless, they relied on his advice.

Michelle, however, went a step further and consulted another attorney. He told her he could not help her unless she had copies of the trust. It wasn't until 2002 that a private detective contacted Plaintiffs and informed them that the trusts had not terminated. They promptly filed an action at that time.

¶23 Determination of when a plaintiff would reasonably discover facts relative to a cause of action when a defendant has affirmatively concealed facts "is a 'highly fact-dependent legal question[]' that is 'necessarily a matter left to trial courts and finders of fact.'" Russell Packard, 2005 UT 14 at ¶39 (alteration in original) (citation omitted). Plaintiffs did not file a cross-motion for summary judgment with the trial court. On appeal, Plaintiffs assert there are issues of fact that preclude summary judgment for Defendants. We agree that summary judgment is inappropriate.

¶24 "[W]eighing the reasonableness of the plaintiff's conduct in light of the defendant's steps to conceal the cause of action necessitates the type of factual findings which preclude [judgment as a matter of law] in all but the clearest of cases.'" Id. (second alteration in original) (quoting Berenda v. Langford, 914 P.2d 45, 54 (Utah 1996)). This case does not qualify as one of the "clearest of cases." Id. A fact finder could certainly determine that Plaintiffs acted reasonably in not bringing suit within the applicable statute of limitations. Indeed, it would be hard to find otherwise.

#### CONCLUSION

¶25 We hold that Malu, as settlor of the two irrevocable trusts did not have title to the property at issue, and therefore, could not bequeath it as part of his estate. He similarly could not transfer the property in the trusts, as a trustee, other than as directed in the trusts, to the surviving beneficiaries. Plaintiffs' claim to quiet title to the real property to remove the cloud on title created by the deed to Cuma and her son is not subject to a statute of limitations and may be pursued. Likewise, the petition to have Michelle appointed as trustee of the trusts is consistent with the trust instruments for the purpose of fulfilling the trust terms.

¶26 Accordingly, we remand for the purpose of a trial on the issue of whether the statutes of limitation applicable to Plaintiffs' other causes of action are tolled by the equitable discovery rule and for other proceedings consistent therewith.

---

Pamela T. Greenwood, Judge

-----

¶27 I CONCUR:

---

Russell W. Bench,

Associate Presiding Judge

-----

JACKSON, Judge (concurring in part, dissenting in part):

¶28 I concur in part and dissent in part.

#### I. TRUSTEE'S BREACH OF TRUST

¶29 The main opinion concludes that Malu "could not transfer the property in the trusts, as a trustee, other than as directed in the trusts." This evades the well-established principle that a trustee can breach the trust, thereby triggering the statute of limitations. See 90 C.J.S. Trusts § 125 (2002) ("The trust relationship may continue until it is terminated by a repudiation by the trustee . . . ."); 76 Am. Jur. 2d Trusts § 654 (2005) (stating that the statute of limitations is tolled only "until the trustee openly repudiates the trust"). The United States Supreme Court and Utah's courts have both long recognized this rule. See Hammond v. Hopkins, 143 U.S. 224, 252 (1892) ("[W]here a trustee [breaches the trust], the cestuis que trust are entitled to [take action] subject to the qualification that the application for such relief must be made within reasonable time . . . ."); Philippi v. Philippe, 115 U.S. 151, 157 (1885) ("[W]hen the trust is repudiated by . . . the trustee who claims to hold the trust property as his own, . . . the statute of limitation will begin to run."); Wasden v. Coltharp, 631 P.2d 849, 851 (Utah 1981) (per curiam) ("Where the trustee denies the obligation of his trust and the beneficiary has notice of his repudiation, the statute begins to run."); Thomas v. Glendinning, 13 Utah 47, 56, 44 P. 652, 654 (1896) ("[W]hen the trustee denies the trust and assumes ownership of the trust property, . . . then the statute of limitations attaches."); Wood v. Fox, 8 Utah 380, 32 P. 48, 52 (1893) ("The law is that the statute of limitations begins to run against a claim growing out of a trust from the time the trustee repudiates the trust and the cestui que trust has notice.").

#### II. STATUTE OF LIMITATIONS FOR AFFIRMATIVE RELIEF

¶30 The main opinion also concludes that the quiet title action is

not subject to a statute of limitations. In Branting v. Salt Lake City, the Utah Supreme Court stated that

[W]e are very clearly of the opinion that . . . actions by which nothing is sought except to remove a cloud from or to quiet 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 . . . come within the [statute of limitations] . . . .

47 Utah 296, 153 P. 995, 1001 (1915) (emphasis added). This court has ruled that "[a] statute [of limitations] 'applied to all actions, both legal and equitable, in which affirmative relief is sought.'" Dow v. Gilroy, 910 P.2d 1249, 1251 (Utah Ct. App. 1996) (emphasis in original) (quoting American Tierra Corp. v. City of West Jordan, 840 P.2d 757, 760 (Utah 1992)). To determine whether a claim seeks affirmative relief, the key distinction is not whether the claim is styled as a quiet title action but whether it is "against apparent or stale claims" as opposed to an active battle between adverse parties. In Branting itself and all of the cases that Branting cites on this point, the courts concluded that the parties sought affirmative relief where there were active, adverse claimants.<sup>(1)</sup> Thus, Nolan and Gatlin's action is not exempt from a statute of limitations merely because it is a quiet title action.

¶31 While I take issue with the main opinion for failing to recognize that a trustee's actions may trigger a limitations period, without more evidence, I would not adopt the Defendants' argument that Malu's actions in fact triggered the limitations period. Instead, I would instruct the trial court to permit the Defendants to provide such evidence on remand.<sup>(2)</sup>

### III. TOLLING OF LIMITATIONS PERIOD

¶32 I also take issue with both the trial court and the main opinion because Nolan was not Gatlin's agent, and her actions and knowledge should not be imputed to Gatlin.

¶33 Further, the main opinion remands to the trial court to weigh the reasonableness of the Plaintiffs' conduct in light of the Defendants' steps to conceal the cause of action. Because the trial court stated that it had considered the discovery rule, I would more specifically outline what factors the trial court did not but should consider. Specifically, the trial court should "apply a balancing test" to determine when "a rigid application of the statute . . . [will] be irrational and unjust." Snow v. Rudd, 2000 UT 20, ¶11, 998 P.2d 262 (quotations and citation omitted). This test "weigh[s] the hardship imposed on the claimant[s] . . . against any prejudice to

the defendant resulting from the passage of time." Id. (quotations and citation omitted). In this balance, the trial court should consider that (1) the Defendants never had any legal or equitable claim to the trust properties whereas Nolan and Gatlin had both,<sup>(3)</sup> (2) Nolan did take some action, (3) Cuma's agent Fadel misled Nolan and Gatlin, and (4) "the close familial relationship[s] involved" may have affected the parties actions. Id. at ¶11; see also Walker v. Walker, 17 Utah 2d 53, 404 P.2d 253, 257 (1965); Acott v. Tomlinson, 9 Utah 2d 71, 337 P.2d 720, 724 (1959).

### III. LENGTH OF LIMITATIONS PERIOD

¶34 I also take issue with the main opinion's failure to examine and specify which statute of limitations applies to which cause of action. The trial court ruled that one of several statutes of limitations applied, and the main opinion adds little clarity.<sup>(4)</sup>

¶35 First, the claim for the return of the rents and lease payments seeks return of mesne profits. Section 78-12-23(1) sets a six-year period of limitations "for the mesne profits of real property." Utah Code Ann. § 78-12-23(1) (1995). This specific statute controls over any more general one. See Cathco, Inc. v. Valentiner Crane Brunjes Onyon Architects, 944 P.2d 365, 369 (Utah, 1997) ("[T]he more specific provision will govern over the more general provision." (quotations and citation omitted)). It is uncontested that Nolan and Gatlin brought a claim within six years. Since I would hold that Nolan and Gatlin have held equitable title to the trust property since the formation of the trusts, they are entitled to the mesne profits regardless of the application of the statutes of limitations to the other claims.

¶36 Second, the gravamen of the wrongful deprivation claim lies in tort and does not straightforwardly stem from the trust instrument. Tort claims for the taking of personal property are governed by a three-year limitations period. See Utah Code Ann. § 78-12-26(2) (1995). The other tort claims, including the wrongful deprivation of real property, are subject to a four-year limitations period. See id. § 78-12-25(3) (1995). The punitive damage claim arises out of the tort claims and should be treated as ancillary to them with an identical period of limitation.

¶37 Third, in essence, the remaining claims all ask for the return of the trust property. The trial court's analysis was flawed to the extent that it considered section 75-3-1006 because neither "the claim of any claimant," as defined by Utah Code Title 75,<sup>(5)</sup> nor "the right of any heir or devisee" is at issue. Utah Code Ann. § 75-3-1006 (1995). Moreover, the Defendants' argument for section 78-12-19 should fail because Nolan and Gatlin are not "claiming under the decedent"--their claim does not stem from Malu's ownership but from

their own--and, this is not an action to set aside a sale. Id. § 75-12-19 (1995).

¶38 Without explanation, the supreme court determined that section 78-12-25 limited recovery in a dispute between a beneficiary and a constructive trustee. See Snow v. Rudd, 2000 UT 20, ¶9, 998 P.2d 262. Section 78-12-25 addresses in one subsection actions "upon a contract, obligation, or liability not founded upon an instrument in writing" and provides "for relief not otherwise provided by law" in another subsection. Utah Code Ann. § 78-12-25(1), (3). It limits recovery for these actions to four years. See id. Although the court's rationale for applying this statute was never made clear, the reason may be that although the obligation stemmed from a written instrument, the relief lay in equity, which is "not . . . provided by law." Id. While there is implicit authority that would point us to Utah Code section 78-12-23(2) (1995), which grants a six-year period to bring claims "founded upon an instrument in writing," namely Thomas v. Glendinning, 13 Utah 47, 44 P. 652 (1896), I feel that it is our duty to follow the supreme court's lead, even if its steps are shrouded.

¶39 Thus, on remand after determining how long the limitations period should be tolled, I would have the trial court apply a four-year limitations period, except as otherwise noted.

#### IV. ADDITIONAL ISSUES

¶40 "[W]here an appellate court finds that it is necessary to remand a case for further proceedings, it has the duty of 'pass[ing] on matters [that] may then become material.'" Bair v. Axiom Design, L.L.C., 2001 UT 20, ¶22, 20 P.3d 388 (first and second alterations in original) (citation omitted). I take issue with the main opinion's failure to address these points.

##### A. Ending of the Limitations Period

¶41 On remand, it may be necessary to determine when to stop counting to determine whether the limitations period expired. Two dates are possible: (i) August 26, 2002, when Nolan instituted a probate proceeding to have herself appointed as successor trustee and to convey Inez Gatlin's interest to herself and Gatlin, or (ii) October 10, 2002, when Nolan brought a civil claim directly against the Defendants. This appeal flows most directly from the civil claim, as the heading implies, but the probate proceeding was consolidated into that case. For the most part, Nolan effectively sought the same result from both actions --i.e., control over the trust property. And to that extent, the commencement of this action should be the first day on which Nolan took legal action to protect her interest in the trusts, August 26, 2002. On the other hand, to the extent that the civil case asks for punitive damages and tort claims, which were not

raised in the probate proceeding, those actions were commenced on October 10, 2002.

### B. Dowry

¶42 Cuma has raised the argument that because she had dowry rights to the trust property when Malu created the trusts, Malu could never have devised all of the property into the trusts. Utah Code section 74-4-3 was in effect and Malu and Cuma were married at the time that Malu transferred the property into the trusts. See Utah Code Ann. § 74-4-3 (1953) (repealed 1977) (providing that "[o]ne-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, to which the wife has made no relinquishment of her rights, shall be set apart as her property in fee simple, if she survives him . . . "). This interest, however, did "not vest until the death of her husband." Boise Cascade Corp. v. Meyer, 568 P.2d 755, 756 (1977). Because the provision was repealed before Malu died, Cuma's dower interests never vested; instead, she was protected by the elective share statutes, Utah Code sections 75-2-201 to -207. See Utah Code Ann. §§ 75-2-201 to -207 (1995). There is no information in the record to determine whether Malu adequately provided for Cuma, given that the trust property was not properly part of the estate. I would instruct the trial court that Cuma is not entitled to dower rights under Utah Code section 74-4-3.

### CONCLUSION

¶43 In conclusion, I concur in the result to reverse this case to the trial court. On remand, though, I would have the trial court permit the Defendants to introduce evidence that Malu breached the trust and triggered the limitations period. I dissent from the main opinion's conclusion that the quiet title action is exempt from a statute of limitations because the action requests affirmative relief. I would also specifically point out the factors in the discovery rule test that the trial court ignored to determine whether the Plaintiffs should both be charged with knowledge of Malu's breach. I would also make it clear that if the trial court determines that the statute of limitations was triggered, the trial court should apply a four-year statute of limitations to the quiet title claims, a three-year statute of limitations to the tort claims for personal property, and a six-year statute of limitations for the mesne profits.

¶44 I respectfully dissent in part and concur in the result.

---

Norman H. Jackson, Judge

1. Inez Gatlin is Malu's daughter and Plaintiffs' mother.
2. Fadel was legal counsel for the trusts in an action that was initiated in 1992, resulting in an unpublished memorandum decision issued in 1995. See Williams v. Hoopiaina, No. 930758-CA (Utah Ct. App. Jan. 31, 1995). Although Plaintiffs' civil complaint originally named Fadel as a defendant, Plaintiffs voluntarily dismissed him.
3. Originally, because Michelle and her counsel could not locate Michael, but because they believed that he had an interest in the trusts, he was named as a defendant. Later, Michael retained Michelle's counsel and was made a plaintiff in the action.
4. Defendants contend that the discovery rule is not applicable because none of the named defendants still in the case is alleged to have concealed facts from Plaintiffs. We do not agree. Although Fadel is no longer a party to this action, he was counsel for Defendants in the probate of Malu's estate and represented the trusts in the 1995 action in this court. See Williams, No. 930758-CA.

1. See Branting v. Salt Lake City, 47 Utah 296, 153 P. 995, 1001 (1915); see also Hecht v. Slaney, 14 P. 88 (Cal. 1887) (cited in Branting and finding that a statute of limitations applied in a dispute between active, adverse litigants); Irey v. Markey, 32 N.E. 309 (Ind. 1892) (same); Stonehill v. Swartz, 28 N.E. 620 (Ind. 1891) (same); Royse v. Turnbaugh, 20 N.E. 485, 487 (Ind. 1889) (same); Caress v. Foster, 62 Ind. 145 (1878) (same); see, e.g., Davidsen v. Salt Lake City, 95 Utah 347, 81 P.2d 374, 377 (1938) (holding that "if [a plaintiff's] relief . . . depend[ed] . . . upon the cancellation of a deed for fraud or mistake, he must bring his action within the period provided by law for an action based upon that ground").
2. The Defendants assert that a statutory period of limitations began to run when Nolan and Gatlin received notice that Malu's will devised the property to Cuma and her son. I do not think that it is yet clear whether Malu breached the trust. Because "[t]rustees must act with good faith, loyalty, fairness, candor and honesty toward the trust beneficiaries," 76 Am. Jur. 2d Trusts § 349 (2005), to breach a trust, a trustee must act in bad faith. "Bad faith is . . . when a thing is done dishonestly and not merely negligently." Research-Planning, Inc. v. Bank of Utah, 690 P.2d 1130, 1132 (Utah 1984) (quotations and citation omitted). At present, the record lacks any evidence that Malu acted with intent, bad faith, or dishonesty. The breach that, on the present record, has been alleged is far from clear. Neither the sentence in Malu's holographic will nor his failure to mention the trusts expresses anything like the requisite clarity to deny the trust.

3. By operation of the Statute of Uses, when the terms of the trusts were fulfilled so that the trustees' (or trustee's) only duties were to deliver the trust property to the beneficiaries, the Plaintiffs were vested with legal title to the properties. See 27 Henry 8, c. 10 (1535 Eng.); see also Garth v. Cotton, Eng. Rep. 392 (Ch. 1753) (recognizing "jus in rem" and jus "ad rem"); Henderson v. Adams, 15 Utah 30, 48 P. 398, 401 (1897) (stating that the rule of the Statute of Uses "is part of the common law of this state."). Once Nolan turned twenty-one and the Hartmans died, the trust became passive, the Statute of Uses took effect, and the Plaintiffs became seised with the legal title to the trust property. Thus, Nolan and Gatlin were holders of both the legal and equitable title in the property in the LaRayne Hartman Trust after Nolan turned twenty-one and LaRayne Hartman died, and they held legal and equitable title in the property in the Donald Hartman Trust after Nolan turned twenty-one and Donald Hartman died.

4. The trial court ruled that Nolan and Gatlin's claims were barred by Utah Code section 75-3-1006, 78-12-25(3), or 78-12-25(1). The Defendants argue that section 78-12-19 applies in this case.

5. Utah Code section 75-1-201(4) specifically excludes actions of this type from the definition of a "claim." Utah Code Ann. § 75-1-201(4) (1995).

## **ADDENDUM 2**

Deeds of Distribution by Personal Representative

7064 1000713  
08/21/13 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

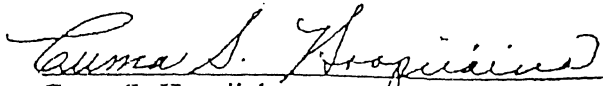
WHEREAS Grantees are entitled to distribution of the hereinafter described real property,

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..

7064913

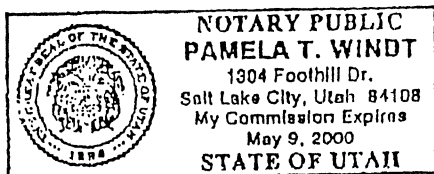
BK8071PG2642

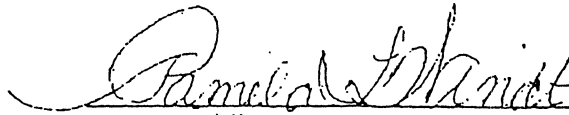
Executed this 20 day of August, 1998.

  
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

RE: WYDATAL DOCUMENTATION OF DISTRIBUTION S. HOOPAIANA WTD

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

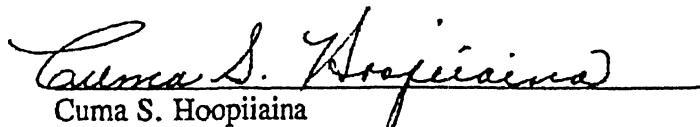
This Deed is made by Cuma S. Hoopiiaina, as Personal Representative of the estate of Malualani B. Hoopiiaina, also known as Malu B. Hoopiiaina, deceased, Grantor, to Cuma S. Hoopiiaina, individually, Grantee, whose address is 1767 So. Texas Street, Salt Lake City, Utah 84108.

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.

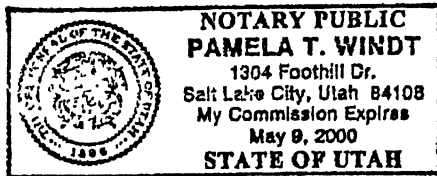
  
Cuma S. Hoopiiaina  
Personal Representative of the Estate of  
Malualani B. Hoopiiaina, also known as  
Malu B. Hoopiiaina, deceased


BK8071PG2645

163

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.HOOPIIAINA.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

165