1990

Kipp Quinn v. Fenton Quinn, Jr. : Brief of Respondent

Utah Court of Appeals

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900169CA

IN THE UTAH COURT OF APPEALS

In the Matter of the Estate of, FENTON GLADE QUINN (Deceased)	)	
KIPP QUINN, successor personal representative, Appellant	)	Case No. 900169-CA Priority No. 16
vs. FENTON QUINN, JR., Respondent	)	

BRIEF OF RESPONDENT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH,

The Honorable Scott Daniels presiding

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PARTIES

1. Nielsen & Senior, Attorneys at Law, 1100 Eagle Gate Tower, 60 East South Temple, Salt Lake City, Utah.

2. Fenton Quinn, Jr., 2601 West Rustic Roads Drive, South Jordan, Utah, former personal representative of the estate of Fenton Quinn.

3. Kipp Quinn, 7747 Biscayne Drive, Salt Lake City, Utah 84117, successor personal representative of the estate of Fenton Quinn.

4. Robert Felton, Attorney at Law, 310 South Main Street, Suite 1305, Salt Lake City, Utah 84101, attorney for Appellant.

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I.

JURISDICTION

The judgment that is the subject of this Appeal is a final order of the Third Judicial District Court of Salt Lake County awarding attorney's fees to Nielsen & Senior, attorneys for the Personal Representative for extraordinary services rendered in a probate estate (R. pp. 325-326). The Utah Court of Appeals has jurisdiction of this matter pursuant to Utah Code Ann. §78-2-3 (2)(j) (1953). Pursuant to Rule 4-A, Rules of the Utah Supreme Court, this appeal was transferred to the Court of Appeals for disposition pursuant to an Order of the Supreme Court dated March 28, 1990.

The judgment of the District Court was dated December 19, 1989 (R, pp. 325-26). Notice of Appeal was filed January 17, 1990 (R, p. 362).

II.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. WHETHER THE AWARD OF ATTORNEY'S FEES AND EXPENSES BY THE TRIAL COURT IS WITHIN THE STATUTORY AUTHORITY OF THE TRIAL COURT AND IS SUPPORTED BY THE EVIDENCE?

By law, attorney's fees are to be paid to the attorneys for the Personal Representative of a Probate estate §75-3-718 and §75-3-719 U.C.A. (1953 as amended)

(Add. 1). Findings of fact should be made which support the award. Cabrera v. Cottrell, 694 P.2d 622 (Utah 1985). Only if no evidence is presented or proffered at trial on the issue of an award of Attorney's fees is an award of attorney's fees an abuse of discretion requiring the award to be overturned. Hal Taylor Associates v. Union America, Inc., 657 P.2d 743 (Utah 1982).

2. WHETHER THE AMOUNT OF ATTORNEY'S FEES AWARDED WAS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT?

Where there is evidence regarding attorney's fees at trial, the amount of attorney's fees to be awarded, are in the sound discretion of the trial court and will not be disturbed in the absence of a clear abuse of discretion. Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667 (Utah 1982). It is to be presumed that the trial court properly exercised its discretion unless the record clearly shows to the contrary. Regional Sales Agency v. Reichert, 784 P.2d 1210, 1215 (Utah App. 1989). Goddard v. Hickman, 685 P.2d 530, 534-535 (Utah 1984).

3. WHETHER THE COSTS AWARDED BY THE TRIAL COURT FOR EXPERT WITNESS FEES, COPYING, ETC., ARE "EXPENSES AND DISBURSEMENTS" WHICH ARE TO BE PAID FROM THE PROBATE ESTATE?

Expenses and disbursements of a Personal Representative, including but not limited to attorney's fees and costs, are to be paid from the probate estate.

§75-3-719 (1953 as amended) (Add.1).

4. WHETHER FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE ORALLY BY THE TRIAL COURT AND RECORDED IN OPEN COURT FOLLOWING THE CLOSE OF THE EVIDENCE BUT WHICH ARE NOT REPEATED IN THE WRITTEN ORDER WHERE THE CONCLUSIONS OF LAW APPEAR ARE SUFFICIENT?

Findings of Fact and Conclusions of Law made orally and recorded in open court are sufficient without more. Rule 52(a) of the Utah Rules of Civil Procedure.

III.

STATUTES AND ORDINANCES

75-3-101 U.C.A. (1953 as amended 1975) - See Addendum 1

75-3-106 U.C.A. (1953 as amended 1975) - See Addendum 1

75-3-705 U.C.A. (1953 as amended 1977) - See Addendum 1

75-3-707 U.C.A. (1953 as amended 1975) - See Addendum 1

75-3-715 U.C.A. (1953 as amended 1975) - See Addendum 1

75-3-718 U.C.A. (1953 as amended 1977 & 1987)See Addendum 1

75-3-719 U.C.A. (1953 as amended 1975) - See Addendum 1

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75-3-808 U.C.A. (1953 as amended 1975) - See Addendum 1

78-2-3(2)(j) U.C.A. (1953) - See Addendum 1

Rule 52(a) Utah Rules of Civil Procedure-See Addendum 1

Rule 54(d)(1) Utah Rules of Civil Procedure-See Addendum 1

IV.

STATEMENT OF THE CASE

The Statement of the Case as set forth by the Appellant contains many statements and allegations more properly characterized as argument, and therefore, a new Statement of the Case is made as follows:

A. Nature of the Case. Kipp Quinn, Appellant, hereinafter referred to as "Kipp", who is not related to the decedent, the Successor Personal Representative of the Estate of Fenton Glade Quinn, Sr., hereinafter referred to as "Glade", appeals the award of attorney's fees and expenses to the attorneys for the former Personal Representative, Fenton Glade Quinn, Jr., hereinfter referred to as "Fenton", the decedent's son and Respondent herein. The only issue at the trial was the proper amount of attorney's fees and Personal Representative's expenses and disbursements to be awarded. Attorney's fees and expenses were awarded in the amounts of (a) $24,181.00 and $340.32, respectively, for the Administration of the Estate, (b) $20,706.00 and $3,952.60, respectively, for legal services rendered Fenton and the Estate in defending a claim for $650,000.00 and the resulting legal action for wrongful death which resulted in a judgment against the Estate for $200,000.00 less than asserted on the claim, and (c) $6,781.00 and $184.32, respectively, for legal representation of the Estate in litigation against Penny

McGrath, a debtor of the Estate, which resulted in a recovery by the Estate of over $75,000.00.

B. Course of Proceeding. The Proceeding out of which this appeal arises was commenced by Petition for Compensation of Attorneys and Reimbursement of Expenses in Estate Litigation filed October 10, 1989 by Nielsen & Senior, attorneys for Fenton as Personal Representative of the Estate (R. p. 34). Only the Proceeding of this Petition is now before this Court. Other, independent proceedings, as defined in §75-3-106(1)(a) U.C.A. (1953 as amended) (Add. 1), conducted in Glade's Estate included: (a) Petition for Determination of Intestacy and Fenton's Appointment as Personal Representative, filed June 12, 1984 (R. p. 34), (b) Petition for Supervised Administration and Order Enjoining the Waste of Assets (R. p. 34), filed September 14, 1984 by Kipp which was denied, (c) Petition For Order Determining That Fenton Quinn Predeceased Dawana Quinn for Purposes of Heirship and Distribution of Glade's Estate filed by Kipp on August 10, 1984 (R. p. 43). After several appearances by counsel and extensive efforts to prepare for the trial set on the Petition (R. p. 55), Kipp's Petition was denied as a matter of law for stating a claim upon which relief could not be granted (R. p. 134), (d) Petition for Order Restraining Personal Representative filed by Kipp on September 28, 1984 (R. p. 51) which was denied, (e) Wrongful Death action commenced by Kipp for

damages resulting from the death of his mother, (f) Petition by Kipp filed on October 25, 1988 to remove Fenton during the pendency of Fenton's appeal of the Wrongful Death action, (g) Petition for allowance of Personal Representative's fees filed by Fenton which was denied (R. p. 352), (h) Petition for Allowance of Exempt Property filed by Fenton which is still pending (R. p. 359), (i) Petition filed by Kipp on August 18, 1989, for Determination of Attorney's Fees (R. p. 205).

C. Disposition at Trial. Following the trial on November 7, 1990 before the Honorable Scott Daniels of the Third District Court sitting without a Jury on the sole issue of attorney's fees and expenses and disbursements, the Court in open court, entered its findings of fact (R. pp. 114-117), and awarded Nielsen & Senior, attorneys for Fenton as Personal Representative of the Estate: $24,181.00 attorney's fees and $340.32 costs in the Administration of the Estate, $20,706.00 attorney's fees and $3,952.60 costs in the defense by the Estate of the Wrongful Death action, and $6,781.00 attorney's fees and $184.32 costs in Fenton's lawsuit against Penny McGrath for recovery of debts due to the Estate. (T. pp. 115-117) No award of attorney's fees or costs was made for the legal services rendered in Fenton's appeal of the Wrongful Death judgment in which the Estate was not successful and for which $6,560.50 fees and $353.10 costs had been requested. The Order entered by the

trial court stated that the fees and costs were to have priority as a cost or expense of Administration of the Estate (R. p. 325).

D. Relevant Facts. Fenton was appointed Personal Representative of Glade's Estate, without objection or contest, on June 27, 1984 (R. p. 18).

Kipp's claim against the Estate for $650,000.00 was disallowed (R. p. 104), and Kipp filed a Wrongful Death action in which judgment was entered against the Estate for about $200,000.00 less than the claim filed by Kipp. The Estate subsequently filed an appeal.

During the pendency of the appeal, the Estate commenced an action against Penny McGrath, to recover debts due to the Estate, and Kipp filed a Petition to remove Fenton as Personal Representative and to appoint himself. (R. p. 175). Kipp was denied appointment as Personal Representative, and Fenton continued to serve (R. p. 190).

On April 18, 1989, this Court entered its decision denying Fenton's appeal. (R. p. 323). Kipp was appointed Successor Personal Representative on June 20, 1989 (R. p. 197).

The Petition in this Proceeding requested compensation for legal services and expenses in regard to: (a) the Administration of the Estate, (b) the McGrath lawsuit, (c) the Wrongful Death action and, (d) Appeal of the judgment in the Wrongful Death matter (R. pp. 214-317; T. p. 8).

The original value of the Estate was estimated to be about $600,000.00 (R. p. 42). Very few, if any, of Glade's records were available to Fenton from which to prepare an accurate inventory (T. pp. 78, 80, 81, 83). Glade's home and its contents were in Kipp's sole possession. (T. pp. 81, 95 & 96). Fenton was denied access to the records (T. pp. 43, 78, 80, & 81). Judge T. Hansen ordered Fenton to deliver an Inventory to Kipp (R. p. 184) which he did. A previous Inventory had been prepared but not filed, and the supplementary Inventory showing the revised market values as of the date of the decedent's death as required by §75-3-707 U.C.A. (1953, as amended) (Add. 1) was delivered and filed by Fenton in 1988 (R. p. 78).

Fenton retained Nielsen & Senior to assist him in the Estate Administration and Estate litigation on an hourly basis measured by the rate of the attorney performing the services (T. pp. 52 & 79). If the Estate was complicated, it was understood that the statutory fee was not a cap on fees (T. p. 52).

Nielsen & Senior filed its only application for compensation with its Petition. No other statements were ever submitted to the Court for approval. (T. p. 16).

VI.

SUMMARY OF ARGUMENT

1. The presence of economic gain, i.e. "benefit", to

the estate as a result of legal services is not something the Court must consider in making its award of attorney's fees and expenses and disbursements. No evidence was introduced at the trial that the Personal Representative failed to act in good faith at any time nor that he failed to perform his duties as Personal Representative. The testimony at trial of the attorneys who actually performed the legal services for the Personal Representative as to the complexity of the Estate, the difficulty of administering the estate, the reasonableness of the hours spent in rendering legal services to the Personal Representative, the expertise and experience of the attorney involved, the fee customarily charged in the community for similar services, and the original estimate of the size of the estate, together with the detailed statement of each item of work performed and the time expended thereon and the amounts charged with respect thereto provided to the trial court at the trial, and the testimony of the Personal Representative at trial are all that are necessary for the trial court to make a determination of a reasonable attorney's fee.

The trial court heard the evidence but did not believe Kipp's allegations that Fenton acted improperly to deprive the creditors and made a proper award of attorney's fees and expenses and disbursements.

2. Comparisons of attorney fees to the size of the

probate estate are improper in a very complex, difficult, and unusual estate. The Court considered all of the relevant factors necessary to make a sound decision after hearing the witnesses' testimony and reviewing the detailed billing statements introduced at the trial and judging the credibility thereof.

3. Awards of all expenses and disbursements of the Personal Representative in administering the estate and prosecuting and defending proceedings are specifically authorized by statute. A Personal Representative's expenses and disbursements includes not only "costs" as the term "costs" is used in the Utah Rules of Civil Procedure, but also many other things. The Trial Court acted properly in its award of the expenses and disbursements.

4. The Findings of Fact and Conclusions of Law entered by the Court either in writing or orally in open court where they were recorded are sufficient to sustain its award of attorney's fees and expenses and disbursements.

VII.

ARGUMENT

ISSUE 1

WHETHER THE AWARD OF ATTORNEY'S FEES AND EXPENSES BY THE TRIAL COURT IS WITHIN THE STATUTORY AUTHORITY OF THE TRIAL COURT AND IS SUPPORTED BY THE EVIDENCE?

A Personal Representative is not personally liable on contracts entered into as a Personal Representative. §75-

3-808(1) U.C.A. (1953 as amended) (Add. 1). The Estate of the decedent is liable, §75-3-808(3) (1953 as amended) (Add. 1), and any successor Personal Representative is duty bound by the contracts of his predecessor. §75-3-808(3) and §75-3-715 U.C.A. (1953 as amended) (Add.1).

§75-3-718 U.C.A. (1953 as amended) (Add. 1), prior to Amendment, provided that the Personal Representative's attorney was entitled to reasonable compensation for services, but not to exceed the amounts set forth in the statutory fee schedule for a normal probate. Additional attorney's fees deemed just and reasonable by the Court could be awarded for extraordinary services. As amended, the statute now provides that attorney's are entitled to reasonable compensation for services, (Add. 1).

§75-3-719 U.C.A. (1953 as amended) (Add. 1) requires that the Estate of the decedent pay all necessary expenses and disbursements, including reasonable attorney's fees of the Personal Representative if he defends or prosecutes any proceeding in good faith, whether successful or not.

The foregoing statutes both authorize an award of attorney's fees and expenses for services rendered in Probate Proceedings. The only statutory standards are: reasonableness in amount and good faith on the part of the Personal Representative in deciding to defend or to prosecute which are questions of fact to be determined by the trial court. Regional Sales Agency v. Reichert, 784

P.2d 1210, 1215 (Utah App. 1989), Goddard v. Hickman, 685 P.2d 530, 534-535 (Utah 1984).

The old "benefit to the estate" test became obsolete when the legislature enacted these statutes unless 20/20 hindsight following an unsuccessful prosecution or defense manages to equate unsuccessful with bad faith. It seems inconceivable that successful prosecution or defense would ever be regarded as bad faith.

At the conclusion of the trial in these Proceedings-and after having heard all of the evidence relating to the fees for legal services rendered in connection with the Administration of the Estate, the Court found that: (a) this was an exceptionally unusual Estate; (b) that decedents [Glade and Dawana] died at the same time; (c) that there was a lack of records; (d) that there was animosity generated between the heirs of the two Estates; and (e) that the complexity of the Estate justified an award of $24,181.00 fees and $340.32 costs for the services rendered in the Estate Administration (T. pp. 114 & 115).

Based upon the proffer of evidence on the issue and the testimony of the attorneys who worked on the matters involved that the work was necessary, beneficial to the Estate, and reasonable in the amount of time spent, items of work performed, and in terms of amount, and that the rates charged were reasonable based upon the experience and expertise of the attorneys involved and the time and place

in the Salt Lake City market (T. pp. 9 & 10), the court made its decision.

Kipp's attorney had full opportunity to call witnesses and to cross-examine the attorneys who worked on the various Proceedings which produced the following uncontradicted testimony:

(a) The value of the decedent's estate at the outset was reasonably believed to be between $500,000.00 and $600,000.00, (T. p. 42). Kipp now complains that no breakdown was given, but his attorney did not ask for one, and cannot now be heard to complain about his own failure. Associated Industrial Development, Inc. v. Jewkes, 701 P.2d 486, 489 (Utah 1984).

(b) All of the records were in the possession of Kipp (T. pp. 43, 81 83, 95 & 96), and only some were produced as a result of discovery by Fenton's attorneys (T. p. 43).

(c) The circumstances surrounding the deaths were unclear. Fenton had received information which required investigation that the decedents had entered into a suicide pact. (T. p. 44).

(d) Kipp filed a Petition requesting that the Court Order that all of Glade's Estate passed to Dawana as a matter of law (T. p. 44) (R. 43). The matter was set for a speedy trial, and it was necessary to prepare extensively for that trial. A Court Order was required to get information from the police (T. pp. 45 & 46).

(e) The Cadillac which belonged to the Estate and which Fenton had in his possession was taken without Fenton's knowledge by Kipp's brother, Kelly, and was believed stolen which required legal assistance (T. p. 46). While Kelly had the car, it was repossessed by the bank and sold in a questionable manner (T. p. 47).

(f) Extensive efforts were made to get income tax information and records but they did not seem to exist. All of the records were kept in the decedent's home. (T. p. 48). The home and its contents were in the possession of Kipp. (T. pp. 95 & 96).

(g) A Complaint was filed by an alleged creditor of the Estate, Menlove, beyond the statutory period for filing claims on the theory that it involved insurance coverage. Legal services were rendered in connection with that legal action (T. pp. 50 & 51).

(h) The Estate appeared to be insolvent due to the many claims filed. (T. pp. 49 & 50). Kipp filed at least three different claims (R. pp. 32, 33, 83, 98) all of which were disallowed by Fenton (T. pp. 81, 104). Kipp only took further action on one of the three claims.

(i) The home was threatened with foreclosure, but even after a qualified buyer with the funds to purchase the home was located, Kipp threatened to not cooperate in the sale and to allow the Trustee on the Trust Deed to foreclose upon the home unless his unresonable demands were met (T.

p. 54). Legal services were rendered assisting Fenton in meeting those demands without violating his fiduciary duty to the others who had an interest in the Estate (T. p. 54).

(j) Many extra appearances had to be made in connection with the Estate which are not required in a normal probate due to Kipp's constant interference (T. p. 65).

(k) The testimony given of specific occurrances which required legal assistance covered only part of the unusual things which occurred in the Estate Admiinistration (T. p. 52).

The testimony regarding the unusual nature and complexity of the Estate Administration was that of a qualified, expert witness (T. pp. 64 & 65). In addition to the Estate Administration, testimony was given regarding legal services rendered in the Wrongful Death litigation and the McGrath litigation.

It is the testimony of the attorneys claiming the fees which is most valuable and relevant. Associated Industrial Development, Inc. v. Jewkes, 701 P.2d 486, 488 & 489 (Utah 1984), and the Court heard that testimony. The reasonableness of the fee to be awarded in regard to a Probate is a matter which is primarily within the peculiar knowledge and sound discretion of the Trial Court. In Re Smith's Estate, 162 P.2d 105, 111 (Utah 1945). The amount awarded as attorney's fees is within the sound discretion of the Trial Court, and unless there is a clear abuse of

discretion, the amount of the award by the trial court will not be disturbed. Turtle Management, Inc. v. Haggis Management, 645 P.2d 667, 671 (Utah 1982).

Cabrera v. Cottrell, 694 P.2d 622 (Utah 1985), provides at pp. 624 and 625 that:

> "A court may consider, among other factors, the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved."

These factors were placed into evidence and were considered by the Court in finding the fees awarded to be reasonable (T. pp. 114 through 117).

In regard to the Wrongful Death action, the evidence was that the amount claimed was $650,000.00 (T. p. 27), that the amount awarded was nearly $200,000.00 less the amount claimed (T. p. 30), and that Fenton offered to settle with Kipp for the value of all of the Estate's assets, prior to trial but that Kipp demanded a settlement of $200,000.00 (T. pp. 29 & 94). Specifically, the Court found that Fenton's offer to settle for the total value of the Estate was reasonable under the circumstances, that the offer was unreasonably rejected, and that Dawana's heirs were at least as unreasonable as Glade's heirs (T. p. 116). Based upon the fact that a fair offer was made by the Estate and only due to that, the Court awarded $20,706.00 attorney's fees and $3,952.60 costs. (T. pp. 116 & 117).

The Court also found the $6,781.00 fees and $184.32 costs incurred in connection with the McGrath litigation to be reasonable. (T. p. 115). This finding was supported not only by the testimony of the attorneys who worked on the case, but also the admission of Kipp and his attorney that the work performed on McGrath was necessary and contributed to the benefit of the Estate. (T. pp. 85, 108 & 109).

Fenton's failure to file an Inventory until 1988 is immaterial. An Inventory was prepared by Fenton at the beginning of the probate which reflected, to the best of the information then available to Fenton, the assets in the Estate and their values. (T. p. 78). Kipp, not Fenton, was in possession of all of Glade's property and papers and had them from the time of Glade's death, including the stock and other things which Fenton believed his father owned (T. pp. 81 & 83). Kipp had possession of the decedent's home and contents at all times. (T. pp. 95 & 96).

§75-3-705 U.C.A. (1953 as amended) (Add. 1) requires only that an Inventory be prepared. There is no statutory requirement that the Inventory be filed, nor is it a breach of duty to fail to file one. Filing was optional until Fenton was ordered otherwise. Then he filed the most recent version of the Inventory which showed the revised market values and descriptions based upon the information which he had been able to gather up to that time as

required by §75-3-707 U.C.A. (1953 as amended) (Add. 1). It does not reflect all of the property Fenton believed Glade owned at his death since he had been unable to get any other documents from Kipp to prove Glade's ownership (R. pp. 43, 78, 80 & 81).

Fenton was not removed as Personal Representative for dereliction of his duty to prepare an Inventory, but only because it appeared to the court at that time, in other, separate, independent Proceedings that Fenton may have (emphasis added), improvidently incurred legal expenses and costs of approximately $73,000.00. That is $17,000.00 more than was finally awarded by the same Judge following the trial in these Proceedings (R. p. 190). $17,000.00 is a significant difference. Kipp had his day in court and failed to produce any credible testimony at trial to support his wild allegations. In light of the fact that no fees or costs or expenses were awarded for the appeal (T. p. 117) it appears that the logical explanation of the court's action in removing Fenton in the prior, independent Proceedings is that it based its prior decision only upon Fenton's incurring attorney's fees and expenses for his appeal of the Wrongful Death Judgment. The trial court's acted consistently in both Proceedings.

In making its award of attorney's fees and expenses, the trial court also had a description of each item of work performed by the attorneys, the time required to perform

each item of work, and the date upon which the services were performed (R. pp. 219-317). It is exactly such accounting records which can substantiate the award of attorney's fees. IFG Leasing Co. v. Gordon, 776 P.2d 607, 608 (Utah 1989).

Although the fee for a normal probate of a $90,000.00 estate in which there was no litigation under the old fee schedule was about $3,600.00, this Estate had extensive litigation and was far from normal. The Court found that it was "...an exceptionally unusual estate..." (T. p. 114).

The decision of the Trial Court is authorized by statute and fully supported by the evidence at trial.

ISSUE 2

WHETHER THE AMOUNT OF ATTORNEY FEES AWARDED WAS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT?

The Trial Court, as the trier of fact, considered the relationship of the fee to the complexity and exceptionally unusual nature of the probate, the novelty and difficulty of the issues involved, and the fact that the trial on the Wrongful Death matter was forced upon Fenton by the unreasonable demand of Kipp and his brothers that the Estate settle for more than the then determined value of all of the Estate assets (T. pp. 114-117).

Attorney's fees "...when awarded as allowed by law, are awarded as a matter of legal right...", and the total amount of attorney's fees awarded in a case cannot be said

to be unreasonable as a result of a comparison of those fees to the amounts involved. Cabrera v. Cotrell, 694 P.2d 622, 625 (Utah 1985). This Court said: "We will presume that the discretion of the trial court was properly exercised unless the record clearly shows the contrary." Regional Sales Agency v. Reichert, 784 P.2d 1210, 1215 (Utah App. 1989), (quoting Goddard v. Hickman, 685 P.2d 530, 534-535 (Utah 1984) [quoting State ex rel Road Comm'n v. General Oil Co., 22 Utah 2d 60, 62, 448 P.2d 718, 719 (Utah 1987)].

As discussed above, the test of whether proceedings prosecuted or defended by the Personal Representative benefit the Estate economically or otherwise is no longer determinative but is now only one of many factors to be taken into account in determining whether or not a prosecution or defense was undertaken in good faith. Even then, the weight to be given the issue of benefit is questionable since benefit necessarily requires an element of success, and successful prosecution or defense is specifically not required under §75-3-719 U.C.A. (1953 as amended) (Add. 1).

Dennett v. First Security Bank, N.A., 439 P.2d 459 (Utah 1968) which was decided well before the adoption of the Utah Uniform Probate Code is distinguishable on its facts, and most, if not all, of the statements made therein, are no longer true under current Utah law. For example, the

assets of an estate belong not to the creditors but to the decedent's heirs subject to, among other things, the intervening rights of creditors under §75-3-101 U.C.A. (1953 as amended) (Add. 1).

There was no evidence at the trial that Fenton acted in bad faith in defending or prosecuting any matters, nor that there was any intent on the part of anyone to incur such large legal fees as to deprive the creditors of any compensation. These Proceedings are totally independent of prior Proceedings. Consistent with the fact that the Court previously thought that $73,000.00 may have been improvidently incurred, it did not award $73,000.00. It awarded $17,000.00 less, which is a significant difference.

In Re Estate of Smith, 426 P.2d 575 (Montana 1967) in which the Order of the trial court as to the amount of attorney fees awarded was affirmed, was decided under the law of Montana which was very different than the Utah Uniform Probate Code. The facts are totally different from the facts in this case except that the initial Personal Representative was removed. Mrs. Smith, the Administratrix, failed to obtain a routine determination of heirship for two years, and as a result the estate lost the interest on $260,000.00 during that time. Her failure to render accountings and file an inventory were violations of Montana law. The hardships suffered by the Smith estate were loss of interest on $260,000.00 for two years, loss of

tax benefits, and imposition of tax penalties. In this case there is no evidence of loss of interest, violation of Utah law, loss of tax benefits, imposition of tax penalties or any other hardship to Glade's Estate, Further, Mr. Smith's debts of $15,000.00 were small in relation to the size of the Estate, whereas the debts in Glade's Estate were very large.

Kipp produced no evidence that he spent $20,000.00 in "correcting and supervising" Fenton. Instead, it appears that those were the attorney's fees spent by Kipp in prosecuting the Wrongful Death action. (T. p. 94). The Court examined the portions of the statement of Kipp's attorney which it was given and determined that the services performed by Kipp's attorney and Fenton's attorneys were not comparable and that the fees awarded for the Estate Administration were not unreasonable (T. p. 115).

Fenton had a fiduciary duty to defend the estate and its other creditors from the excessive claims and improper petitions filed by Kipp. There is nothing in the record to show, much less clearly show, that the trial court improperly exercised its discretion. The attorney's fees awarded were within the sound discretion of the trial court which heard the evidence, saw the witnesses as they testified, and was in a position to judge the credibility of the testimony and evidence given.

ISSUE 3

WHETHER THE COSTS AWARDED BY THE TRIAL COURT FOR EXPERT WITNESS FEES, COPYING, ETC. ARE "EXPENSES AND DISBURSEMENTS" WHICH ARE TO BE PAID FROM THE PROBATE ESTATE?

§75-3-719 U.C.A. (1953 as amended) (Add. 1) requires that the Estate of the decedent pay all necessary expenses and disbursements of the Personal Representative in defending or prosecuting any proceeding in good faith. The term "costs" which is used in Rule 54(d)(1) of the Utah Rules of Civil Procedure (Add. 1) and discussed by the Utah Supreme Court in Morgan v. Morgan, 137 Ut. Adv. Rep. 35 (June 29, 1990) and defined in Frampton v. Wilson, 605 P.2d 771 (Utah 1980), does not appear in the Probate statute. Neither of the cases cited involve a probate, and both deal with the definition of "costs" as used in the Utah Rules of Civil Procedure and not with "expenses and disbursements" which would seem broad enough to include expenditures for anything reasonably related to the proceedings.

The expenses the Estate was ordered to pay were $340.32 in the administration of the Estate (R. pp. 259 through 261) which involved a number of Proceedings (T. pp. 41-65), $184.32 in the McGrath litigation (R. pp. 278 & 279), and $3,952.60, $3,604.00 of which was an expert witness fee, in the wrongful death litigation (R. pp. 305 & 306).

Because a Personal Representative is not personally liable for obligations incurred in the capacity of a

Personal Representative under §75-3-808 U.C.A. (1953 as amended)

(Add. 1), the probate estate must be liable for the expenses and disbursements incurred in defending or prosecuting Proceedings. §75-3-808 and §75-3-719 U.C.A. (1953 as amended). The obligation of the Estate to pay is not limited to "reimbursement" of those expenditures for which the Personal Representative is personally liable since the Personal Representative is never personally liable. Otherwise, no Personal Representative, acting as such, would ever be able to defend or prosecute any action and would have no alternative but to roll over and play dead whenever a claim was asserted regardless of whether or not the claim was legitimate or reasonable in amount. No one would undertake to represent the Personal Representative in contesting the claim since expenses are always incurred in contesting claims, such as fees of expert witnesses in good faith believed to be necessary to defend, for example, a wrongful death action. All of the reasonably necessary expenses of the Personal Representative are to be paid by the probate Estate when the defense or prosecution is undertaken in good faith.

The trial court found that Fenton acted in good faith in proceeding with the trial on the Wrongful Death when his fair offer was rejected (T. pp. 116 & 117) rather than suffer a default judgment for $650,000.00. Expenses were

incurred in the Wrongful Death action where the major issue was the economic damage to three adult children (T. p. 40), in regard to which only the testimony of an expert witness was competent and admissable.

The issue of liability for an expense as between the Estate and Personal Representative is to be determined in an appropriate proceeding relating to the administration of the Estate as was done in this case. §75-3-808(4) U.C.A. (1953 as amended) (Add. 1).

Dennett v. First Security Bank, N.A., 439 P.2d 459 (1968), does not apply here for two reasons. First, it is distinguishable on its facts and deals only with a contingent attorney fee claimed in lieu of the fee awarded by the trial court, not expenses and disbursements nor costs. Second, it was decided prior to the adoption of the Utah Uniform Probate Code, which made its reasoning and the law cited therein obsolete in Utah.

All of the expenses awarded by the trial court related to Fenton's uncontested appointment based upon his statutory priority or to Proceedings which occurred while he was serving as Personal Representative. Expenses and disbursements are paid as an administration expense under §75-3-805(1)(b) U.C.A. (1953 as amended) (Add. 1) and were not set off against the amount of the claim established in the Wrongful Death litigation. The fact that the expenses of the Personal Representative at the trial, including

attorney's fees, would, by law, be paid from the Estate before any claims established at the trial were paid must have been considered by Kipp and his counsel before they unreasonably rejected Fenton's reasonable, good faith offer of settlement prior to trial (T. pp. 29, 94).

The evidence at trial supports the fact that Fenton acted in good faith in all matters for which sums were awarded for necessary expenses and disbursements. The fact that the result of applying the statutory law is that the amounts remaining to be distributed to creditors is reduced by the amount of the necessary expenses and disbursements is merely a consequence of the legislative scheme, is specifically authorized by statute, and can only be remedied by the Utah State Legislature.

ISSUE 4

WHETHER FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE ORALLY BY THE TRIAL COURT AND RECORDED IN OPEN COURT FOLLOWING THE CLOSE OF THE EVIDENCE BUT WHICH ARE NOT REPEATED IN THE WRITTEN ORDER ARE SUFFICIENT?

Rule 52(a) of the Utah Rules of Civil Procedure (Add. 1) provides in pertinent part:

> "It shall be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum decision filed by the court."

The trial court stated its findings of fact and conclusions of law orally, and they were recorded in open court following the close of the evidence (T. pp. 114-

117). The findings of fact stated are adequate to support the decision of the trial court.

The trial court considered the factors discussed in Cabrera v. Cottrell, 694 P.2d 622, 624, 625 (Utah, 1985), and in accord with Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah, 1979) the court made findings on all material issues. The facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment. The only issue at trial was whether the attorney fees and expenses for the four categories of legal work performed were reasonable (T.p. 114). Kipp produced no competent evidence at trial to the contrary. The Conclusions of Law were adequately stated and recorded in open court (T. pp. 115-117). The Order requiring that the current Personal Representative pay from the assets of the Estate the amounts awarded as a cost and expense of administration is proper and in accord with §75-3-718, §75-3-719, and §75-3-808 U.C.A. (1953 as amended) (Add. 1).

In any event, even if there had been a failure to enter findings of fact and conclusions of law it does not require reversal of the judgment. If the findings and conclusions are such that it is impossible to review the issues without "... invading the trial court's fact-finding domain...", the judgment would be merely vacated, and the case remanded for further proceedings, and the scope of the further proceedings would be limited to the entry of proper

findings of fact and conclusions of law by the trial court. Acton v. Deliran, 737 P.2d 996, 999 (Utah, 1987).

The findings of fact and conclusions of law are sufficient to allow appellate review, and the decision of the trial court should be sustained.

VIII.

CONCLUSION

Respondent, Fenton Glade Quinn, Jr., requests that this Court sustain the judgment of the Trial Court in this matter.

Respectfully submitted this 19th day of October, 1990.

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CERTIFICATE OF SERVICE

I, B. Kent Ludlow, certify that on October 19, 1990 I served four (4) copies of the foregoing Brief of Respondent upon Robert Felton, the counsel for the Appellant in this matter, by personally serving it upon him at the following address:

Robert Felton
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Salt Lake City, Utah 84101

B. Kent Ludlow
B. Kent Ludlow
Attorney of Record

Addendum 1

75-3-101. Devolution of estate at death—Restrictions.—The power of a person to leave property by will and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this code to facilitate the prompt settlement of estates. Upon the death of a person his real and personal property devolves to persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property and family allowance, rights of creditors, elective share of the surviving spouse, and administration.

History: C. 1953, 75-3-101, enacted by L. 1975, ch. 150, § 4.

75-3-106. Scope of proceedings—Proceedings independent—Exception.—(1) Unless supervised administration as described in part 5 of this chapter is involved:

(a) Each proceeding before the court or registrar is independent of any other proceeding involving the same estate.

(b) Petitions for formal orders of the court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this chapter, no petition is defective because it fails to embrace all matters which might then be the subject of a final order.

(c) Proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives.

(d) A proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.

History: C. 1953, 75-3-106, enacted by L. 1975, ch. 150, § 4.

75-3-705. Duty of personal representative—Inventory and appraisement.—Within three months after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item. The personal representative shall send a copy of the inventory to interested persons who request it. He may also file the original of the inventory with the court.

History: C. 1953, 75-3-705, enacted by L. 1975, ch. 150, § 4; L. 1977, ch. 194, § 34.

75-3-707. Duty of personal representative—Supplementary inventory.—If any property not included in the original inventory comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he shall make a supplementary inventory or appraisement showing the market value as of the date of the decedent's death of the new item or the revised market value or descriptions, and the appraisers or other data relied upon, if any, and file it with the court if the original inventory was filed, or furnish copies thereof or information thereof to persons interested in the new information.

History: C. 1953, 75-3-707, enacted by L. 1975, ch. 150, § 4.

75-3-715. Powers and duties of successor personal representative.—A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personal to the executor named in the will.

History: C. 1953, 75-3-715, enacted by L. 1975, ch. 150, § 4.

75-3-718. Compensation of personal representative and attorney.— When no compensation is provided by the will, or the personal representative renounces all claim thereto, he shall be entitled to reasonable compensation for his services; provided, however, the compensation for a normal probate proceeding shall not exceed the sum of the following amounts of the probate estate:

5% of the first $1,000;
4% of the next $4,000;
3% of the next $5,000;
2% of the next $40,000;
1½% of the next $50,000; and
1% of the amount over $100,000.

When no compensation is provided by will, or the attorney renounces all claim thereto, the attorney for the personal representative shall be entitled to reasonable compensation for his services; provided, however, the compensation for a normal probate proceeding shall not exceed the sum of the following amounts of the probate estate:

5% of the first $20,000;
4% of the next $40,000;
3% of the next $140,000;
2½% of the next $550,000;
2% of the next $750,000; and
1½% of the balance.

Such additional compensation may be allowed to the personal representative and/or the attorney as the court may deem just and reasonable for any extraordinary services, including the filing of Federal estate tax return.

History: C. 1953, 75-3-718, enacted by L. 1977, ch. 194, § 37.

75-3-718. Compensation of personal representative and attorney..

(1) A personal representative and an attorney are entitled to reasonable compensation for their services.

(2) If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, he may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the court.

History: C. 1953, 75-3-718, enacted by L. 1987, ch. 32, § 1.

Repeals and Reenactments. — Laws 1987, ch. 32, § 1 repeals former § 75-3-718, as enacted by Laws 1977, ch. 194, § 37, setting out a schedule of limitations on the compensation of personal representatives and attorneys, and enacts the present section

75-3-719. Expenses in estate litigation.—If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorneys' fees incurred.

History: C. 1953, 75-3-719, enacted by L. 1975, ch. 150, § 4.

75-3-805. Classification of claims.—(1) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(a) Reasonable funeral expenses;

(b) Costs and expenses of administration;

(c) Debts and taxes with preference under federal law;

(d) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;

(e) Debts and taxes with preference under other laws of this state;

(f) All other claims.

(2) No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.

History: C. 1953, 75-3-805, enacted by L. 1975, ch. 150, § 4.

75-3-808. Individual liability of personal representative.—(1) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(2) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(3) Claims based on contracts entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate, or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(4) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge, or indemnification or other appropriate proceeding.

History: C. 1953, 75-3-808, enacted by L. 1975, ch. 150, § 4.

Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A, in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action Requests for findings are not necessary for purposes of review Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b) The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly The motion may be made with a motion for a new trial pursuant to Rule 59 When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact

(1) by default or by failing to appear at the trial,

(2) by consent in writing, filed in the cause,

(3) by oral consent in open court, entered in the minutes

(Amended effective Jan. 1, 1987)

PART VII.

JUDGMENT.

Rule 54. Judgments, costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings

(b) **Judgment upon multiple claims and/or involving multiple parties** When more than one claim for relief is presented in an action, whether as a claim counterclaim, cross claim, or third party claim and or when multiple parties are involved the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties

(c) **Demand for judgment.**

(1) **Generally** Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings It may be given for or against one or more of several claimants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves

(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) **Costs.**

(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law

(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered

(3), (4) [Deleted]

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered and the costs, if the same have been taxed or ascertained The clerk must, within two days after the costs have been taxed or ascertained in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose and make a similar notation thereof in the register of actions and in the judgment docket

(Amended effective January 1, 1988)