

1994

# In the matter of the estate of: Kenneth Dale Ashton : Reply Brief

Utah Court of Appeals

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**BRIEF**

940696

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**IN THE UTAH COURT OF APPEALS**

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IN THE MATTER OF THE ESTATE  
OF:

KENNETH DALE ASHTON

)  
)  
) Case No. 940696-CA  
)

) Priority Classification 15  
)

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REPLY BRIEF OF APPELLANT  
RUTH ELIZABETH ASHTON

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Appeal from the Third Judicial District Court  
Salt Lake County, State of Utah  
Honorable Leslie A. Lewis, District Judge, presiding

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STATE OF UTAH

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REPLY BRIEF OF APPELLANT, RUTH ELIZABETH ASHTON

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ARGUMENT

- I. MRS. ASHTON IS NOT CHALLENGING THE ACCURACY AND VERACITY OF THE TRIAL COURT'S FINDINGS OF FACT. RATHER, MRS. ASHTON MAINTAINS THAT THE TRIAL COURT'S FINDINGS OF FACT ACCURATELY REFLECTS ALL OF AND THE ONLY EVIDENCE PRESENTED AT TRIAL.

The Appellant (hereinafter "Mrs. Ashton") did not file a trial transcript when she brought this appeal because the only evidence presented at trial is accurately portrayed by Judge Lewis' Memorandum Decision and the Trial Court's Findings of Fact. In their brief, Respondents (hereinafter "Heirs") claim Mrs. Ashton is asking this court to retry the facts of this case. Respondent's Brief, Point V p.10, 31. Quite to the contrary, Appellant clearly states in her brief that "Mrs. Ashton does not question the veracity of the Trial Court's factual findings. . ." Appellant's Brief, p. 19.

As advanced by Appellant's Brief, Mrs. Ashton maintains that the Trial Court's factual findings do not rise to the level of

clear and convincing evidence of Mr. Ashton's (hereinafter "Decedent") intent at any of the various times title was placed in the Decedent's and Mrs. Ashton's names as joint tenants with full rights of survivorship OR as Tenants in Common. Simply put, there was absolutely no evidence or testimony presented to the Trial Court which established Decedent did not intend to create valid title when title was executed; that Decedent did not intend to pass a present possessory interest in the various properties at the time title was established in Decedent's and Mrs. Ashton's names. Mrs. Ashton is not asking this Court to retry the facts of this case.

Since the evidence presented to and relied upon by the Trial Court does not rise to the level of clear and convincing evidence of Decedent's intent at the time any one of the various joint ownership interests were formed, the Trial Court erred, as a matter of law, in ruling that ALL property titled in Decedent's and Mrs. Ashton's names, jointly, was to be included in the Decedent's estate. This is especially true when the Trial Court did not even bother to take evidence as to which properties were brought into the relationship by Mrs. Ashton and only then was Decedent's name added to the record title of Mrs. Ashton's property.

**II. AS OPPOSED TO THE ASSERTIONS MADE IN RESPONDENT'S BRIEF, THE CURRENT FINDINGS OF FACT DO NOT AND CANNOT, AS A MATTER OF LAW, RISE TO THE LEVEL OF CLEAR AND CONVINCING EVIDENCE THAT DECEDENT DID NOT INTEND TO GIVE MRS. ASHTON VALID AND PRESENT JOINT OWNERSHIP INTERESTS IN HIS PROPERTY.**

The evidence relied upon by the Trial Court in coming to its

ruling that Decedent did not intend to give a present ownership interest in the various properties titled in Decedent's and Mrs. Ashton's names does not rise to the level of clear and convincing evidence. Evidence rises to the level of "clear and convincing evidence" when it leads to the conclusion that the truth of the matter asserted is highly probable.<sup>1</sup>

Mrs. Ashton asserts that the evidence presented at trial, accurately depicted in the Trial Court's Findings of Fact and addressed by Judge Lewis in her Memorandum Decision, does not and cannot, as a matter of law, lead to the conclusion that it is "highly probable" Decedent did not intend to create the specific interests identified by title to the various jointly held properties.<sup>2</sup> Even a cursory examination of the very facts relied upon by the Trial Court supports Mrs. Ashton's contention. Inasmuch as Respondent's Brief has misrepresented Mrs. Ashton's position with regard to what evidence the Trial Court relied upon in coming to its decision, a review of Mrs. Ashton's actual position regarding the Trial Court's factual findings is proper

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<sup>1</sup>E.g. Riley Hill Gen. Contr. v. Tandy Corp. 737 P.2d 595, 602 (Or. 1987) ("To be clear and convincing, evidence must establish that the truth of the facts asserted is highly probable."); Davis v. Dept of Labor & Industries, 615 P.2d 1279, 1283 (Wash 1980) (Clear and convincing standard of proof denotes quantum of proof less than "beyond a reasonable doubt" but greater than a "preponderance of the evidence.")

<sup>2</sup>It is questionable whether the evidence relied upon by the Trial Court even meets the preponderance of the evidence test. Proof by "preponderance of the evidence" means that the fact finder must believe that the facts asserted are more probably true than false. E.g. Riley Hill Gen. Contr. v. Tandy Corp., 737 P.2d 595, 602 (Or. 1987).



at this time.

To begin, and as opposed to the representations made in Respondent's Brief at pages 31-32, what Mrs. Ashton actually stated in her brief was that the six statements quoted on page 19 of Appellant's Brief "summarized" the Trial Court's findings. Because there were 44 separate factual findings in the Trial Court's Finding of Facts, Mrs. Ashton simply, accurately, and appropriately categorized all of the relevant facts into the six broad categories.

When examining Judge Lewis' **Memorandum** Decision and the actual language of the Trial Court's Findings of Fact, it becomes abundantly clear that all the factual findings relate to what Decedent's intentions were at or around the time he executed his will; NOT what Decedent's intent was at the various times title was taken in his and Mrs. Ashton's names.

For instance, Paragraphs 5-8 of the Findings of Fact expressly relate to concerns the Decedent and Mrs. Ashton had at the time they were developing their identical wills. As stated by Paragraph 6, "In discussing their wills, the Decedent and [Mrs. Ashton] were concerned about fair distribution of their combined total estate to their respective children." (Emphasis added). As the text clearly indicates, the intentions being discussed relates to what Decedent's intent was at or around the time he executed his will, which is true for each of Paragraphs 5 through 8.

Again, in Paragraphs 9-14 of the Trial Court's Findings of

Fact, the only intent addressed relates to worksheets prepared and relied upon by Decedent when determining what percentage of his and Mrs. Ashton's property would be devised to their respective children pursuant to their wills. At the time Decedent was developing his will, Decedent may very well have desired to divide jointly held property pursuant to the percentages calculated on the worksheets. However, what Decedent's intent was at the time he developed his will is only minimally relevant, at best, in attempting to defeat Mrs. Ashton's survivorship rights in the various jointly held properties.

Likewise, Paragraphs 15-32 of the Trial Court's Findings of Fact relate to the actual preparation and execution of Decedent's and Mrs. Ashton's identical wills. Again, the only references to or discussions of "intent" found in Paragraphs 15-32 are those addressing what concerns were raised in order to have their respective wills generated by Carolyn Driscoll, the attorney who originally drafted the parties' wills, as well as the subsequent addendum. Nowhere in Paragraphs 15-32 can one find indications, let alone clear and convincing evidence supporting a factual finding, that Decedent did not "intend" to give a present possessory interest to Mrs. Ashton in his properties at the time title to property was taken and recorded in both of their names. What Decedent's intent was at the time he developed and executed his will, standing alone, is totally irrelevant to Mrs. Ashton's survivorship rights in jointly held property.

Moreover, Paragraphs 15-32 are illustrative of at least one reason why Utah law requires those who are seeking to defeat a survivorship interest to prove by clear and convincing evidence that at the time the joint tenancy was created, the grantor did not intend to create a valid joint tenancy.<sup>3</sup> These paragraphs document several occasions, during the relatively short time period surrounding the development and execution of Decedent's will, when Decedent changed his intentions concerning how he wanted his property to be distributed. See, e.g., Findings of Fact, Paragraphs 19-23, as well as Paragraphs 33-34.

Paragraphs 33-34 of the Trial Court's factual findings relate to Decedent's intent concerning a change that was made to his will by an addendum that was executed after his original will had been executed. In Paragraphs 35-37 and 39, the Trial Court reiterates that at the time Decedent executed his will, he did not intend to disinherit his children and he intended to divide the combined estate between his and Mrs. Ashton's respective children. Again, conspicuously missing is any reference to Decedent's intent at the time title was taken in jointly held property; the only relevant factor to be considered when attempting to defeat Mrs. Ashton's survivorship interests.

Paragraph 40 of the Trial Court's Findings of Fact is also irrelevant to the Heirs' attempt to defeat Mrs. Ashton's

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<sup>3</sup>Brief of Appellant, Point III(B), p.16-18 provides a complete discussion of why the law requires those challenging a surviving joint tenant's right of survivorship to prove, by clear and convincing evidence, that at the time tile was taken as joint tenants, no valid joint tenancy was intended.

survivorship interest in the jointly held property. Regardless of Decedent's intent at the time these beneficiary designations were executed, they are simply immaterial to establishing what Decedent's intent was at the time property was taken in Decedent and Mrs. Ashton's names.

When examined in light of ALL of the surrounding factual findings, Paragraphs 38 and 41 of the Trial Court's Findings of Fact exposes the legal errors that occurred in the Trial Court. Nowhere in the Trial Court's Findings of Fact are there paragraphs expressly relating to, or even remotely determining, what Decedent's intent was at the various times Decedent caused title to be taken in both his and Mrs. Ashton's names. Yet, without any reference to evidence regarding "intent" at the times title was taken in joint tenancy or as tenants in common, Paragraph 41 of the Trial Court's Findings of Fact leaps to the determination that the "total facts and circumstances further establish that the Decedent did not intend to give [Mrs. Ashton] a present interest or ownership in his property, that the joint tenancies and tenancies in common were created for convenience."

The only evidence presented at trial was with regard to "intent" surrounding Decedent's development and execution of his will. It is obvious error, as a matter of law, to thereafter determine that this same evidence of "intent" is clear and convincing evidence of Decedent's "intent" at all other times, such as the times when Decedent caused title to be taken in both his and Mrs. Ashton's names.

Finally, Paragraph 38 of the Trial Court's Findings of Fact is a very good example of the dilemma facing the Trial Court, which lead to its erroneous ruling, as a matter of law. Paragraph 38 states ". . . the vast majority of the Decedent's property was transferred into joint tenancies or tenancies in common with [Mrs. Ashton]. The Decedent expressed a desire to preserve property for his children's benefit. This is inconsistent with giving [Mrs. Ashton] a present ownership interest." (Emphasis added). First, this finding shows Decedent understood property title consequences and therefore chose not to convert all of his property into jointly held property with Mrs. Ashton. Second, this factual finding establishes a concern that should have been explicitly resolved prior to defeating Mrs. Ashton's survivorship interest in the jointly held property.

Paragraph 38 demonstrates that the Trial Court knew the mere act of transferring title on the various properties into his an Mrs. Ashton's names was evidence, though rebuttable, of Decedent's "intent" to convey a present interest in the property to Mrs. Ashton; otherwise, no inconsistency would exist. Pursuant to Utah law, the proper way to resolve this inconsistency is to require those challenging the validity of various titles to prove by clear and convincing evidence that, at the time the titles were created, the grantor did not intend to transfer a present ownership interest in the property. See Brief of Appellant, Point II, p. 10-13. In the present case, the Heirs failed to present any evidence, and the Trial Court failed to

find any evidence, concerning what the Decedent's intentions were at the various times he cause titled to be taken in his and Mrs. Ashton's names as joint tenants or as tenants in common.

In effect, Respondents are arguing that the proper way to resolve the inconsistency is for the Trial Court to first determine what Decedent's intent was at the time he executed his will. At that point, all that is left for the Trial Court to do is use that finding to supplant and supersede whatever Decedent's actual intent may have been at the various times he caused title to be taken in his and Mrs. Ashton's names.<sup>4</sup> After a review of Judge Lewis' Memorandum Decision and the Trial Court's Findings of Fact, one can only conclude that the Trial Court accepted the Heirs' argument and ruled accordingly.

Inasmuch as the facts of this case failed to address what Decedent's intent was at the various times title was taken in either joint tenancy or as tenants in common, the facts relied upon by the Trial Court do not and cannot, as a matter of law, lead to the conclusion that it is "highly probable" that Decedent did not intend to give Mrs. Ashton a present ownership interest in the properties. Therefore, the Trial Court's legal ruling that Decedent's estate should include all properties titled in

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<sup>4</sup>In effect, by adopting the procedures it did, the Trial Court is allowing Decedent and the Heirs to modify completed inter vivos transactions by will, which is contrary, not only to various express statements of the law, but also contrary to the legal principles and notions which support the doctrine of joint tenancy. For example: Utah Code Ann. § 75-6-104(5) (1993) states: A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a trust account, or a P.O.D. payee designation, cannot be changed by will.

Decedent's and Mrs. Ashton's names, regardless of whether title was held as joint tenants with full rights to survivorship or as tenants in common, is improper. The Trial Court's ruling should be reversed because that ruling is not supported by any evidence, let alone clear and convincing evidence, of Decedent's intent at the time title was taken in Decedent's and Mrs Ashton's names.

**III. AS PERSONAL REPRESENTATIVE OF DECEDENT'S ESTATE, MRS. ASHTON IS ENTITLED TO RECOVER LITIGATION COSTS, AS AN EXPENSE OF THE ESTATE, AND MRS. ASHTON'S COUNSEL IS ENTITLED TO REASONABLE COMPENSATION FOR SERVICES RENDER TO THE ESTATE.**

At the close of the new trial following remand, Mrs. Ashton moved to recover attorney compensation and litigation expenses, from the time of the Heirs' earlier appeal through to the present, as an expense of the estate. Judge Lewis summarily denied Mrs. Ashton's motion and ruled such expenses were individual expenses, not those of the estate. See, e.g., Brief of Appellant, App., Judgment, Paragraph 4.

The Heirs now assert that Mrs. Ashton did not preserve her right to appeal this issue because, at trial, Mrs. Ashton failed to present evidence as to the reasonableness of the compensation sought or any evidence showing that the expenses were incurred in good faith. Brief of Respondent, Point VI, p.34-38. It appears the Heirs mistakenly believe, or so they assert, that it is the duty of the personal representative to present evidence at the time of trial as to the reasonableness of the compensation sought and evidence that the conduct of the personal representative was commenced or carried out in good faith. Id.

The law concerning any personal representatives' right to

recover attorney's compensation and litigation expenses is very clear in the State of Utah. Contrary to the Heirs' assertion, Mrs. Ashton did not present evidence regarding the reasonableness of compensation or litigation expenses because, as the language of Utah Code Ann. §75-3-718(1) indicates, Mrs. Ashton was under no obligation to do so. Pursuant to Section 75-3-718(1) of the Utah Probate Code, unless and until an interested person objects to the compensation requested, reasonable compensation shall be the amount requested. In the present case, no one, including the Trial Court, raised an objection to the reasonableness of the amount of compensation or litigation expenses requested because no amount was ever given inasmuch as the court Ordered accounting of Decedent's estate had not yet been completed by Mrs. Ashton, as personal representative.

Furthermore, the Heirs failed to present any evidence at trial that Mrs. Ashton had acted in bad faith, and the Trial Court failed to make any findings regarding whether Mrs. Ashton was acting in good faith or not - the issue was simply not addressed at trial. At the close of the trial, the Trial Court simply denied Mrs. Ashton's request that attorney's compensation and litigation expenses be included in her accounting of the Decedent's estate, which the Trial Court ordered her to complete. As is apparent by reviewing the Trial Court's Findings of Fact, no evidence was ever even presented regarding either the reasonableness of compensation and expenses or as to whether or not the litigation expenses were incurred in good faith.



The language found in Utah Code Ann. § 75-3-718(1) and § 75-3-719 speak in terms of mandatory reimbursement for reasonable attorney's fee's and litigation expenses incurred in good faith. Unless objected to by an interested party, the amount of compensation and litigation expenses requested is deemed to be reasonable and proper. Accordingly, had the Heirs or any other interested party objected to Mrs. Ashton's request at trial, the Trial Court would then have been in a proper position to make such a ruling.<sup>5</sup> However, since no interested party objected to Mrs. Ashton's request for attorney compensation and reimbursement for litigation expenses, the Trial Court erred by summarily refusing to grant Mrs. Ashton's request. This Court should reverse the Trial Court's ruling on this issue and order that compensation and litigation expenses be included as an expense of the Decedent's estate and paid accordingly.

#### CONCLUSION

Mrs. Ashton does not question the veracity of the Trial Court's factual findings. In fact, Mrs. Ashton believes the Findings of Fact adopted by the Trial Court are actually an extremely accurate and complete indication of ALL evidence that was actually presented at trial. What Mrs. Ashton contends is that the Trial Court's factual findings do not support the Conclusions of Law or the Judgment that was based on these

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<sup>5</sup>The Trial Court would then be obligated to employ the procedure set forth in Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988) to determine the reasonableness of the amount of attorney's fees sought. See Brief of Appellant, Point IV, p.20-24 for detailed explanation of this procedure.

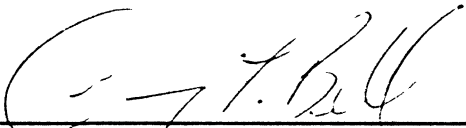
findings. The findings certainly do not rise to the level of clear and convincing evidence that, at the various times Decedent caused title to be taken in both his and Mrs. Ashton's names, Decedent did not intend to give Mrs. Ashton a present possessory interest in that property.

Contrary to Respondent's assertions, what Mrs. Ashton is asking is that this Court analyze the reported facts as they relate to the subsequent rulings of law entered by the Trial Court. The facts relied upon by the Trial Court in reaching its legal ruling do not and cannot, as a matter of law, lead to the conclusion that it is "highly probable" that Decedent did not intend to create joint ownership properties at the time title was taken. Therefore, the Trial Court's ruling that Decedent's estate now includes all properties titled in Decedent's and Mrs. Ashton's name, regardless of how that title is held, is improper as a matter of law.

Additionally, under Utah law, unless and until requests are objected to, Utah courts are obligated to grant proper requests for compensation from individuals who have provided services to an estate, as well as their requests for litigation expenses incurred in good faith on behalf of the estate. Because there were no objections to Mrs. Ashton's request that attorney compensation and litigation expenses be included in Decedent's estate, and there are no findings supporting a denial of her request, the Trial Court was obligated, under Utah law, to grant Mrs. Ashton's request.

Based on the foregoing arguments, Mrs. Ashton respectfully asks this Court to reverse the trial court and rule that properties titled in Decedent's and Mrs. Ashton's names as joint tenants with full rights of survivorship be excluded from Decedent's estate and that properties held as tenants in common be dealt with according to the provisions of the Utah Probate Code. Additionally, Mrs. Ashton respectfully asks this Court to rule that in completing the court Ordered accounting on Decedent's estate, Mrs. Ashton be entitled to include attorney compensation and litigation costs as estate expenses, which should be paid from the estate accordingly.

**RESPECTFULLY SUBMITTED** this 6TH day of February, 1995.

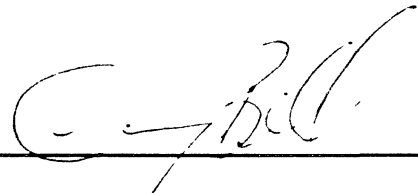
  
BY: Gary L. Bell  
Attorney for Appellant  
Ruth Elizabeth Ashton

CERTIFICATE OF DELIVERY

I hereby certify that two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT RUTH ELIZABETH ASHTON were hand-delivered or mailed, by first class mail, postage prepaid, on this 6<sup>TH</sup> day of February, 1995, to the following:

John K. Rice, Esq.  
Attorney for Respondents  
Steven Jay Ashton, et al.  
17 North Main Street  
Midvale, Utah 84047

By: \_\_\_\_\_

A handwritten signature in dark ink, appearing to read "J. K. Rice", is written over a horizontal line.