

Litigating Probate, Trust, and Elder Law Issues

MUSINGS OF AN OLD GEEZER

1. Vulnerable Adults and Adult Protective Services.

a. Defending an APS Claim of Neglect. Until recently, I thought APS had a single mandate to protect our vulnerable, elderly citizens. That is, however, only a part of its mandate, and I believe that part of its mandate is overshadowed by its mandate to investigate and report. While an investigation and report could lead to some voluntary act that protects the vulnerable adult, as indicated by its purpose and powers, APS only has limited power to protect a vulnerable adult who is subject to abuse. Thus, its second purpose (after investigating and making reports) is to: “where appropriate, provide short-term, limited protective services **with the permission** of the affected vulnerable adult or the guardian or conservator of the vulnerable adult.” Utah Code Ann. § 62A-3-302(2) (2008). To fulfill its duties it is given twelve powers, nine of which support its duty to investigate and report. The other powers grant APS the right to “coordinate with, or make referrals to, community resources; . . . provide limited services to a vulnerable adult, on a temporary basis, when family or community resources are not available to provide for the protective needs of the vulnerable adult; . . . institute proceedings in a court of competent jurisdiction to seek relief necessary to carry out the provisions of this chapter” Utah Code Ann. § 62A-3-303(4),(5), and (8) (2008). Otherwise, APS can only notify peace officers or the county attorney and depend upon them to act to protect the elderly person. Utah Code Ann. §62A-3-308 (2008); §62A-3-309 (2013).

When APS investigates a claim of elder abuse, it seeks to determine whether the claim is supported. If it determines it is, then it grants the “perpetrator” of the elder abuse 30 days to challenge the finding. Utah Code Ann. §62A-3-311.5 (2008). Otherwise, the finding becomes part of the permanent database maintained by APS. If APS’s determination is “inconclusive” or “without merit,” there is no further action taken. Utah Code Ann. §62A-3-301(16), (29) (2012).

The problem here is that there are three types of elder abuse that are treated as equals, but they are not equal. APS identifies the person found guilty of abuse, neglect, or exploitation as the “perpetrator.” Two types of elder abuse, abuse and exploitation, involve actions by the alleged abuser against the vulnerable adult. The identity of the alleged abuser is known either by name or description. When APS determines the claim is supported, it is making a finding that a specific person, normally identified by name, was guilty of a specific type of abuse or exploitation. Here there is a “perpetrator.”

Neglect is not the same. When a vulnerable adult is neglected, all of us are potentially responsible for that neglect. Utah law attempts to limit the scope of the potential abusers by limiting it to one who “assumes the responsibility” for the vulnerable adult. Utah Code Ann. §62A-3-302(7) (2012) (definition of “caretaker”). Trying to determine who “assumed the responsibility” as opposed to one who simply saw a need and tried to help (without assuming any

responsibility) is not easy. In any event, referring to this person as a “perpetrator” is inaccurate (“a person who perpetrates, or commits, an illegal, criminal, or evil act” Dictionary.com at <http://dictionary.reference.com/browse/perpetrator>).

Further, consider what happens when various members of a family agree to perform specific duties, such as providing food vs. clothing vs. medicine vs. doctor and hospital visits vs. companionship. What if these roles are performed by some family members and some of the vulnerable adult’s neighbors. If neglect occurs, none, some, or all may be involved. But APS is not wired to consider this. If the person filing the claim asserts that one person “assumed” the responsibility, then that becomes the beginning point for the case worker. Without carefully analysis, it is likely to be an ending point as well. If a family member helps out of “love and respect,” is that the same as assuming a duty? Further, should a person be liable only after being told the consequences of assuming the duty and then doing so?

What further complicates this matter is that neglect may be “self-neglect.” While a supported finding of “self neglect” would authorize APS to take action, file a report, or both, the vulnerable adult may resist. In this regard, APS adopted the following principles to govern its actions:

- (1) Adult Protective Services shall respect the lifestyle that is knowingly and voluntarily chosen by the vulnerable adult.
- (2) A vulnerable adult with capacity to consent has the right to self-determination.

Utah Administrative Code, R510-302-3 (2013). Note that a vulnerable adult is anyone over 65 years of age. That makes my wife a vulnerable, while I am not yet vulnerable. Since the caregiver assuming responsibility takes the vulnerable adult “as is,” in cases of alleged neglect, the case worker needs to be prepared to measure the vulnerable adult’s capacity before looking at caretakers. Even if the capacity is found wanting, the case worker needs to examine the vulnerable adult’s lifestyle prior to losing capacity. Some people are born slob – and they like it! If the caretaker maintains the status quo, is that neglect? Should it be?

Finally, when a known abuser or exploiter is unmasked, the course of action to protect the vulnerable adult should be fairly clear starting with creating a barrier to protect the vulnerable adult from the abuser or exploiter. But when a person is found guilty of neglect, the solution may not be so clear. It may be essential for the health of the vulnerable adult that the neglecter, perhaps a special child or friend, be authorized to continue to interact with the vulnerable adult while steps are taken to provide the care that the neglecter could not. Indeed, what if the neglecter simply refuses to assume responsibility in the future. Does that solve the problem? Obviously not, but that question illustrates how different neglect is from abuse and exploitation.

Authorities

- a. Under Utah law, “**Elder abuse**” means abuse, neglect, or exploitation of an elder adult.”

Utah Code Ann. §62A-3-301(10) (2012).

b. “**Elder Adult**” means a person 65 years of age or older.”
Utah Code Ann. §62A-3-301(11) (2012).

c. “**Vulnerable adult**” means an elder adult, or an adult who has a mental or physical impairment which substantially affects that person's ability to:

- (a) provide personal protection;
- (b) provide necessities such as food, shelter, clothing, or mental or other health care;
- (c) obtain services necessary for health, safety, or welfare;
- (d) carry out the activities of daily living;
- (e) manage the adult's own financial resources; or
- (f) comprehend the nature and consequences of remaining in a situation of abuse, neglect, or exploitation.

d. “**Abuse**” means:

- (a) knowingly or intentionally:
 - (i) attempting to cause harm;
 - (ii) causing harm; or
 - (iii) placing another in fear of harm;
- (b) unreasonable or inappropriate use of physical restraint, medication, or isolation that causes or is likely to cause harm to a vulnerable adult;
- (c) emotional or psychological abuse;
- (d) a sexual offense as described in Title 76, Chapter 5, Offenses Against the Person; or
- (e) deprivation of life sustaining treatment, or medical or mental health treatment, except:
 - (i) as provided in Title 75, Chapter 2a, Advance Health Care Directive Act; or
 - (ii) when informed consent, as defined in Section 76-5-111, has been obtained.

e. “**Neglect**” means:

- (i) (A) failure of a caretaker to provide necessary care, including nutrition, clothing, shelter, supervision, personal care, or dental, medical, or other health care for a vulnerable adult, unless the

vulnerable adult is able to provide or obtain the necessary care without assistance; or
(B) failure of a caretaker to provide protection from health and safety hazards or maltreatment;

(ii) failure of a caretaker to provide care to a vulnerable adult in a timely manner and with the degree of care that a reasonable person in a like position would exercise;

(iii) a pattern of conduct by a caretaker, without the vulnerable adult's informed consent, resulting in deprivation of food, water, medication, health care, shelter, cooling, heating, or other services necessary to maintain the vulnerable adult's well being;

(iv) knowing or intentional failure by a caretaker to carry out a prescribed treatment plan that causes or is likely to cause harm to the vulnerable adult;

(v) self-neglect by the vulnerable adult; or

(vi) abandonment by a caretaker.

(b) "Neglect" does not include conduct, or failure to take action, that is permitted or excused under Title 75, Chapter 2a, Advance Health Care Directive Act.

f. “**Exploitation**” means an offense described in Subsection 76-5-111(4) or Section 76-5b-202.

g. **Exploitation pursuant to Section 76-5-111(4):** A person commits the offense of exploitation of a vulnerable adult when the person:

(i) is in a position of trust and confidence, or has a business relationship, with the vulnerable adult or has undue influence over the vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, credit, assets, or other property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the adult's property, for the benefit of someone other than the vulnerable adult;

(ii) knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, or assists another in obtaining or using or endeavoring to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or

possession of his property for the benefit of someone other than the vulnerable adult;

(iii) unjustly or improperly uses or manages the resources of a vulnerable adult for the profit or advantage of someone other than the vulnerable adult;

(iv) unjustly or improperly uses a vulnerable adult's power of attorney or guardianship for the profit or advantage of someone other than the vulnerable adult; or

(v) involves a vulnerable adult who lacks the capacity to consent in the facilitation or furtherance of any criminal activity.

Utah Code Ann. §76-5-111 (2011).

h. Exploitation pursuant to Section 76-5b-202: A person is guilty of sexual exploitation of a vulnerable adult if the person:

- (a) (i) (A) knowingly produces, possesses, or possesses with intent to distribute material that the person knows is vulnerable adult pornography; or
(B) intentionally distributes or views material that the person knows is vulnerable adult pornography; and
(ii) the vulnerable adult who appears in, or is depicted in, the vulnerable adult pornography lacks capacity to consent to the conduct described in Subsection (1)(a); or

(b) is a vulnerable adult's legal guardian and knowingly consents to, or permits the vulnerable adult to be, sexually exploited as described in Subsection (1)(a).

i. The purposes of Adult Protective Services are:

Subject to the rules made by the division under Section 62A-3-106.5, Adult Protective Services:

(1) shall investigate or cause to be investigated reports of alleged abuse, neglect, or exploitation of vulnerable adults;

(2) shall, where appropriate, provide short-term, limited protective services with the permission of the affected vulnerable adult or the guardian or conservator of the vulnerable adult; and

(3) may make rules, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, and develop procedures and policies relating to:

- (a) reporting and investigating incidents of abuse, neglect, or exploitation; and
- (b) providing protective services to the extent that funds are appropriated by the Legislature for this purpose.

Utah Code Ann. § 62A-3-302 (2008).

j. APS:

- (1) shall maintain an intake system for receiving and screening reports;
- (2) shall investigate reports;
- (3) shall perform protective needs assessments;
- (4) may coordinate with, or make referrals to, community resources;
- (5) may provide limited services to a vulnerable adult, on a temporary basis, when family or community resources are not available to provide for the protective needs of the vulnerable adult;
- (6) shall have access to facilities licensed by, or contracting with, the department or the Department of Health for the purpose of conducting investigations;
- (7) shall be given access to, or provided with, written statements, documents, exhibits, and other items related to an investigation, including medical or financial records of a vulnerable adult who is the subject of an investigation if:
 - (a) for a vulnerable adult who does not lack the capacity to consent, the vulnerable adult signs a release of information; or
 - (b) for a vulnerable adult who lacks the capacity to consent, an administrative subpoena is issued by Adult Protective Services;
- (8) may institute proceedings in a court of competent jurisdiction to seek relief necessary to carry out the provisions of this chapter;
- (9) may require all persons, including family members of a vulnerable adult and any caretaker, to cooperate with Adult Protective Services in carrying out its duties under this chapter, including conducting investigations and providing protective services;

(10) may require all officials, agencies, departments, and political subdivisions of the state to assist and cooperate within their jurisdictional power with the court, the division, and Adult Protective Services in furthering the purposes of this chapter;

(11) may conduct studies and compile data regarding abuse, neglect, and exploitation; and

(12) may issue reports and recommendations.

Utah Code Ann. § 62A-3-303 (2008).

2. The Reliance Defense in Probate Litigation.

a. Utah Code Ann. §75-3-714. Transactions authorized for personal representatives -- Exceptions.

Except as restricted or otherwise provided by this code, by the will or by an order in a formal proceeding and subject to the priorities stated in Section 75-3-902, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

...

(21) employ persons, including attorneys, auditors, investment advisers, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;

b. Utah Code Ann. §75-7-802. Duty of loyalty.

... (8) This section does not preclude the following actions by the trustee:

...

(j) employing persons, including attorneys, auditors, investment advisers, or agents, even if they are associated with the trustee:

(i) to advise or assist the trustee in the performance of the trustee's administrative duties or perform any act of administration, whether or not discretionary; or

(ii) to act without independent investigation upon their recommendations;

c. Utah Code Ann. §75-7-814.

...

(2) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances.

(a) The trustee shall exercise reasonable care, skill, and caution in:

(i) selecting the agent;

(ii) establishing the scope and terms of the delegation consistent with the purposes of the trust; and

(iii) periodically reviewing the agent's actions to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent has a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with the requirements of this Subsection (2) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

d. Musings. A Personal Representative, acting reasonably, can retain an agent, *e.g.* a lawyer or accountant, and rely upon that agent's advice without independent investigation. In doing so, the Personal Representative is exonerated for any errors made by the agent. *Wohl v. Lewy*, 505 So.2d 525 (Fla. App. 1987). This makes sense since it encourages a Personal Representative to retain experts and to have the experts make the decisions necessary to administer the estate. But is the rule the same with regard to a Trustee? Apparently not. Under Section 75-7-814, the Trustee can delegate "investment and management" functions, but the Trustee must "periodically review[] the agent's actions to monitor the agent's performance and compliance with the terms of the delegation." Utah Code Ann. §75-7-814(2)(a)(ii). This requires the Trustee to hire a second expert to monitor the first expert. For example, if the Trustee hires an accountant to prepare the estate tax return, it is unrealistic to expect an individual Trustee to be able to review and monitor the accountant's work.

But assuming that Section 75-7-814 controls the retention of agents, what is the purpose of Section 75-7-802(8)(j). The duty of loyalty does not prevent a trustee from relying without independent investigation, but does that mean the trustee can rely without independent investigation. It seems illogical to state the duty of loyalty does not preclude reliance without independent investigation, if the Trustee may not rely absent reviewing

and monitoring the work of the agent. Since both provisions were enacted in 2004 as part of the Uniform Trust Code, I do not see how one reconciles this conflict.

3. **Standards of Competency for Executing Wills and Trusts.**

a. Prior to 2004, most estate litigators thought that the standard to establish that someone was competent to execute a will was different from the standard for executing a trust. To be competent to execute a will,

one must be able to (1) identify the natural objects of one's bounty and recognize one's relationship to them, (2) recall the nature and extent of one's property, and (3) dispose of one's property understandingly, according to a plan formed in one's mind. If any of these three elements is lacking at the time the will is made, the will is invalid.

Matter of Estate of Kesler, 702 P.2d 86, 88 (Utah 1985) (footnotes omitted). Although there was no Utah law on the point, “[i]t [was] hornbook law that less mental capacity is required to execute a will than any other legal instrument.” Teresa Stanton Collett, “Love among the Ruins: the Ethics of Counseling Happily Married Couples,” 22 Seattle U. L. Rev. 139, 148. Most decisions regarding the capacity to execute a trust required the capacity to execute a contract. *See, e.g., In re Estate of ANC*, 133 Misc. 2d 1043, 509 N.Y.S.2d 966 (N.Y. Sup. Ct. 1986) (requiring contractual capacity for creation of inter vivos trust). *See, e.g., Jimenez v. O'Brien*, 117 Utah 82, 96, 213 P.2d 337, 344 (1949) (Wade, dissenting re capacity to execute a contract).

b. With the adoption of the Utah Uniform Trust Code, Utah adopted the same standard for both wills and trusts. Utah Code Ann. §75-7-402(1)(a) (requiring “the settlor [to have] capacity to create a trust, which standard of capacity shall be the same as for a person to create a will . . .”).

4. **Can the Estate Litigator and Estate Planning Attorney be Members of the Same Firm?**

When an estate plan is contested, normally the estate planning attorney will be a witness to the testator/settlor’s competency and any influence, pressure, or fraud brought to bear on the testator/settlor. Can a litigator in the same firm defend the estate plan? Ethically, if one lawyer is disqualified from representation, all lawyers in the firm are as well. Utah R. Prof. Cond. 1.10 Imputation of Conflicts of Interest: General Rule. But the rule is not quite that broad: “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 [the rules governing conflicts of interest regarding current and former clients].” *Id.* When the litigator defends the estate plan, there will normally be no conflict of interest with the client who created the estate plan.

The prohibition about serving as a lawyer and a witness is found in Rule 3.7. Utah R. Prof. Conduct 3.7, Lawyer as a Witness. Although generally prohibited from acting as a lawyer and an advocate, the Rule specifically provides: “(2) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.” *Id.* Thus, the litigator should be able ethically to defend the estate plan.

Even so, the client should consider whether it is wise to have the litigator defend the estate plan. In this regard, the litigator should explain the potential consequences of having the litigator argue the estate planner’s credibility to a jury or the Court. The association of the litigator and the estate planner can provide opposing counsel fertile ground for arguing bias.

5. Privileges Post Death.

As noted above, the key witness to what occurred in the process of preparing the estate plan will likely be the estate planning lawyer. When a party contesting the estate plan seeks to discovery information regarding the estate planner’s representation of the testator/settlor, is that information privileged? Can the estate planner be deposed.

Utah law has long held that there is no privilege that protects the communications between the estate planner and the testator/settlor. *In re Young's Estate*, 33 Utah 382, 94 P. 731, 732-735 (1908). The Court there held:

[A]s between heirs or beneficiaries of a deceased person in a will contest, where undue influence or want of capacity are in issue, neither side can invoke the privilege as against the testimony of an attorney who prepared the will under the direction of the deceased, and the attorney should be required to disclose all matters relevant to such issues the same as any other person cognizant of the facts would be.

Id. at 735. This decision applies to the substantive attorney client privilege and the evidentiary attorney client privilege. With regard to the latter, Utah law embraces the *Young* decision, but it is even broader than the conclusion in *Young*.

URE 502(d) **Exceptions to the Privilege.** Privilege does not apply in the following circumstances: . . . (2) Claimants through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

6. Attorney Fees in Trust and Estate Litigation

a. Estate Statutory Provisions.

- i. Utah Code Ann. §75-3-718. Compensation of personal representative and attorney.

(1) A personal representative and an attorney are entitled to reasonable compensation for their services. If a petition is filed which either directly or indirectly seeks approval of the personal representative's compensation or the attorney's compensation and if no objection is filed by an interested person to the compensation requested, reasonable compensation shall be the compensation sought in the petition. When an interested person objects to the personal representative's compensation, the court shall determine reasonable compensation for the personal representative based on the quality, quantity, and value of the services rendered to the estate and the circumstances under which those services were rendered, including the practice for other fiduciaries who are in similar circumstances to the personal representative in question. When an interested person objects to the attorney's compensation, the court shall determine reasonable compensation for the attorney.

(2) When a petition seeks approval of or objects to a personal representative's compensation or an attorney's compensation, at least 10 days before the time set for the hearing of the petition, the petitioner or the petitioner's attorney shall send a copy of the petition to all interested persons either by certified, registered, or first class mail or by hand-delivery.

(3) If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, the personal representative 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.

ii. Utah Code Ann. §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, the personal representative is entitled to receive from the estate all necessary expenses and disbursements, including reasonable attorney fees incurred. This provision expressly applies in a will contest to any person nominated as a personal representative in a testamentary instrument submitted in good faith.

b. Trust Common Law Provisions. In *Hughes v. Cafferty*, 2004 UT 22, ¶¶21-27, 89 P.3d 148, the Supreme Court held that the court may award attorney fees in trust litigation against the trustee or any beneficiary under the inherent power of the court to award attorney fees, citing *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 782 (Utah 1994) (establishing the “inherent right” regarding certain types of litigation). Since “[t]he common law of trusts and principles of equity supplement this chapter, except to the extent [otherwise] modified . . .,” this ruling likely continues to have validity,

notwithstanding the adoption of the Utah Uniform Trust Code. On the other hand, Section 75-7-1004 quoted below may “modify” *Hughes v. Cafferty*.

c. Trust Statutory Provisions

Utah Code Ann. §75-7-1004. Attorney's fees and costs.

(1) In a judicial proceeding involving the administration of a trust, the court may, as justice and equity may require, award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

(2) If a trustee defends or prosecutes any proceeding in good faith, whether successful or not, the trustee is entitled to receive from the trust the necessary expenses and disbursements, including reasonable attorney's fees, incurred.

d. Musings. If a Trustee acts in good faith but the court determines that equity and justice require that the trustee be denied litigation expenses or that the trustee pay another party's litigation expenses, which statutory provision controls? One can argue that subsection (1) can only be used against a trustee when the trustee acts in “bad” faith. There is no Utah case that has addressed this issue, and the Uniform Trust Code does not have subsection (2) as part of the official text. Nonetheless, subsection (2) is taken from Section 75-3-719 quoted above, and that section is identical to the corresponding provision of the Uniform Probate Code.

7. Cases vs. Proceedings.

a. Section 75-3-106 “Scope of Proceedings – Proceedings independent – Exception,” provides:

(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.

Utah Code Ann. §75-3-106 (1975).

b. The definition of “Proceeding” is set forth as:

"Proceeding" includes action at law and suit in equity.

Utah Code Ann. §75-1-201(38) (2013).

c. A supervised administration is:

a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court which extends until entry of an order approving distribution of the estate and discharging the personal representative or other order terminating the proceeding. A supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party. Except as otherwise provided in this part, or as otherwise ordered by the court, a supervised personal representative has the same duties and powers as a personal representative who is not supervised.

Utah Code Ann. §75-3-501 (1975).

d. The Lesson I Should Have Learned Long Ago: When an issue arises in a probate proceeding that leads to litigation, the various claims that are made by the parties are not automatically part of the same case. Since each proceeding is “independent,” probate litigators should make it a regular habit to seek a supervised administration of litigated matters. In that way, the various claims that are asserted are part of the same case and are not independent proceedings.

For an example of how the failure to obtain supervised administration harmed a litigant, see *In the Matter of the Estate of Uzelac*, 2008 UT App 33, ¶¶ , 78 P.3d 347. The decedent had instructed his PR to distribute to wife her entitlements under a prenuptial agreement. Wife therefore proceeded to assert identical rights against her husband’s estate as both a creditor and a beneficiary. Prior to the trial date, wife learned that the PR had distributed all of the remaining assets to the decedent’s children. She filed a motion to recover the property, but she only asserted her rights as a creditor to the decedent’s estate because prior to the trial, she did not realize that her status as a creditor was disputed. Prior to the trial, the trial court denied wife’s motion. After a bench trial, the trial court ruled against wife on all points. Wife appealed, and on remand, wife was awarded \$230,000 as a beneficiary of husband’s estate, but her claim as a creditor was denied as being untimely. Notwithstanding its award of \$230,000 to wife, the trial court again denied wife’s motion to recover the estate property distributed prior to the trial.

Wife then appealed that ruling. As one ground for denying wife’s appeal, the Court of Appeals ruled that the motion to recover the distributed property was a separate, independent proceeding and that when the Court denied that motion *prior to the initial trial*, the 30 day period for filing appeals began to run. Since wife did not file her initial appeal until *after* the initial trial, her appeal of that ruling was untimely. While the Court of Appeals’ rulings on both appeals are questionable, the lesson to be learned remains. If you are involved in litigation, you should seek a supervised administration.

8. Statutes of Limitation.

a. Statute of Limitations re Trusts and Trustees

Utah Code Ann. §75-7-607. Limitation on action contesting validity of revocable trust -- Distribution of trust property.

(1) A person shall commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

(a) three years after the settlor's death; or

(b) 90 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and **of the time allowed for commencing a proceeding.**

Utah Code Ann. §75-7-815 Distribution upon termination.

(1) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent **but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.**

Utah Code Ann. §75-7-1005. Limitation of action against trustee.

(1) A beneficiary may not commence a proceeding against a trustee for breach of trust more than six months after the date that the beneficiary or a person who may represent and bind the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and **informed the beneficiary of the time allowed for commencing a proceeding.**

Utah Code Ann. §78B-2-307. Within four years.

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

b. Statute of Limitations re Wills and Personal Representatives.

i. Formal Proceedings. In a formal proceeding, the Court enters a final order after notice to interested persons. While a party can seek to vacate or appeal an adverse order, the order constitutes a limitation regarding any future action

with regard to the subject matter of the order. Utah Code Ann. §75-3-412. Subsection (1) provides:

Subject to appeal and subject to vacation as provided in this section and in Section 75-3-413, a formal testacy order under this part, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition . . .

ii. Informal Proceedings.

Utah Code Ann. §75-3-107(1)(c):

A proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of 12 months from the informal probate or three years from the decedent's death.

iii. Claims against the PR and the Estate

Utah Code Ann. §75-3-803

(1) All claims against a decedent's estate which arose before the death of the decedent, ... whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:

(a) one year after the decedent's death; or

(b) ... within the time provided by Subsection 75-3-801(1) for all claims barred by publication.

(3) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any of its subdivisions, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(a) a claim based on a contract with the personal representative within three months after performance by the personal representative is due; or

(b) any other claim within the later of three months after it arises, or the time specified in Subsection (1)(a).

Utah Code Ann. § 75-3-108. Statutes of limitation on decedent's cause of action

No statute of limitation running on a cause of action belonging to a decedent which had not been barred as of the date of his death shall apply to bar a cause of action surviving the decedent's death sooner than 12 months after death. A cause of action which, but for this section, would have been barred less than 12 months after death, is barred after 12 months unless tolled.

iv. Title to Property.

See In re Hoopiaina Trust, 2006 UT 53, ¶1, 144 P.3d 1129 (holding that a family dispute over the ownership of certain real property that was litigated as a quiet title action was not subject to any statute of limitations).

9. Service of Process in Trust Litigation.

a. Prior to the adoption of the Utah Uniform Trust Code in 2004, proceedings regarding a trust could be initiated by any interested person filing a petition “and giving notice pursuant to Section 75-1-401 to interested persons.” Utah Code Ann. §75-7-207 (1975; repealed 2004). Section 75-1-401 provides that the clerk of the court post notice and give notice to specifically identified interested persons by mail.

b. Notice under the Utah Uniform Trust Code is governed by Section 75-7-109, “Methods and waiver of notice.” It provides:

(1) Notice to a person under this chapter or the sending of a document to a person under this chapter must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed electronic message.

(2) Notice under this chapter or the sending of a document under this chapter may be waived by the person to be notified or sent the document.

(3) Notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.

Notice in trust litigation is now governed by the rules of civil procedure. In order to commence a legal case involving a trust, notice must be served on the defendant as set forth in Utah R. Civ. Proc. 4. The defendant would be the party responsible for misconduct. It could be one or more beneficiaries or trustees.

c. Lesson Learned (the Hard Way). As a practical matter, this question may never be an issue in your practice. Improper service of process is waived if the party improperly served appears and takes part in the proceedings. *State v. All Real Property*, 2004 UT App 232, ¶8, 95 P.3d 1211. I wish I had recognized this change after I read the 2004 Utah Uniform Trust Code, but I learned this fact because of the nasty shock I received (not to mention the resulting embarrassment) when a more knowledgeable attorney objected to service at the first hearing.