

IN THE UNITED STATES DISTRICT COURT FOR THE  
CENTRAL DISTRICT OF ILLINOIS  
PEORIA DIVISION

DEBRA K. KEACH and PATRICIA A. SAGE, )

Plaintiffs, )

vs. )

Case No. 01-1168

U.S. TRUST COMPANY, NA., f/k/a U.S. TRUST )  
COMPANY OF CALIFORNIA, NA., et al., )

Defendants. )

ELLEN D. FOSTER REPLY BRIEF IN SUPPORT  
OF HER SECOND MOTION FOR SUMMARY JUDGMENT

Now comes Defendant, Ellen D. Foster, as Executrix of the Estate of Thomas S. Foster, by her attorneys, Charles G. Roth, James W. Springer and Joseph Z. Sudow of Kavanagh, Scully, Sudow, White & Frederick, P.C., and for her Reply Brief in support of her Second Motion for Summary Judgment states as follows:

FACTS

1. Plaintiffs claim as additional material facts paragraphs 9 through 14.
2. Paragraph 9 is immaterial. Plaintiffs' service on this Defendant is immaterial.

3. Paragraph 10 is immaterial.
4. Paragraph 11 recites this Court's order with regards to a motion to dismiss in this Court. As such, it is immaterial with respect to the wholly different Illinois probate court judgment and orders.
5. Paragraph 12 recites immaterial report of conferences between counsel. It is not alleged the state court prefaced its decision on counsel's out of court discussions.
6. Paragraph 13 correctly repeats a portion of the court's order of 11 July 2002.
7. Paragraph 14 consists of three sentences. The first two are correct. The third is unsupported by any reference to the record and may be dismissed as counsel's advocacy. Plaintiffs cite no law, state or federal, that would require U.S. Trust or the Administrative Committee to take any action in the Illinois estate affecting closing of the estate.
8. The estate remains closed.

#### APPLICABLE LAW

1. Under the doctrine of *res judicata* a judgment is final when rendered by a court of competent jurisdiction on the merits. *Premier Elec. Const. Co. v. Miller-Davis Co.*, 422 F.2d 1132 (7th Cir., 1970), *cert. denied* 400 U.S. 828.
2. A judgment pending on appeal is, nevertheless, ordinarily deemed final for *res judicata*, the effect of an appeal being merely to suspend the execution of the

judgment leaving it in full force. *Railway Steel Spring Co. v. Chicago & E.I.R. Co.*, 12 F.2d 430 (7th Cir., 1926); *Wiseman v. Law Research Service, Inc.*, 133 Ill.App.2d 790 (4th Dist., 1971), “Judgment of a trial court in Illinois can be *res judicata* or serve as basis for estoppel by judgment, even though such judgment is being appealed.”; *Sixty-Third & Halsted Realty Co. v. Goldblatt Bros.*, 342 Ill.App. 389 (1st Dist., 1951), “The law is clearly established that a judgment and decree pending on appeal is *res judicata*.” and “...the appeal is a continuation of the action in the trial court. *First Nat. Bank of Jonesboro v. Road Dist. No. 8*, 389 Ill. 156.”

#### ARGUMENT

There is little substantial disagreement between the parties as to the facts. Mr. Foster passed away on 11 July 1996. This Defendant was appointed as Executrix 14 days later. On 1 October 1998, the probate court by order discharged this Defendant and closed Tom’s estate. Because assets in the value of approximately \$219 were newly discovered, the estate was reopened on 16 September 1999 “for the sole purpose of transferring the remaining estate property.” By order the Executrix was not required to provide publication notice to creditors or interested parties. Plaintiffs’ Complaint had not been filed. On 1 March 2001, this Defendant filed a petition to close the estate. Over a month later, Plaintiffs filed their present action naming this Defendant in her position as Executrix. Thirteen days later an order was entered discharging this Defendant and again closing the estate.

In spite of repeated attempts and motions to the local probate court in a quest to reopen the estate, Plaintiffs have been consistently refused. Plaintiffs have filed a Notice of Appeal to the Third Judicial District Appellate Court.

Plaintiffs incorrectly argue that the filing of the appeal prohibits the application of *res judicata*. As indicated by the cases cited in the law section of this Reply, Illinois law is clear that the filing of an appeal does not change the status of a decision being final. Accordingly, the legal status as a party of Ellen D. Foster is effectively terminated and this Defendant has been discharged from her duties as Executrix. As such, the office has no legal standing to be sued and summary judgment should be entered in favor of this Defendant on that limited grounds.

WHEREFORE, Defendant, Ellen D. Foster, as Executrix, prays that this Court enter summary judgment in her favor as Executrix and dismiss her from this litigation.

ELLEN D. FOSTER, as Executrix,  
Defendant

By her Attorneys, KAVANAGH, SCULLY,  
SUDOW, WHITE & FREDERICK, P.C.

By Charles G. Roth  
Charles G. Roth, ARDC 02399113  
James W. Springer, ARDC 06192903  
Joseph Z. Sudow, ARDC 2764989

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon the following by placing the same in an envelope, postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Peoria, Illinois, or by hand delivery, on the 31 day of January, 2003, addressed as follows:

Mr. Dean Rhoads  
Sutkowski & Rhoads, Ltd.  
124 S.W. Adams St.  
Suite 560  
Peoria, IL 61602

Mr. Richard J. Pautler  
Thompson Coburn LLP  
One Firststar Plaza  
34<sup>th</sup> Floor  
St. Louis, MO 63101

Mr. Timothy Bertschy  
Heyl, Royster, Voelker & Allen  
124 S.W. Adams St., Suite 600  
Peoria, IL 61602

Mr. Robert Eccles  
O'Melveny & Myers  
555 13<sup>th</sup> St. NW  
Washington, DC 20004

Ms. Nancy Ross  
McDermott, Will & Emery  
227 W. Monroe Street  
Chicago, IL 60606-5096

Mr. Jeffrey B. Rock  
Hasselberg, Rock, Bell & Kuppler  
4600 N. Brandywine Drive  
Assoc. Bank Bldg. Suite 200  
Peoria, IL 61614-5591

Mr. Dean R. Essig  
135 Washington Square  
Washington, IL 61571

Mr. Stephen D. Gay  
Husch & Eppenberger L.L.C.  
401 Main Street  
Suite 1400  
Peoria, IL 61602

Mr. Bradley M. Jones  
Mr. Richard L. Pemberton  
Meagher & Geer, P.L.L.P.  
4200 Multifoods Tower  
33 South Sixth Street  
Minneapolis, MN 55402

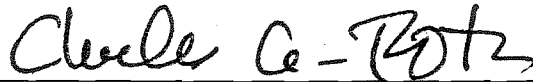
Mr. Leland L. Smith  
Hinshaw & Culbertson  
456 Fulton Street  
Suite 298  
Peoria, IL 61602-1220

Mr. Sari Alamuddin  
Seyfarth Shaw  
55 E. Monroe, Suite 4200  
Chicago, IL 60603

Mr. James C. Bailey  
Steptoe & Johnson LLP  
1330 Connecticut Avenue NW  
Washington, DC 20036

Mr. Roy G. Davis  
Davis & Campbell L.L.C.  
401 Main Street, Suite 1600  
Peoria, Illinois 61602

Mr. Robert Riffle  
Elias, Meginnes, Riffle & Seghetti  
416 Main Street, Suite 1400  
Peoria, Illinois 61602



---

Charles G. Roth, ARDC 02399113