

Background

Diane M. Simon filed a complaint, in her personal capacity on April 17, 2007 and listed Richard Eugene Blair d/b/a Richard Blair Commodities as the sole respondent.² After prompting,³ she joined ADMIS, substituted the estate of her late husband, Mickey Simon, as the complainant and proceeded as the executrix of the estate.⁴

In the Complaint (as augmented by the Supplement and supporting documents), Diane Simon alleged that, from 2004 until the summer of 2006, Blair engaged in fraud, unauthorized trading and the conversion of money in connection with trading accounts that deceased husband, Mickey Simon,

² Commodity Futures Trading Commission Reparations Complaint Form, dated April 8, 2007, at 1.

³ Diane Simon initially listed herself as the complainant. *Id.* However, Mickey Simon, her late husband, had owned the accounts at issue. Letter from the Office of Proceedings to Diane M. Simon, dated May 18, 2007, at 1 ("Proceedings Letter"); Letter from Diane Simon to the Proceedings Clerk, dated April 8, 2007 ("Complaint"), at 1-2. Consequently, the Office of Proceedings brought the standing issue to her attention and suggested that she proceed in the name of her husband's estate as the estate's executor. Proceedings Letter at 1. In addition, it noted that ADMIS and Blair were parties to a guarantee agreement and directed Diane Simon to state whether she intended to join ADMIS as a respondent. *Id.* at 1-2 ("Since ADM Investor Services, Inc. was the guarantor of Richard Eugene Blair d/b/a Richard Blair Commodities during the time of the alleged violations, you should inform the Office [of Proceedings] in writing whether or not you intend to include ADM Investor Services, Inc. as a respondent.").

⁴ Letter from Diane M. Simon to the U.S. Commodity Futures Trading Commission, dated May 22, 2007 ("Supplement"), at 5 ("I am going to make out a new application as Estate of Mickey Simon and sign it as executor and also name ADM Investor's [sic] as a defendant.").

owned and Blair introduced to ADMIS.⁵ Once satisfied with the development of Diane Simon's pleading, the Office of Proceedings forwarded the Complaint and Supplement to ADMIS and Blair (in his capacities as the introducing broker that operated under the name Rich Blair Commodities and an associated person of that IB).⁶ In their answers, the respondents denied that they were liable to the estate.⁷

On January 22, 2008, Blair and ADMIS moved for summary disposition.⁸ Diane M. Simon responded on February 25, 2008.⁹ In separate orders issued on April 23, 2008, we granted ADMIS' motion, on grounds that the in pari delicto doctrine barred the estate's suit against the firm, but denied Blair's

⁵ Supplement at 1-2; Complaint at 1-2, 5. See, e.g., ADM Investor Services, Inc. account statement, dated January 30, 2004, at 1 (attached to the Complaint). See supra notes 3-4.

⁶ Letter from the Office of Proceedings to ADM Investor Services, Inc. et al., dated June 12, 2007, at 1.

⁷ Answer of Richard Eugene Blair, Individually and d/b/a Rich Blair Commodities and Related Motion for Reconsideration of Determination to Forward Complaint, dated August 14, 2007, at 4-5; Answer of Respondent ADM Investor Services, Inc. and Related Motion for Reconsideration of Determination to Forward Complaint, dated August 2, 2008, at 18-21.

⁸ Motion of Respondent ADM Investor Services, Inc. for Summary Disposition, dated January 22, 2008, at 1; Motion for Summary Disposition, filed January 22, 2008; Brief in Support of Motion for Summary Disposition, filed January 22, 2008 ("Blair Memorandum"); Statement of Facts in Support of Motion for Summary Disposition, filed January 22, 2008 ("Blair Statement of Facts").

⁹ Answer to Respondents' Motion for Summary Disposition, filed February 25, 2008 ("Simon Response"); Diane Simon's Answer and Affidavits Index to Supporting Exhibits, filed February 25, 2008.

request.¹⁰ Denying Blair's motion did not conclusively resolve the issues he raised and further consideration has compelled us to reconsider, sua sponte, both orders because of the arguments he made.

Summary Disposition Is Required When Undisputed Facts Compel A Result And There Is No Substantial Reason To Expect That A Hearing Would Produce A Contrary Result

In granting ADMIS' summary disposition order, we explained,

We must grant a summary disposition motion if the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and matters of official notice, show that: (1) there is no genuinely disputed issue of material fact, (2) we need not further develop facts in the record and (3) the moving party is entitled to a decision as a matter of law. In determining whether these standards are met, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. In addition, any significant doubt that the parties' dispute can be reliably resolved without a hearing precludes relief. However, when a motion is adequately supported, the party opposing summary disposition may not rely on mere allegations or some metaphysical doubt as to the material facts but must come forward with sufficient evidence to demonstrate a genuine dispute of material fact.¹¹

We also noted,

The substantive law will identify which facts are material. Only facts that might affect the outcome of the suit under the governing law are material. Factual disputes that are irrelevant or unnecessary will not be counted. A dispute of fact is not genuine

¹⁰ Order, dated April 23, 2008; Order Granting Summary Disposition in Favor of Respondent ADM Investor Services, Inc., dated April 23, 2008, at 22.

¹¹ Order Granting Summary Disposition in Favor of Respondent ADM Investor Services, Inc., dated April 23, 2008, at 5-6 (citations, brackets and quotation marks omitted).

unless the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party.¹²

The substantive law that most concerns us at this stage is the Wyoming probate code.

The Record Clearly Shows That Diane Simon Was Never Appointed To Be The Executor Of Mickey Simon's Estate

Blair's motion rests, in part, on the claim that Diane Simon was never appointed as an executor of her husband's estate and, thus, cannot maintain this action.¹³ Diane Simon responded by arguing that Mickey Simon's estate was so small that Wyoming law did not require formal probate and his will designated her as the executor.¹⁴ Our reading of Wyoming probate law indicates that a person who is designated as the executor in a will does not become the executor without a court appointment and the undisputed evidence leads us to conclude that Diane Simon never received such authority.

¹² Id. at 6 n.23 (citations, brackets, ellipsis and quotation marks omitted).

¹³ Blair Memorandum at 2-4. In other words, Blair challenged her authority to litigate for the estate.

¹⁴ Simon Response at 3. The Simons resided in Wyoming. Simon Response at 1-2; Blair Statement of Facts, Exhibit B.

Ordinarily, a probate court initially controls a decedent's estate.¹⁵ The court's involvement in the processing of a decedent's will is generally two-fold. First, it conducts probate proceedings to determine the will's validity.¹⁶ Then comes administration of the estate (i.e., making an inventory of assets, collecting them, paying debts and, after the entry of a final decree of distribution, distributing assets).¹⁷ Administration serves to protect the rights of a decedent's creditors as well as his devisees.¹⁸ The personal representative

¹⁵ The Wyoming probate code states,

Except as otherwise provided in this code, when a person dies the title to his property, real and personal, passes to the person to whom it is devised by his last will, or in the absence of such disposition to the persons who succeed to his estate as provided in this code. However all of his property is subject to the possession of the personal representative and to the control of the court for the purposes of administration, sale or other disposition under the provisions of law, and his property, except homestead and other exempt property, is chargeable with the payment of debts and charges against his estate. There is no priority between real and personal property, except as provided in this code or by the will of the decedent.

Wyo. Stat. §2-7-402 (emphasis added).

¹⁶ 1 Page on the Law of Wills §1.3 (2003).

¹⁷ Wyo. Stat. §2-7-813 ("Upon approval by the court of the final report . . . the court shall enter a final decree of distribution. In the decree the court shall name the persons and the proportions or parts of the estate to which each is entitled. The personal representative shall proceed forthwith to make the distributions."); 1 Page on the Law of Wills §1.3. See infra note 20.

¹⁸ See supra note 15. See infra note 20.

or, more precisely in cases such as this, the executor¹⁹ is the key agent in the administrative process.²⁰ In general, "[t]hrough an executor is named in the

¹⁹ When the decedent die testate, the personal representative is an executor. 1 Page on the Law of Wills §1.3.

²⁰ The duties and powers prescribed by the probate include the following. "Before letters testamentary or of administration are issued, the personal representative shall take and subscribe an oath before some officer authorized to administer oaths, that he will perform according to law the duties of executor or administrator, which oath shall be attached to the letters." Wyo. Stat. §2-3-101. The personal representative must generally post a bond. Wyo. Stat. §2-3-102. See Wyo. Stat. §2-3-104 ("Whenever an order appointing a personal representative is made by any district court or officer having authority to make the appointment, the order shall state the time within which the personal representative shall qualify by giving the bond and taking the oath required by law."). "The personal representative shall take possession of all of the estate of the decedent and collect all debts due to the estate." Wyo. Stat. §2-7-103. The "personal representative shall make and return to the court . . . a true inventory upon his oath, of all the estate of the decedent." Wyo. Stat. §2-7-403(a). "[T]he personal representative shall file under oath a report of appraisal of values of estate assets listed in the inventory." Wyo. Stat. §2-7-404(a). "When a claim, accompanied by the affidavit required in W.S. 2-7-704, has been filed with the clerk, the personal representative shall allow or reject it and his allowance or rejection shall be in writing and filed with the clerk" Wyo. Stat. §2-7-712(a). "When the estate is ready to be closed, the personal representative shall file with the clerk of court, under oath, his final report and accounting and petition for distribution." Wyo. Stat. §2-7-811(a). See Wyo. Stat. §2-7-204. "The personal representative shall proceed forthwith to make the distributions" after the court enters "a final decree of distribution." Wyo. Stat. §2-7-813. "Actions for the recovery of any property, real or personal, or for the possession thereof . . . may be maintained by and against the personal representative in all cases in which the action might have been maintained by or against their respective testators or intestates." Wyo. Stat. §2-7-104. See Parker v. Artery, 889 P.2d 520, 526 (1995 Wyo.) ("The personal representative of a deceased is the party authorized by law to defend an action against the estate."). In addition, a personal representative's duties include notifying potential stakeholders at the beginning and end of a will's administration. Wyo. Stat. §2-7-201 ("Upon admission of a will or an estate of an intestate decedent to probate and issuance of letters, the personal representative shall cause to be published once a week for three (3) consecutive weeks in a daily or weekly newspaper of general circulation in the county in which the probate is pending, a notice of admission of the will or estate to probate and of the

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will, he must still qualify before the court and be given judicial recognition and acceptance."²¹

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appointment of the personal representative."); Wyo. Stat. §2-7-204(a) ("When an estate is in condition for final settlement, but not less than three (3) months after the date of the first publication of the notice of opening the probate, the personal representative shall give notice that he has filed in the office of the clerk of court a final account and petition for distribution, where anyone interested may examine and file objections thereto in writing at any time within ten (10) days after the day mentioned in the notice, naming the last day on which any objections may be filed."). For example, Section 2-7-205(a) states,

A true copy of the notice required in W.S. 2-7-201 shall be mailed by ordinary United States mail, first class, to:

(i) The surviving spouse, if any, and to all of the heirs at law of the decedent and to all of the beneficiaries named in the will of the decedent. The mailings shall be made not later than one (1) week after the first publication of the notice in the newspaper;

(ii) Each creditor of the decedent whose identity is reasonably ascertainable by the personal representative within the time limited in the notice to creditors. The mailing shall be made not later than thirty (30) days prior to the expiration of three (3) months after the first publication of the notice in the newspaper; and

(iii) The state department of health if the decedent received medical assistance pursuant to W.S. 42-4-101 through 42-4-114.

Wyo. Stat. §2-7-205(a). Moreover, executors must file reports with the court and may settle claims lodged by or against the estate (subject to court approval). Wyo. Stat. §§2-7-109 - 2-7-110, 2-7-806(a)-(b)

²¹ 1 Page on the Law of Wills §1.3. Accord Wyo. Stat. §2-1-301(a)(xv) ("Executor" means any person appointed by the court to administer the
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In this case, Diane Simon does not claim that any court issued letters testamentary appointing her as the executor²² and the only relevant evidence indicates that she neither petitioned for probate nor administration.²³ Thus,

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estate."); Wyo. Stat. §2-1-301(a)(xxviii) ("Personal representative' includes executor and administrator."); Wyo. Stat. §2-6-209; Wyo. Stat. §2-7-102 ("Any person, except one acting under the provisions of W.S. 2-1-201 and 2-1-202, who administers the personal estate of any person dying after the passage of this act, or any part thereof, without proving the will of the deceased or taking out letters of administration of such personal estate, shall be punished by imprisonment in the county jail not more than one (1) year or by a fine not exceeding five hundred dollars (\$500.00) or both."). See supra note 20.

²² Simon Response at 3. She reasoned, "Mick appointed me executor of his [w]ill. There was no need for the court to appoint an executor." Affidavit of Diane Simon, dated February 22, 2008, at 3 (included in Simon Response, Exhibit 2).

²³ The evidence shows that, rather than petitioning for probate and administration of Mickey Simon's estate, Diane Simon submitted a petition to file a will without probate or administration pursuant to Wyoming Statute Section 2-6-121. Blair Statement of Facts, Exhibit B. See Simon Response at 3; Supplement at 5. See supra note 22. Section 2-6-121 states,

(a) Concurrently with the filing with the clerk of a will of a deceased person, or at any time thereafter, the executor or any distributee named therein may file a sworn petition for filing of the will without probate or administration. The petition shall show:

(i) The date and place of death of the decedent, and county and state of last residence of the decedent;

(ii) The names, ages and residences of the heirs and devisees of the decedent, so far as known to the petitioner;

(continued..)

unless some provision of the Wyoming probate code other than Section 2-7-402 controls, the Wyoming courts never relinquished control of Mickey Simon's estate, she was never an executor and she lost the appointed priority that came with being designated as the executor in Mickey Simon's will.²⁴

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(iii) That a true copy of the will and a true copy of the petition have been mailed to each of the heirs and devisees; and

(iv) That, pending possible subsequent action, the petition and the will are to be filed and indexed by the clerk, without further proceedings.

(b) The clerk shall receive, file and index the petition, and annex the will thereto, and maintain same as part of the permanent files. No filing fee shall be charged.

(c) No proceedings under this section may be commenced after the filing of a petition under W.S. 2-6-122 or 2-6-201, nor after the entry of an order by the court pursuant to W.S. 2-6-120 making other provisions for the disposition of the will.

Wyo. Stat. §2-6-121. In discussing Section 2-6-121, Professor Ann Bradford Stevens commented, "I do not see its usefulness." Ann Bradford Stevens, Uniform Probate Code Procedures: Time For Wyoming To Reconsider, 2 Wyo. L. Rev. 293, 312 n.124 (2002). There is no reason to believe that filing a petition pursuant to this statute results in a will being probated or administered.

²⁴ Wyo. Stat. §2-6-202 ("If the person named in a will as executor, for thirty (30) days after he has knowledge of the death of the testator and that he is named as executor, fails to petition the proper court for probate of the will and that letters testamentary be issued to him, he may be held to have renounced his right to letters"); Wyo. Stat. §2-6-208 (stating that the "person designated in the will" is the preferred executor); Rice v. Tilton, 80 P. 828, 831-32 (Wyo. 1905) ("The plaintiffs were not rendered incompetent by the delay, but simply
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As noted above, Diane Simon argues that she already owns and controls the cause of action because Mickey Simon left a small estate and formal administration was unnecessary.²⁵ There is a summary procedure that permits distributees to obtain control of the property left to them.²⁶ However, this process requires a distributee to, among other things, file an affidavit with the county clerk that states: (1) "[t]he value of the entire estate, wherever located, less liens and encumbrances, does not exceed one hundred fifty thousand dollars," (2) "[t]hirty . . . days have elapsed since the death of the decedent," (3) "[n]o application for appointment of a personal representative is pending or has been granted in any jurisdiction" and (4) "[t]he claiming distributees are entitled to payment or delivery of the property; the facts concerning the distributees' relationship to the decedent, and there are no other distributees of the decedent having a right to succeed to the property

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lost their preference right, and it then became, at least, a matter for the exercise of sound discretion by the court . . .").

²⁵ There is one obvious flaw in this argument (and, perhaps, a second). Diane Simon is proceeding in the name of the estate, an approach that implies the cause of action has yet to be distributed to her, and the summary proceeding contemplates the absence of an executor. See infra text accompanying note 27. In addition, Mickey Simon's estate included the present cause of action. DeHerrera v. Herrera, 565 P.2d 479, 482 (Wyo. 1977). See infra note 29. At the outset of this proceeding, she claimed that it was worth \$942,235.24. Supplement at 2.

²⁶ Wyo. Stat. §2-1-201.

under probate proceedings."²⁷ There is no evidence that Diane Simon ever filed such an affidavit and her Section 2-6-121 petition did not include the necessary declarations concerning the size of Mickey Simon's estate.²⁸ Consequently, there is no basis upon which to find that Diane Simon obtained the authority to summarily administer the estate as a devisee.²⁹

For the reasons set forth above, the evidence clearly supports the inference that no court ever appointed Diane Simon to be the executor of

²⁷ Id. When the decedent's estate does not exceed \$150,000 and includes real property, a distributee may apply for a decree establishing the right and title to the property. Wyo. Stat. §2-1-205(a). This process includes public notice. Wyo. Stat. §2-1-205(c).

²⁸ Blair Statement of Facts, Exhibit B.

²⁹ She argues, in part, that there was little estate to administer because the Simons owned their tangible property as joint tenants. Response at 3 ("Mick and Diane's land, cattle, vehicles and farm equipment was [sic] all titled as joint tenants with rights of survivorship."). However, she does not argue that, prior to his death, Mickey Simon also created a joint tenancy in the present cause of action. See id. Had he done so, Diane Simon would not be able to recover as the estate's executor because the cause of action would not have been part of the estate. Nussbacher v. Manderfeld, 186 P.2d 548, 555 (Wyo. 1947). "[W]here property is held in joint tenancy the joint tenant first dying has no interest which can be devised." Id. (quoting Eckardt vs. Osborne, 170 N.E. 774 (Ill. 1930)).

We note that Mickey Simon's will purports to create a joint tenancy in his entire estate. Blair Statement of Facts, Exhibit C. However, a "will passes no present interest in the property devised or bequeathed. Such property belongs to the original owner." 1 Page on the Law of Wills §5.17. Accord Canada v. Ihmsen, 240 P. 927, 928 (Wyo. 1925) ("Wills are, as courts express it, ambulatory in nature, that is to say revocable at the pleasure of the testator until his death. In the absence of a contract, there is nothing to hinder a testator of sound mind from changing his will as often as he pleases."). Thus, the interests conveyed by the will are part of the estate even if they are labeled as a joint tenancy between the decedent and another.

Mickey Simon's estate and she did not take the steps necessary to summarily administer the estate as a devisee. It lends no substantial support to contrary inferences. Thus, Blair has shown that, as a matter of law, Diane Simon lacks authority to litigate on the estate's behalf and, given the estate's status, permitting her to amend the complaint so that she could proceed in her personal capacity would be inappropriate. Moreover, there is no substantial reason to believe that additional fact finding would alter these conclusions.³⁰ Accordingly, our denial of Blair's summary disposition motion was improvident and Blair is entitled to a judgment in his favor, albeit one that results in a dismissal of the complaint without prejudice. For the same reasons, fairness to the estate (and its creditors) requires us to vacate our summary disposition in favor of ADMIS since it resulted in a dismissal with prejudice.³¹

Conclusion

For the reasons set forth above, we **VACATE** the Order, dated April 23, 2008, and the Order Granting Summary Disposition in Favor of Respondent

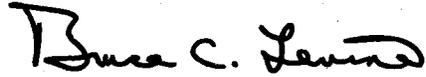
³⁰ Diane Simon may, of course, rectify the situation before the Wyoming courts.

³¹ Order Granting Summary Disposition in Favor of Respondent ADM Investor Services, Inc., dated April 23, 2008, at 22.

ADM Investor Services, Inc., dated April 23, 2008, and **DISMISS** the complaint
without prejudice.

IT IS SO ORDERED.

On this 4th day of June, 2008

A handwritten signature in black ink that reads "Bruce C. Levine". The signature is written in a cursive style with a horizontal line underneath it.

Bruce C. Levine
Administrative Law Judge