

2005

Michelle Samantha Gatlin Nolan, Successor
Trustee of the Malualani B Hoopiiaina Trust,
Michelle Samantha Gatlin Nolan, individually, and
Michael Gatlin, individually v. Cuma S
Hoopiiainina, Personal Representative of the Estate
of Malualani B Hoopiiaina, Cuma S Hoopiiaina,
individually, Marlin M Forsyth, individually,
George K Fadel, individually, Michael Gatlin, ISG
Resources Inc, Lisa Goodwill, John Doe's 1 thru 10
: Brief of Appellee

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Nolan Olsen; Olsen & Olsen.

Ralph C. Petty.

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UTAH SUPREME COURT

MICHELLE SAMANTHA GATLIN
NOLAN, Successor Trustee of the
MALUALANI B HOOPIIAINA TRUST,
MICHELLE SAMANTHA GATLIN
NOLAN, individually, and MICHAEL
GATLIN, individually,

Plaintiffs,

vs

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

Defendants

Supreme Court No 20050619

Appellate No 20040309 CA

Civil No 020910872 PR

Probate No 023901215 TR

IN THE MATTER OF THE

THE MALUALANI B HOOPIIAINA
TRUST, aka THE LARAYNE J
HARTMAN TRUST and THE DONALD
HARTMAN TRUST,

**BRIEF OF RESPONDENTS, MICHELLE SAMANTHA GATLIN NOLAN
AND MICHAEL GATLIN**

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Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to be a stylized 'M' or 'W' shape.

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STATEMENT OF ISSUES AND STANDARD OF REVIEW

Whether Respondents' quiet title action is subject to a statute 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, paragraph 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 P.11, 48 P.3d 968.

CONTROLLING PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES AND REGULATIONS

Utah Code Ann. §75-3-1005. Limitations on proceedings against personal representative.

Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within six months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.

Utah Code Ann. §75-7-307. Limitations on proceedings against trustees after final account.

Unless previously barred by adjudication, consent, or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustees and the beneficiary unless a proceeding to assert the claim is commenced within six months after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his examination is protected after three years. A beneficiary is deemed to have received a final account or statement if, being an

adult, it is received by him personally or if, being a minor or disabled person, it is received by his representative as described in Subsections 75-1-403(1) and (2).

Utah Code Ann. §78-12-23. Within six years.

Mesne profits of real property – instrument in writing.

An action may be brought within six years:

- a. For the Mesne profits of real property.
- b. Upon any contract, obligation or liability founded upon an instrument in writing.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The Court of Appeals, based upon the facts and law, correctly ruled that there is no statute of limitations where the quiet title action is not to vest title but rather is to perfect an existing title. The Court of Appeals ruled as follows:

Although Plaintiff 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.

Nolan v. Hoopiaina, 2005 UT App 272, ¶19.

The Court of Appeals also correctly ruled that the two properties were held in fee in the name of the Trust and ruled as follows:

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.

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.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.

Nolan v. Hoopiiaina, 2005 UT App 272, ¶¶15 and 16.

The Court of Appeals also correctly ruled that the case of Banks v. Means, 52 P.3rd 1190 (2002) is controlling as to a trust and ruled as follows:

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 a trust he is no longer the owner of the trust property and has only such ability to deal with it as is expressly reserved to him in the trust instrument. A settlor has the power to modify or revoke a trust only if and to the extent that such power is explicitly reserved by the terms of the trust. The creation of a trust involves the transfer of property interests in the trust subject-matter to the beneficiaries, and these interests cannot be taken from the beneficiaries except in accordance with a provision of the trust instrument.

Nolan v. Hoopiiaina, 2005 UT App 272, ¶13.

Appellants' claim that Plaintiffs filed a quiet title action in an attempt to acquire title to real property owned by Appellants is wholly without merit in that Plaintiffs commenced the action in that they were the fee owners of the two pieces of real property as beneficiaries of the two Irrevocable Trusts. Appellants had slandered the title to their property by filing void Personal Representative Deeds and Lis Pendens with the Salt Lake County Recorder.

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 and remanded, 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, as to the issue of "whether Respondents' quiet title action may be subject to a statute of limitations" only. This appeal is now pending before the Supreme Court of Utah.

STATEMENT OF FACTS

1. Appellants set forth no new facts which were not considered by the Court of Appeals.
2. In paragraph 6 of Appellants' Statement of Facts, Samantha never saw the will until the will was filed for probate, which was the first time the will was filed with the Court.
3. In paragraph 8 of Appellants' Statement of Facts, Appellants did not provide that George Fadel, Appellants' attorney who prepared the Trusts, advised both Plaintiffs Michelle Samantha Gatlin Nolan and Michael Gatlin that there were no Trusts and that Plaintiffs were to receive nothing from the estate (R.357-364).
4. In paragraph 13 of Appellants' Statement of Facts, it should be noted that Malualani B. Hoopiiana did not mention in his holographic will the Trust property located at 345 West 700 South, Salt Lake City, Utah (R.399).

ARGUMENT

THE COURT OF APPEALS CORRECTLY RULED THAT THE STATUTE OF LIMITATIONS DOES NOT APPLY TO QUIET TITLE ACTIONS.

Appellants' argument that Plaintiffs sought "affirmative relief" is erroneous. Plaintiffs requested the Court to determine that the two Trusts dated April 10, 1974, were irrevocable, that Plaintiff Michelle Samantha Gatlin Nolan should be appointed Successor Trustee, and that the Personal Representative Deeds and Lis Pendens filed by Cuma Hoopiiaina should be determined void.

Certiorari was not granted on the issue of the two Trusts being valid. Accordingly, it is a factual and legal conclusion that the property had been in the name of a valid irrevocable trust since April 10, 1974, and that the beneficiaries of the Trust were entitled to the property at the time Plaintiff Michelle Samantha Gatlin Nolan turned 21 years of age. This occurred several years prior to recording the void Personal Representative Deeds in 1997 by Cuma Hoopiiaina, which upon discovery by Plaintiffs in August of 2002 were apparent or stale claims. Plaintiffs requested a determination that the real property was owned in fee by the two Irrevocable Trusts, that the beneficiaries of the two Trusts be determined to be the fee owners of the real property, and that Plaintiff Nolan be appointed the Successor Trustee of the two Irrevocable Trusts.

The Court of Appeals stated:

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. Nolan v. Hoopiiaina, 2005 UT App 272, ¶16.

Based upon the above ruling by the Court of Appeals, the Personal Representative Deeds are void and of no effect. The issue of whether Plaintiffs' claims were a Quiet Title Action is now

moot in that the Court of Appeals ruled that the Trust was the fee owner of the two Trust properties and that Plaintiffs were the beneficiaries of the Trust. Plaintiff, Michelle Samantha Gatlin Nolan, should be appointed Successor Trustee, and the Personal Representative Deeds filed against the property by Appellants were void and it was therefore not necessary for any further ruling as to a Quiet Title action. The Court of Appeals did, however, rule that the statute of limitations did not apply to quiet title actions and left open the question of statute of limitations that may apply in relation to Third, Fourth and Fifth Causes of actions in Plaintiffs' Complaint concerning an accounting and personal property which had been sold or removed from the Trusts.

The two (2) parcels of real property were conveyed to the two Trusts by Malualani Hoopiiaina on April 10, 1974, and recorded in the Salt Lake County Recorder's Office on April 18, 1974, and since that date have remained the property of the Trusts. The Personal Representative Deeds which the Court of Appeals declared void were filed in 1997. Even if it was determined that the issue of the statute of limitations was not a moot issue, Plaintiffs would have the right to quiet title to their Trust properties by an action to remove the stale claim of Appellants who had filed the void Personal Representative Deeds.

In quiet title actions, the discovery of a stale claim is not made until a title report is acquired by the fee owner, and in most instances those stale claims have been in existence for more than four years. A time limit on clearing title by way of a quiet title action would render property unmarketable if the apparent or stale claims could not be removed.

The claim could then be made that if someone filed a void deed against the property of another and that deed remained against the property for longer than four years, the void deed

could not be removed by a Quiet Title action, and the person filing the void deed could make some claim to the property, which of course would be contrary to law and public policy.

There is also the issue of the discovery rule and the argument by both the majority opinion and the dissent and concurrence of the Honorable Norman H. Jackson as to when the statute of limitations commenced to run as to Plaintiffs' causes of action, with the majority opinion stating as to Plaintiffs' claims:

A fact finder could certainly determine that Plaintiffs acted reasonably in not bringing suit within the applicable statute of limitations. Nolan v. Hoopiaina, 2005 UT App 272, ¶24.

The dissent and concurring opinion of Justice Jackson provided:

III Tolling of Limitations Period. 2005 UT App 272, ¶¶ 32 and 33.

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.

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, paragraph 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 where as Nolan and Gatlin had both, (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 paragraph 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).

In their brief, Appellants claim that the statute of limitations should be applied in quiet title actions. The Court of Appeals ruled that Plaintiffs, as beneficiaries of the Trust, had been the owners of the two properties at the time Michelle Samantha Gatlin Nolan turned 21 years of age. Nolan v. Hoopiaina, 2005 UT App 272, ¶13. Michelle Samantha Gatlin Nolan filed a Petition to be appointed Successor Trustee immediately upon discovering that the Trusts were in existence. Plaintiffs immediately commenced this action when Plaintiffs discovered that Defendant, Cuma Hoopiaina, had filed with the Salt Lake County Recorder two Personal Representative Deeds attempting to convey the property to herself and her son. Cuma Hoopiaina later filed a Lis Pendens against each of the properties when she discovered the Trusts were the fee owners of the properties. The principal purpose of the action commenced by Plaintiffs as fee owners of the trust property was to remove the void Personal Representative Deeds and Lis Pendens filed by Appellants.

Appellants rely on the case of Branting v. Salt Lake City, Utah, 153 P. 995, 1001 (1915). This case has no precedential value in the instant case. The Branting case is a case wherein Salt Lake City assessed various adjoining properties for the construction of a sewer line. One of the defenses to that assessment was a quiet title action to have the assessment removed. The Court ruled:

We are very clearly of the opinion that, while 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 principal purpose is to obtain some affirmative relief as was the case here, clearly come within the provisions of Section 2883.

One of the remaining causes of action in Plaintiffs' Complaint was for an accounting of money collected by Defendants after the death of Malualani Hoopiiaina which is a six year statute of limitations "for the Mesne profits of real property." Utah Code Ann. §78-12-23(1) (1995).

The last cause of action was for return of personal property in the Trusts or compensation for other trust assets as set forth in the Trust Agreement which were sold and would likewise not be subject to the statute of limitations or, in the alternative, based upon the discovery rule the statute of limitations commenced from the date Plaintiffs had knowledge that they were beneficiaries of the Trusts in August 2002.

The cases set forth by Appellants in their argument have no precedential relevance to the action before the Court. The matter before the Court involves two Irrevocable Trusts wherein two pieces of property were conveyed by Settlor to the Trust, with Plaintiffs being the beneficiaries of the Trust.

In Davidson v. Salt Lake City, 81 P.2d 374, 377 (1938), Plaintiff was attempting to set aside a deed from Plaintiff to Salt Lake City, and by reason of cancellation of the deed to quiet title in Plaintiffs, the Court ruled:

Actions by which nothing is sought, except to remove a cloud from or to quiet the title to reality as against apparent or stale claims, are not barred by the statute of limitations, but the statute does apply to actions in which the principal purpose is to obtain some affirmative relief. Comp.Laws 1917, §§ 6449, 6450, 6468, subd. 4.1. (Emphasis added).

All other cases set forth by Appellants have no relevance to the statute of limitations on quiet title actions. There is no question that the Court of Appeals ruled properly that the principal purpose of Plaintiffs' action was to void the Personal Representatives' Deeds and Lis Pendens

which had been filed with the Salt Lake County Recorder's Office which slandered the title of Plaintiffs' trust properties.

The only applicable statute of limitations would be the following:

1. Utah Code Ann. §75-3-1005 which sets forth a statute of limitations as against Personal Representatives of six (6) months after closing of an estate.
2. Utah Code Ann. §75-7-307 which sets forth a six month statute as against Trustees after beneficiaries have received a final accounting of the Trust.
3. Utah Code Ann. §78-12-23 within six years for an action on Mesne profits of real property.

None of the above statute of limitations has expired.

**THE COURT OF APPEALS CORRECTLY RULED
THAT THE TRUSTEE OF AN IRREVOCABLE TRUST
CANNOT BREACH THE TRUST.**

In responding to Appellants' Petition for Certiorari, the Supreme Court granted Certiorari on one issue only, to-wit: whether Respondent's quiet title action may be subject to a statute of limitations. Based on that fact, Respondents do not need to respond to this issue which certainly appears to be an improper addition to Appellants' brief.

Respondent would refer the Supreme Court to Plaintiffs' Statement of the Case and Argument in this brief, the ruling by the Court of Appeals, Respondents' original appeal, and Respondents' Brief in Opposition to the Appellants' Writ of Certiorari.

CONCLUSION

The Court of Appeals correctly ruled that the two Trusts were valid and irrevocable and that Malualani Hoopiaina had no power to revoke the Trusts and could deal with the Trust assets only as provided in the Trust instrument. The Court further correctly ruled that Malualani

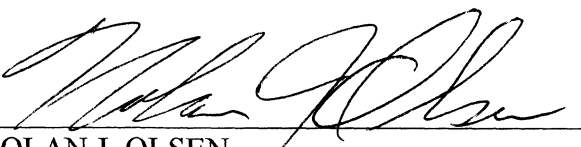
Hoopiiaina's bequeathal of one of the Trust's real properties to Cuma Hoopiiaina, as well as her subsequent transfer of the two Trusts' properties to herself and her son, were void and of no effect and that Nolan should be appointed as the Successor Trustee. The ruling of the Court of Appeals was a final ruling as to fee title and removal of the void deeds and, therefore, any further quiet title action was not necessary and would be a moot issue.

The Court of Appeals has properly ruled that as to Quiet Title actions, there is no statute of limitations if the principal purpose of the action is to remove a cloud from the title by reason of an apparent stale or void claim. The action in this case was to quiet an existing title and not to establish title.

The Court of Appeals also properly ruled that the discovery rule is applicable. Accordingly, based on the facts, the statute of limitations would start to run in August of 2002, when Plaintiffs discovered there were two Irrevocable Trusts.

Accordingly, the Supreme Court should affirm the Court of Appeals decision of June 16, 2005.

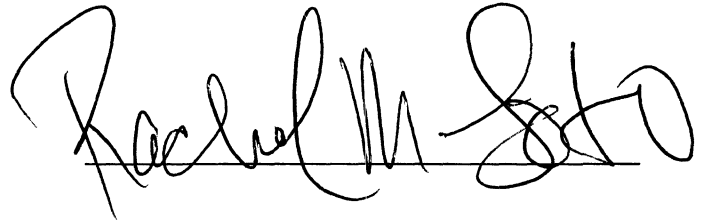
DATED this 7th day of December, 2005.


NOLAN J. OLSEN
Attorney for Plaintiffs/Appellants

CERTIFICATE OF MAILING

I hereby certify that on the 14th December, 2005, I mailed a true and correct copy of the foregoing **BRIEF OF RESPONDENTS, MICHELLE SAMANTHA GATLIN NOLAN AND MICHAEL GATLIN**, postage prepaid thereon, to the following:

Ralph C. Petty, Esq.
BERRETT & ASSOCIATES, L.C.
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Salt Lake City, Utah 84144

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