Transactional 2: Probate Litigation

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I. Notable Appeals in Probate Litigation.

A. *Matter of Estate of Morrison,* 933 P.2d 1015 (Utah App. 1997).

1. Facts and Holding.

There are generally three types of orders that are subject to appeal: (i) A final order; (ii) an order certified under Rule 54(b) as one that is final as to a party or a separate claim; and (iii) an important interlocutory order accepted for appeal by the appellate court pursuant to a petition from the appealing party. *Matter of Estate of Morrison,* 933 P.2d 1015, text at 1016 and fn.2 (Utah App. 1997). In typical civil litigation, a party can easily recognize a final order since it terminates the case and awards judgment to the plaintiff or defendant. But in probate litigation, a final order can be entered before the end of the case and that creates a problem for probate litigants.

When a probate order is final was addressed in *Matter of Estate of Morrison.* In *Morrison*, the personal representative sold a valuable parcel of land and distributed the proceeds to the beneficiaries. At the time of the sale and distribution, the personal representative believed that other property was owned by the estate. When subsequent orders held that the estate had no claim to the other property, the personal representative moved the court to order the return of part of the proceeds of sale to pay for estate expenses. The probate court ruled for the personal representatives and ordered the return of part of the proceeds. The beneficiaries appealed the ruling. *Id.* at 1016-17.

On appeal the personal representative claimed the probate court's order was not a final order. The Court of Appeals acknowledged that: "Generally, a final order 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " But it further held that when it comes to appeals in probate litigation, finality is determined on a "pragmatic" basis. Citing prior cases, the Court ruled that a probate order is final when it "resolve[d] an issue of vital importance" and "conclude[d] a major phase in the process of formal testacy proceedings," when an appeal was necessary to avoid a "cloud of uncertainty," when the order resolved the "real issue in the case" and "[t]here was nothing further to be decided on that particular issue." Applying those principles to the beneficiaries' appeal, the Court held the order was a final appealable order, and the appeal proceeded on the merits. *Id.* at 1016.

2. Analyzing the Impact of *Matter of Estate of Morrison*.

Given the basis of the opinion, the appellant in *Estate of Morrison* could have protected the appeal by using Rule 54(b). In fact, when faced with a situation like *Estate of Morrison* that would be advisable. Of course, the probate court could deny the motion for certification. In that case, the appellant would need to use *Estate of Morrison.*

But assuming that Rule 54(b) was not used or was unavailable, the issue in *Estate of Morrison* was whether to allow the appeal to proceed. Using a pragmatic approach to determining finality in that circumstance does little harm. Either the appeal continues or the matter is remanded for further proceedings, and an appeal can be taken at a later date when the matter is final.

But using a pragmatic approach to hold that an appeal is not timely is entirely different. Requiring an appeal within 30 days of the entry of a final order is premised on the underlying assumption that the order can be recognized as a final order. For the attorney representing the losing party, the only way to address the possibility that the appellate court might later determine the interlocutory order final is to appeal the order. There is no procedure for a "notice of intent to appeal" as used in the past. *See Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1039 Fn.4 (Utah 1989) (discussing former Utah R. Civ. Proc. 72(a)).

B. *In re Voorhees' Estate*, 12 Utah 2d 361, 366 P.2d 977 (1961).

1. Facts and Holding.

In *Voorhees' Estate,* the decedent deeded certain mountain property to his wife. After his death, his wife and children disputed a number of matters including whether the wife's claim to the mountain property was superior to the children's claims. Prior to the trial, wife sold the mountain property to a third party. At the 1959 trial, the court ordered the widow to deed the mountain property to the administrator of the husband's estate. The trial court did not adjudicate the parties' claims regarding a grazing permit. *Id.* at 365, at 990.

In its 1959 decision, the trial court stated:

> This court shall and does retain jurisdiction over this cause to adjudicate any matter which may arise under the Memorandum pending the final creation of the trust provided therein, and in the further probate proceedings herein. *Id.*

Following the trial court's decision there were continuing proceedings regarding the validity of the sale to the third party and other matters including the rights to the grazing permit. In 1960, the trial court entered its decision holding the third party had no rights and resolving all other pending matters, including rights to the

grazing permit. The wife then appealed, seeking a reversal of the 1959 and 1960 decisions. *Id.*

On appeal, the appellees claimed that the wife's appeal of the 1959 was untimely.

The Supreme Court ruled that:

[T]he real issue between the parties and before the court was whether the mountain ground belonged to Mrs. Voorhees or to the estate. Upon plenary hearing thereon, the issue was resolved against her. The fact that the court retained jurisdiction as mentioned above to adjudicate further matters did not leave open for reconsideration the question as to who owned that property.

Id.

2. Analyzing the Impact of *Voorhees' Estate.*

The precedential value seems contrary to the non mandate version of the law of the case doctrine. *See Blackmore v. L & D Dev. Inc.*, 2016 UT App 198, ¶15, 382 P.3d 655 (noting three exceptions to the normal rule that prior decisions of the trial court are binding on future proceedings, including "when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice." *Id.* However, *Estate of Morrison* cited *Voorhees' Estate* in support of its analysis. *Estate of Morrison* at 1017.

However, *Voorhees' Estate* creates a substantial risk to probate litigants. It requires the lawyer to analyze all interim decisions as potential "final" decisions.

C. *In re Estate of Uzelac*, 2008 UT App 33, 178 P.3d 347.

1. Facts and Holding.

Prior to their marriage, the decedent and his wife executed an antenuptial agreement that was primarily for the wife's protection. The agreement required the parties to determine the amount of property acquired by the husband and wife during the marriage in order to determine the amount due the wife. The decedent also executed a handwritten will in which he named his spouse as a beneficiary and stated she should receive all of the property to which she would be entitled under the antenuptial agreement.

The trial was set for October 2004. When the wife learned in the summer of 2004 that the personal representative had distributed all of the remaining real property of the estate to the residuary beneficiaries (subject to a life estate in the wife), she filed a Motion to recover the property or void the distribution so that her claim could be paid in full.

Less than two weeks prior to the trial on the wife's claim against the estate, the trial court entered a signed "Minute Entry" denying her motion.[1] The trial proceeded, and from an adverse result, the wife appealed both the Minute Entry, the trial court's findings of fact and conclusions of law, and its judgment. On appeal, the court of appeals reversed and vacated all prior orders of the Court. On remand, the trial court set the wife's entitlement as a beneficiary of the estate at $230,000+, but it again refused to recover the distributed property or void its distribution. Wife again appealed.

In denying wife's second appeal, the Court of Appeals held in part that the signed Minute Entry was a final, appealable order. Although *In re Estate of Morrison* was argued by the parties, the Court ruled that the Motion to Recover the Property was an independent proceeding under the probate code (Utah Code Ann. §75-3-106), that the order entered was a final testacy order under Section 75-3-412, and that, as such, the Minute Entry had to be appealed within 30 days of its entry. Since the wife waited to appeal the minute entry until after the trial court's entered its findings of fact and conclusions of law and its judgment, her appeal was untimely and the Court of Appeals had no jurisdiction to hear the appeal.

2. **Analyzing the Impact of *Estate of Uzelac*.**

While *Estate of Uzelac* could be a trap for the unwary, there is a potential solution. As noted, in deciding that the Minute Entry on the Motion to Recover had to be appealed within 30 days of its entry, the Court of Appeals relied on Section 75-3-106(1). In stating each proceeding is independent, that section states it applies: "Unless supervised administration as described in Part 5, Supervised Administration, is involved . . ." While a motion for supervised administration can be denied, it is not likely to be denied when the purpose is to prevent interim orders from being immediately appealable. As provided in Section 75-3-502(1), if the decedent's will requires supervised administration, the court will grant a motion for supervised administration. Otherwise Section 75-3-502 provides:

> (2) If the decedent's will directs unsupervised administration, supervised administration shall be ordered only upon a finding that it is necessary for protection of persons interested in the estate.
> (3) In other cases if the court finds that supervised administration is necessary under the circumstances.

[1] To uncover this fact, one must read both the first (*In re Estate of Uzelac*, 2005 UT App 234, 114 P.3d 1164) and second appellate decisions.

Under the *Estate of Uzelac* decision, supervised administration may be advisable in order to protect the persons interested in the estate from the consequences of an interim order being held to be a final testacy order and immediately appealable. [2]

D. In the Matter of the Irrevocable Jack W. Kunkler Trust A, 246 P.3d 1184 (Utah 2011)

1. Facts and Holding.

Kunkler case involved a trust (the "Trust") that provided for two trustee positions—a Class I Trustee and a Class II Trustee. The Trust required investment in "raw undeveloped ground" which "must be situated in Salt Lake County." The Class I Trustee was responsible for managing and investing Trust funds. The original Class II Trustee had complete discretion over selection of land to be sold. After the resignation of the original Class II Trustee, however, the responsibility for selection of land to be sold was transferred to the Class I Trustee.

On March 2, 2007, the Class I Trustee, KeyBank, filed a petition to modify the Trust to allow KeyBank to expand the scope of permissible land sales to include both developed land and land outside of Salt Lake County. On March 9, 2007, the successor Class II Trustee ("Kunkler") filed a petition to remove KeyBank as trustee and objected to KeyBank's petition.

On February 13, 2008, KeyBank filed a motion to resign as Class I Trustee and to appoint a successor trustee. As a part of this motion, KeyBank requested for the first time payment of fees. On February 25, 2008, Kunkler filed an opposition to KeyBank's motion and at a February 27, 2008 hearing, Kunkler requested a jury trial on the issue of trustee fees.

The district court denied Kunkler's jury demand as not timely filed under Rule 38, ruling that the demand had to be filed not later than 10 days after the service of the last *pleading* directed to such issue, and that Kunkler's May 9, 2007 petition to remove KeyBank as trustee was the last pleading directed to the attorney's fee issue (ruling that the petition to remove "implicitly incuded within it the administration fees to which KeyBank would be entitled). The district court later held an evidentiary hearing and awarded KeyBank attorney's fees.

[2] Note that the only statutory restriction on the personal representatives' powers when administration is supervised is the personal representative's power to distribute the estate without a court order. Utah Code Ann. §75-3-504. To make a distribution when administration is supervised, the personal representative must have a court order. The Court can impose other restrictions, but in the absence of the Court doing so, distribution is the only restriction that applies.

Kunkler appealed. The Utah Supreme Court ruled that Utah Code § 75-7-201 restricts court supervision of trust administration to only those issues raised by pleading. The Court ruled that KeyBank's "motion" to resign (and for fees) injected a new issue into the dispute that had not been raised by "pleading." Therefore, the district court lacked authority under Utah Code § 75-7-201 to supervise the award of fees. As a result, the Supreme Court vacated the court's award of attorney's fees. The Supreme Court further directed the district court to treat KeyBank's motion to resign as a petition invoking the Court's jurisdiction on the issue of trustee fees and therefore, to consider the jury demand as timely.

2. Analyzing the Impact of *Kunkler.*

It is not uncommon in trust cases that a party files a motion that raises new issues not raised in the original pleading. Under *Kunkler*, an argument may be made that the court lacks jurisdiction to hear any issue not raised by pleading. However, *Kunkler* also suggests that the court has discretion to treat relief requested by motion as a petition. This treatment of a motion is also supported by Utah Code § 75-1-201 which defines a "Petition" as a "written request to the court for an order after notice."

II. General Probate Procedures in District Court

A. Procedures Vary from District to District

- Uncontested calendar v. random assignment to trial judges
- See handout for general outline of district-by-district procedures.

B. Utah Code § 75-1-304.

"Unless specifically provided to the contrary in this code or unless inconsistent with its provisions, the rules of civil procedure, including the rules concerning vacation of orders and appellate review, govern formal proceedings under this code."

III. Ex Parte Petition to Appoint a Guardian.

A. Statutory Provision.

Section 75-5-310 provides for the appointment of an emergency guardian without notice as follows:

75-5-310. Emergency guardians.

(1) If an incapacitated person has no guardian and an emergency exists or if an appointed guardian is not effectively performing the guardian's duties and the court further finds that the welfare of the incapacitated person

requires immediate action, it may, without notice, appoint an emergency guardian for the person for a specified period not to exceed 30 days pending notice and hearing.

(2) The court shall, in all cases in which an emergency guardian is appointed, hold a hearing within 14 days pursuant to Section 75-5-303.

Prior to May 2014, this provision authorized the appointment of a temporary guardian *ex parte.* In both cases, notice is waived if "an emergency exists." What constitutes an "emergency" is left to the discretion of the court.

B. Conflicting Interests/Concerns

As with other expedited or ex parte procedures (i.e., protective orders, civil mental health commitments, etc.), the potential exists for abuse of emergency guardianship proceedings. On the other hand, there are situations where an emergency guardianship is necessary and warranted to protect the physical and financial well-being of the protected person.

Courts should consider whether notice is possible, or advisable—the provision that notice is not required doesn't mean it might not be appropriate under the circumstances. Counsel for the party placed under guardianship should be proactive in getting the matter before the court quickly if there is any question that the process is being used inappropriately.

In the Third and Fourth Districts, it is not clear whether the hearing within 14 days should be before the judge assigned to the probate calendar or the judge assigned to the case. Since there should also be a pending petition for the appointment of a permanent guardian, that matter will not yet have been heard, and therefore there will be no minute entry assigning the case to mediation or the trial calendar. That would lead one to believe the probate judge should be the one to preside at the hearing notwithstanding it might be contested. On the other hand, probate judges handling an uncontested calendar will generally either grant a petition or deny and refer to mediation (Third District) or the trial calendar (both Districts). Thus, absent a District Court rule addressing the issue, the parties may be faced with a time-consuming effort trying to coordinate between judges, attorneys, and the competing parties themselves.

C. Other Guardianship Issues.

1. Appointment of guardian without legal representation for incapacitated person.

In the 2016 legislative session, U.C.A. 75-5-303 was amended to allow for the appointment of a guardian without counsel for the incapacitated person, under certain circumstances:

(d) Counsel for the person alleged to be incapacitated, as defined in Subsection 75-1-201(22) is not required if:

(i) the person is the biological or adopted child of the petitioner;
(ii) the value of the person's entire estate does not exceed $20,000 as established by an affidavit of the petitioner in accordance with Section 75-3-1201;
(iii) the person appears in court with the petitioner;
(iv) the person is given the opportunity to communicate, to the extent possible, the person's acceptance of the appointment of petitioner; and
(v) the court is satisfied that counsel is not necessary in order to protect the interests of the person.

While the purpose of this amendment is fairly clear—i.e., to make it possible for biological parents who are caring for disabled children to be able to continue to do so after those children reach the age of majority without the need for a costly or protracted legal proceeding, there are some significant liberty interests that are implicated for the incapacitated person.

2. Does a guardian's power override the power of a health care agent? *Compare* Utah Code Ann. §75-2a-112 *with* §75-5-304(2).

75-2a-112. Decision by guardian.

(1) A court-appointed guardian shall comply with an adult's advance health care directive and may not revoke the adult's advance health care directive unless the court, for cause, expressly revokes the adult's directive.
(2) A health care decision of an agent takes precedence over that of a guardian, in the absence of a court order to the contrary.
(3) Except as provided in Subsections (1) and (2), a health care decision made by a guardian for the adult patient is effective without judicial approval.
(4) A guardian is not subject to civil or criminal liability or to claims of unprofessional conduct for a surrogate health care decision made:

(a) In good faith; and
(b) In accordance with U.C.A. 75-2a-110.

75-5-304. Findings – Limited guardianship preferred—Order of appointment.

(1) The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person.
(2) The court shall prefer a limited guardianship and may only grant a full guardianship if no other alternative exists. If the court does not grant a limited guardianship, a specific finding shall be made that nothing less than a full guardianship is adequate.

(3) A guardian appointed by will or written instrument, under Section 75-5-301, whose appointment has not been prevented or nullified under Subsection 75-5-301(4), has priority over any guardian ship may be appointed by the court, but the court may proceed with an appointment upon a finding that the testamentary or instrumental guardian has failed to accept the appointment within 30 days after notice of the guardianship proceeding. Alternatively, the court may dismiss the proceeding or enter any other appropriate order.

IV. Unfunded Trusts

Imagine that a person has lots of valuable property that he or she wishes to put into a safe. Stocks, bonds, gold, silver, cash, etc. The person has a custom safe built of the finest quality. Thick walls, fire proof, water proof, smoke proof, and burglar proof. It goes without saying that this safe will not protect anything if the person fails to put his or her property into the safe. Sometimes, clients create a trust but fail to take the next step of actually transferring their assets into the trust. Funding a trust is the process of transferring assets to the trust. A general assignment may be sufficient to transfer title to certain types of property to a trust (such as personal property that does not have formal title), but certain types of property cannot be transferred merely by an assignment. The comments to section 75-7-401 of the Utah Code state that a trust may be funded with a declaration that states that the owner transfers property to himself or herself as trustee; however, this is a common law rule of general applicability that does not apply when a statute or other law provides the exclusive means of transferring title. *See In re Estate of Washburn*, 581 S.E.2d 148, 152 (N.C. 2003).

1. Real Property (Including Joint Tenancy Property. Under Utah law a transfer of land to a trust requires delivery of a deed that complies with the statute of frauds. Utah Code Ann. § 25-5-1; *Rawlings v. Rawlings*, 2010 UT 52, ¶ 27, 240 P.3d 754 ("Where a transfer of land was made with the intent to create such a trust, the trust will generally fail unless evidenced by a writing that complies with the Statute of Frauds."); *see also Bennion v. Hansen*, 699 P.2d 757, 759 (Utah 1985) (trust was not funded when deed was not delivered).

Often, property is held in joint tenancy. "It is well settled that under a joint tenancy, both parties hold a concurrent ownership in the same property with a right of survivorship . . . ." *Shiba v. Shiba*, 2008 UT 33, ¶ 17, 186 P.3d 329; *see also Howard v. Manes*, 2013 UT App 208, ¶ 34, 309 P.3d 279; *Estate of Breckon v. State Tax Comm'n*, 591 P.2d 442, 443 (Utah 1979). Joint tenancy property that is not transferred to a trust should pass to a surviving joint tenant by operation of law, notwithstanding any general assignment language in a trust.

2. Accounts. Utah law also provides a right of survivorship for jointly held accounts. *See* Utah Code Ann. § 75-6-104; *In re Estate of Maxfield*, 856 P.2d 1056, 1058–59 (Utah 1993). Utah Code Annotated § 75-6-104 provides: "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." *See also Pagano v. Walker*, 539 P.2d 452, 454 (Utah 1975) (noting that a

joint account "creates an ownership of the funds in joint tenancy, with a right of survivorship so that upon the death of one, the other becomes the owner of the funds"). As such, "joint accounts provide a simple and inexpensive method of passing the funds in the account from a deceased joint owner to the surviving joint owner, completely avoiding the necessity of any probate proceedings." *Maxfield*, 856 P.2d at 1059. A right of survivorship on a joint account cannot be changed by, and prevails over, a will or general assignment to a trust. *See* Utah Code Ann. § 75-6-104(5).

Under Utah law, the form of ownership or payment terms of a joint account or a P.O.D. account, "may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. The order or request must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by other written order of the same party during his lifetime." Utah Code Ann. § 75-6-105. The Court of Appeals of Utah confirmed that the *only* way to change the form of ownership or payment terms is to comply with Utah Code Ann. § 75-6-105: "a joint or P.O.D. account can *only* be modified by a written request to the bank from a party to the account." *Estate of Wolfinger v. Wolfinger*, 793 P.2d 393, 396 (Utah Ct. App. 1990) (emphasis added).

3. Vehicles. Where the property at issue is a vehicle, the names of both owners on the title and registration create a "joint tenancy with right of survivorship unless otherwise indicated." Utah Code Ann. § 75-6-201(4).

4. Payable on Death Accounts. "A [payable on death ("***POD***")] account is one 'payable on request to one person during lifetime and on that person's death to one or more POD payees.'" *In re Estate of Uzelac*, 2008 UT App 33, ¶ 23, 178 P.3d 347 (quoting Utah Code Ann. § 75-6-101(6)). A transfer pursuant to a payable on death designation on an account is a valid, nontestamentary transfer under Utah law. *See, e.g.*, Utah Code Ann. §§ 75-6-104, 75-6-106, 75-6-201. Funds subject to such a designation pass to the payees upon the death of the account owner pursuant to the account's governing document and do not become part of the account holder's estate. *See, e.g.*, *Uzelac*, 2008 UT App 33, ¶ 23; Utah Code Ann. §§ 75-6-106, 75-6-201. A POD designation cannot be changed by will or a general assignment to a trust. *See* Utah Code Ann. § 75-6-104(5). Utah Code Ann. § 75-6-105 applies to POD accounts (via its reference to 75-6-104). Consequently, a general assignment is not sufficient to override a POD designation.

V. Attorney Fees in Probate and Trust Litigation

The following materials consist of excerpts from Chapters 7 and 8 of ***The Utah Law of Trusts & Estates***, a legal reference treatise by Robert S. (Rust) Tippett, which can be accessed at ***www.utahtrustsandestates.com***.

§ 7.17.4 Attorney Fees in Probate Litigation

Award of Attorney Fees to Prevailing Party

The general principle in litigation is that each party bears his or her own attorney fees and other costs associated with the litigation. However, Utah Code §78B-5-825 provides that the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense was without merit and not brought in good faith. And, specifically in the probate context, Utah Code §75-1-310 provides that the court may order costs to be paid by any party or by the estate, as justice requires.

In *Taylor v. Estate of Taylor*, 770 P.2d 163 (Utah App. 1989), the plaintiff sought to vacate probate of the decedent's last will in favor of a prior document that was signed by only one witness. The court held that, while §78-27-56 (now §78B-5-825) provides that the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense was without merit and not brought in good faith, the test is subjective and failure to do adequate research does not constitute bad faith. An award of attorney fees was therefore not appropriate. However, Rule 11 and Rule 40 require that pleadings be well-grounded in fact and law, and authorize an award of attorney fees for violations. *Id*. at 170.

Attorney Fees Chargeable to Estate

Utah Code §75-3-719 provides that a personal representative is entitled to reimbursement from the estate for necessary expenses and disbursements, including reasonable attorneys' fees, incurred in connection with any estate litigation prosecuted or defended in good faith, whether or not successful.

Historically, Utah cases required that the litigation be conducted for the benefit of the estate and not just for the benefit of particular estate beneficiaries. While the statute does not contain this requirement, it seems unlikely that the drafters of the statute would have intended to eliminate the requirement, and the good faith requirement in the statute may be considered to incorporate the requirement. Nonetheless, it is not entirely clear.

In *Dennett v. First Security Bank*, 439 P.2d 459 (Utah 1968), an heir of the decedent hired the attorney in a successful attempt to have the decedent's will set aside on grounds of lack of testamentary capacity. The attorney then represented the executor in the probate and was paid for those services. The attorney sued the estate for compensation related to his services to have the will set aside. The Court held that no allowance may be made out of the estate of a deceased person for the services of an attorney not employed by the personal representative of the estate, where the services were rendered for the sole benefit of an individual or group of individuals interested in the estate. *Id*. at 461. The estate did not benefit from the attorney's services; only the heirs benefitted. The attorney's contract, if any, was with an heir of the estate, not with the estate itself. He therefore had no claim against the estate.

In *Jones' Estate*, 202 P. 206 (Utah 1921), the decedent died $1,000 in debt. The decedent's brother successfully contested the will. The decedent's creditors participated in the contest. The creditors should not have cared because decedent died without wife or kids.

Thus, there were no elective share or homestead issues. The Court held that the estate should have been administered for the benefit of the creditors and closed up without unnecessary delay or unnecessary cost. Costs incurred in contesting an insolvent estate may not be charged to the estate. Expenses incurred by special administrator in participating in the contest may not be charged to the estate. However, if the court shall find upon an examination that any of the services rendered by counsel for the special administrator resulted in the recovery of or preservation for the estate of any property likely to be lost to the estate, then a reasonable compensation should be allowed for such services. *Id*. at 208.

In any event, it seems clear that the attorney fees of persons other than the personal representative may not generally be reimbursed. They are not covered by the statute, and they will generally not be for the benefit of the estate as a whole. However, in the event they are for the benefit of the estate as a whole, an argument could be made that the person who incurred the fees should be reimbursed. See discussion of *Jones*, above.

In *Yonk's Estate*, 195 P.2d 255 (Utah 1948), the Court held that the costs and expenses of a losing party incurred in litigating the right of appointment as an administrator are not taxable against the estate. *Id*. at 258. In that case, the personal representative was erroneously appointed. The Court held that he was entitled to administrator fees, attorney fees, the costs of his bond and the cost of publishing notice to creditors, and that the administrator fees and attorney fees should be calculated as if he were a special administrator. They should not be performed on a "proportion of the work performed / proportion of the statutory fee" basis because the family's nominee was willing to serve for no compensation. Thus, they get only the reasonable value of the services performed. (See §7.3.2 of this treatise for a discussion of erroneous appointments of personal representatives.)<'/p>

In *Ashton v. Ashton*, 898 P.2d 824 (Utah App. 1995), the decedent's wife challenged the court's determination that various properties she and the decedent held as joint tenants should be included in the decedent's estate. The court held that the wife was not entitled to have her attorney fees paid under §75-3- 719 because they were incurred for her benefit as a claimant, not for the estate's benefit. *Id*. at 826-827.

In *Pingree's Estate*, 25 P.2d 937, 938 (Utah 1933), the Court said: "An estate may not be charged with expenses incident to two or more persons litigating their relative rights to letters of administration."

§ 8.19.4 Attorney Fees in Trust Litigation

In general, in litigation in Utah courts, each party bears its own legal costs. Utah Code §78B-5-825 carves out an important exception to this rule. It provides that the court must award reasonable attorney fees to a prevailing party if it determines that the action or defense was without merit and not brought in good faith. This rule is not limited to trust litigation. See *Taylor v. Estate of Taylor*, 770 P.2d 163 (Utah App. 1989), for application of this rule to estate litigation.

Utah Code §75-7-1004(1) states a rule that is perhaps broader than was intended: "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." The statute seems to contemplate litigation between a trustee and the trust beneficiaries, but it could conceivably encompass litigation involving a third party if the litigation in some way touches upon trust administration.

In *Cafferty v. Hughes*, 46 P.3d 233 (Utah App. 2002), the court held that, in trust litigation, even "in the absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity."

Of course, attorney fees can also be awarded pursuant to the terms of an agreement between the parties. See *West v. Case*, 142 P.3d 576 (Utah App. 2006).

See §8.8.2 of this treatise for a discussion of when a trustee is entitled to reimbursement from the trust for attorney fees she incurs.