

1988

Wendell E. Taylor v. The Estate of Grant Taylor, Esther Taylor, Darren G. Taylor, and John Does 1 through 5 : Brief of Respondent

Utah Court of Appeals

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A. Howard Lundgren; Attorney for Appellant.

Callister, Duncan and Nebeker; L. S. McCullough; P. Bryan Fishburn; Attorneys for Respondents.

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DOCKET NO. 880136-CA

* * * * *

vs.

Defendants and Respondents.

Category No. 13(b).

88-0136-CA

* * * * *

-ADDENDUM-

* * * * *

Appeal from the Order of the
Third Judicial District Court
in and for Salt Lake County,
State of Utah
Honorable Raymond S. Uno, Judge

* * * * *

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

WENDELL E. TAYLOR,)	
)	
Plaintiff and)	Case No. 860481
Appellant,)	
)	Category No. 13(b).
vs.)	
)	
THE ESTATE OF GRANT TAYLOR,)	
deceased, ESTHER TAYLOR,)	
DARRON G. TAYLOR, and)	
JOHN DOES 1 THROUGH 5,)	
)	
Defendants and)	
Respondents.)	

* * * * *

BRIEF OF RESPONDENTS

-ADDENDUM-

* * * * *

Appeal from the Order of the
Third Judicial District Court
in and for Salt Lake County,
State of Utah
Honorable Raymond S. Uno, Judge

* * * * *

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ADDENDUM

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After consideration I ~~did~~ from my personal author's notes in hand and dictate the following instructions to my brother Noel because I trust that he will follow my orders after my impending demise.

I have not taken any medication in the last 24 hours except two pain pills 1 hr ago. This has very slightly affected my legs in locomotion. I report this to say that I am of a clear and sober mind in making the following declaration.

I have a debt owed to me by my brother Wendell concerning his house on Shirecliff Ln. in SLC. I will leave with my will benefactors instructions that all financial obligations that he (Wendell) has with me are to be cancelled at my passing. This statement is my ultimate desire concerning this obligation.

This I do because I believe that in the presence of certain people and by their instructions future written negotiations may be attempted to be made while I am under the influence of medicines or coercion and not of my clear, free, and sober desires. This I deeply and positively believe could or will happen.

I also order, in continued sobriety, that if this instruction isn't carried out by my benefactors, as clearly directed to them, that Wendell be compensated in treble for all expenses, legal and ordinary, he has incurred or will incur in resisting the dwelling debt problem as well as the cancelled debt. This I have verbally expressed to some. I handle this with you, Noel, and not with Wendell directly for personal reasons I won't explain. Here-in is the documentary re-statement of this order.

Also, I handle this subject this way in the hopes that the principal desire of mine to be consummated is that Wendell will be free of financial obligations to me and or my estate. I handle it with you Noel so that if all goes as I desire and as instructed by me that this document be destroyed without revelation. I suggest to you Noel a short period of waiting after my passing to present this document, if needed, in order to see an accurate picture of the developments if a problem arises. Your judgement in this.

I trust you Noel as a courier and witness to and for this order.

I order the above explained cancellation of debt of Wendell to me or to my estate as part of my Final Will And Testament and this order shall supersede any previous order of mine or any subsequent order of mine or anyone else on this matter.

Soberly and freely dictated by

Grant E. Taylor
Grant E. Taylor

Typed as dictated and witnessed by

Noel E. Taylor
Noel E. Taylor

EXHIBIT A

30 June 1984

After consideration I read from my personal authorship notes in hand and dictate the following instructions to my brother Noel because I trust that he will follow my orders after my impending demise.

I have not taken any medication in the last 24 hours except two pain pills 1 hr ago. This has very slightly affected my legs in locomotion. I report this to say that I am of a clear and sober mind in making the following declaration.

I have a debt owed to me by my brother Wendell concerning his house on Shirecliff Ln. in SLC. I will leave with my will benefactors instructions that all financial obligations that he (Wendell) has with me are to be cancelled at my passing. This statement is my ultimate desire concerning this obligation.

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I also order, in continued sobriety, that if this instruction isn't carried out by my benefactors, as clearly directed to them, that Wendell be compensated in treble for all expenses, legal and ordinary, he has incurred or will incur in resisting the dwelling debt problem as well as the cancelled debt. This I have verbally expressed to some. I handle this with you, Noel, and not with Wendell directly for personal reasons I won't explain. Here-in is the documentary re-statement of this order.

Also, I handle this subject this way in the hopes that the principal desire of mine to be consummated is that Wendell will be freed of financial obligations to me and or my estate. I handle it with you Noel so that if all goes as I desire and as instructed by me that this document be destroyed without revelation. I suggest to you Noel a short period of waiting after my passing to present this document, if needed, in order to see an accurate picture of the developments if a problem arises. Your judgement in this.

I trust you Noel as a courier and witness to and for this order.

I order the above explained cancellation of debt of Wendell to me or to my estate as part of my Final Will And Testament and this order shall supersede any previous order of mine or any subsequent order of mine or anyone else on this matter.

Soberly and freely dictated by

Grant R. Taylor
Grant R. Taylor

Typed as dictated and witnessed by

Noel Taylor
Noel Taylor

EXHIBIT B

STANLEY S. ADAMS
Attorney for Plaintiff 0020
521 Sixth Avenue
Salt Lake City, Utah 84103
(801) 531-0229

RECEIVED

FEB 19 1986

3:55 P.M.

IN THE THIRD JUDICIAL DISTRICT COURT
COUNTY OF SALT LAKE
STATE OF UTAH

WENDELL E. TAYLOR,	:	MEMORANDUM OF POINTS AND
	:	AUTHORITIES IN OPPOSITION
Plaintiff,	:	TO DEFENDANT'S MOTION FOR
	:	SUMMARY JUDGMENT
vs.	:	
	:	Civil No. <u>C85-6869</u>
	:	
THE ESTATE OF GRANT TAYLOR,	:	Judge: <u>Raymond Uno</u>
deceased, ESTHER TAYLOR,	:	
DARRON G. TAYLOR, and JOHN	:	
DOES 1 through 5.	:	
	:	
Defendants.	:	

FACTS

LEGAL ARGUMENT

POINT 1

The June 30, 1984 "Will and/or Codicil" was properly executed in substantial compliance with the necessary requisites and should therefore be admitted to probate. The requirements for proper execution of a will in Utah are set forth in Utah Code Annotated § 75-2-502 as follows: Except as provided for holographic wills, writings within section 75-2-573, and wills within section 75-2-506, every will shall be in writing signed by the testator or in the testator's name by some other person

EXHIBIT C

in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgement of the signature or of the will. The signing by the witnesses must be in the testator's presence and in the presence of each other.

This statutory provision was enacted in 1975 and was essentially an adoption of the Uniform Probate Code. The above provision is identical to section 2-502 of the Uniform Probate Code except for the addition by the Utah Legislature of the final sentence. (Editorial Board Comment to UCA § 75-2-502). It is compliance with this final sentence of the Utah provision which is contested in the defendant's Motion for Summary Judgment in the present case.

Defendant's in their Memorandum cite the purpose of such a provision is to guard against fraud - Defendant's Memorandum, P.9; 94 CJS. § Wills 189. Defendant's then rely heavily on the language used by the Utah Supreme Court in In re. Alexander's Estate, 139 P.2d 432 (Utah 1943). There the court stated:

[T]he right to dispose of property by will is governed and controlled entirely by statute. Such statutes are mandatory, and, unless strictly complied with, the instrument, as a will, is void.

139 P.2d at 434. While it appears that the above-quoted language is non-bending, Plaintiff respectfully urges this Court to consider several additional factors and similar judicial

authority that would lead to a more equitable and just interpretation of the current statute governing execution of wills in Utah.

The case of In re. Alexander's Estate is a 1943 case. It did not involve the present uniform Probate Code. The testatrix' will was declared invalid where the testatrix had not signed the will in the presence of the witnesses, as strictly required by statute, but she had definitely acknowledged to the witnesses that the instrument was her will. The decision was a very close 3-2 decision with Justices Wade and Moffat dissenting. In his dissenting opinion Justice Wade stressed the importance of another Utah Statute which provided that the statutes of this state be construed liberally and in a manner to promote justice. 139 P.2d at 434. Justice Wade, in reviewing the facts of the case, stated that although the testatrix had failed to comply strictly with the statutory requirements, she clearly thought she had made a valid will and desired disposition of her property according to her purported will. He then concluded that:

the legislative intent that our statutes shall "be liberally construed with a view to effect the objects of the statutes and to promote justice"... was undoubtedly enacted to prevent the harsh results of following too literally the exact wording of the statutes, and, to my mind, was made for just such a case as we have here.

139 P.2d at 434. Justice Moffat concurred in the dissent.

The current Utah Code has a similar statute governing construction of this states statutes. Section 68-3-2 states in part:

The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice.

Other jurisdictions have reached similar conclusions as that of Justice Wade. In In re. Rudd's Estate, 369 P.2d 526 (Mont. 1962), the Montana Supreme Court, interpreting a similar wills statute, stated:

This Court has held that the right to make a will depends upon the consent of the legislature and there must be strict compliance with the statute, but we have also declared that substantial compliance with the statute is sufficient...

369 P.2d at 530 (citation omitted). The Court also defined "substantial compliance" to mean "only that a Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. The intent of the legislation being the elimination of fraud." 369 P.2d at 530 (citation omitted). Montana also has statutory and public policies requiring that "a liberal construction be given where possible to effect the testator's wishes. In re. Estate of Birkeland, 519 P.2d 154, 156 (Mont. 1974). Kansas likewise adopted a similar policy:

The will of the testator should be carried out if reasonably possible and a substantial compliance with statutory requirements is enough. Slight or trifling departures from technical requirements will not operate to defeat a will.

✓ In re. Estate of Perkins, 504 P.2d 564, 568 (Kan. 1972). See
x also Hobbs v. Mahoney 478 P.2d 956, 958 (Okla. 1970). (The Oklahoma Supreme Court adopts the "substantial compliance doctrine;" literal compliance with the requisites pertaining to the execution of a will is not required).

Turning to the facts of the case at bar, it is clear that the June 30, 1984 "Will and/or Codicil" of Grant Ross Taylor was executed in substantial compliance with the necessary requisites of Utah Code Annotated § 75-2-502. The will was signed by Grant in the presence of both Noel Taylor and Geraldine Taylor, the attesting witnesses. Noel witnessed the will with his signature in the presence of both Grant and Geraldine, the second witness. Geraldine witnessed the will with her signature in the presence of Noel, the other witness. The only element lacking is that Geraldine failed to sign the instrument in the presence of Grant. However, the requirements which were literally complied with are sufficient to protect against fraud, the very purpose for which the requirements are imposed. Here it must be reiterated, as stated by Justice Wade, that:

the legislative intent that our statutes shall "be
liberally construed with a view to effect the objects

of the statutes and to promote justice" [UCA 68-3-2]... was undoubtedly enacted to prevent the harsh results of following too literally the exact wording of the statutes, and, to my mind, was made for just such a case as we have here.

In re. Alexander's Estate, 139 P.2d at 434.

Further support for a liberal construction of the Utah Probate Code is found in the recent case of Estate of Grossen v. Vincent, 657 P.2d 1345 (Utah 1983). There the Utah Supreme Court considered a different section of the Probate Code, but stated:

The [strict] interpretation urged by the appellants would make the decedent's will now invalid in this state; but it could be admitted to probate in any other state which had adopted the Uniform Probate Code. We will not lightly ascribe an interpretation which will produce such an incongruous result.

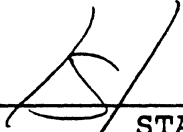
657 P.2d at 1346.

To require an absolute and strict compliance with section 75-2-502 as it now reads would likewise result in an "incongruous result." The provision at issue in the present case is not a provision of the Standard Uniform Probate Code. The very purpose of the Code was to reduce the formalities for execution of a witnessed will to a minimum. (Editorial Board Comment to UCA § 75-2-502). The Utah statute, although worded slightly differently from the standard Code, should be interpreted consistently with the intent of the Uniform Probate Code, and consistently

with other jurisdiction allowing for substantial compliance, and consistently with UCA §68-3-2 providing for liberal construction to promote justice and equity.

CONCLUSION

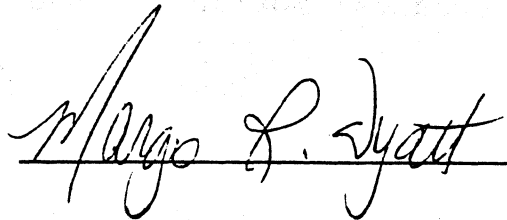
Respectfully submitted this 19th day of February, 1986.



STANLEY S. ADAMS
Attorney for Plaintiff

CERTIFICATE OF HAND DELIVERY

I certify that a true and correct copy of the foregoing "Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment" was hand delivered by me to the offices of P. Bryan Fishburn, Attorney for Defendant, Callister, Duncan & Nebeker located at Suite 800 Kennecott Building, Salt Lake City, Utah 84133, this 19th day of February, 1986.



FILED

FILED IN CLERK'S OFFICE
Salt Lake County Utah

CALLISTER, DUNCAN & NEBEKER
LELAND S. MCCULLOUGH (A2268)
P. BRYAN FISHBURN (A4572)
Suite 800 - Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 530-7300

MAR 24 1986

By H. Dixon Hindley Clerk 3rd Dist. Court
Deputy Clerk

Attorneys for Defendants

Esther Taylor, personally and as personal representative of
the Estate of Grant R. Taylor, and Darron Taylor.

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WENDELL E. TAYLOR,

Plaintiff,

vs.

THE ESTATE OF GRANT TAYLOR,
deceased, ESTHER TAYLOR,
DARRON G. TAYLOR, and
JOHN DOES 1 THROUGH 5,

Defendants.

)
)
) ORDER GRANTING DEFENDANTS'
) MOTION FOR SUMMARY JUDGMENT,
) DISMISSING ACTION WITH
) PREJUDICE, AND AWARDED
) DEFENDANTS ATTORNEYS FEES

) Civil No. C-85-6869

) Judge Raymond Uno

* * * * *

Defendants' Motion for Summary Judgment and Defendants'

Motion for Attorneys Fees came on regularly for hearing before
the Honorable Raymond S. Uno on Thursday, February 20, 1986, at
8:00 o'clock a.m. Defendants were represented by Leland S.
McCullough, Esq. and P. Bryan Fishburn, Esq. Plaintiff was
represented by Stanley S. Adams, Esq. Based upon the Memoranda

EXHIBIT D

filed herein, arguments of counsel, the Affidavit of P. Bryan Fishburn as to attorneys fees, and good cause appearing, therefore,

IT IS HEREBY ORDERED:

1. That Defendants' Motion for Summary Judgment is hereby granted;
2. That this action is hereby dismissed with prejudice; and
3. That Plaintiff is to pay to Defendants their reasonable attorneys fees incurred in defending against this action, such fees having been determined by the Court to be in the amount of \$ 5,000.00.

DATED March 24, 1986.

BY THE COURT

Raymond S. Uno

Honorable Raymond S. Uno
Third District Court Judge

ATTEST

H. DIXON HINDLEY
Clerk

- 2 -

By

[Signature]
Deputy Clerk

CDN0643F

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DISMISSING ACTION WITH PREJUDICE, AND AWARDING DEFENDANTS ATTORNEYS FEES was hand delivered this 3rd day of March, 1986, to the following:

Stanley S. Adams, Esq.
Attorney for Plaintiff
521 6th Avenue
Salt Lake City, Utah 84103

[Signature]

STATE OF UTAH)
COUNTY OF SALT LAKE) 96

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT
THIS 4 DAY OF April 19 86

H. DIXON HINCLEY, CLERK

BY Elisabeth Fajing DEPUTY

"Forward", 8A Utah Code Ann., Title 75 (1978)

FOREWORD

This volume contains the complete text of the Utah Uniform Probate Code adopted by Chapter 150, Laws of 1975, as amended through the Second Special Session of the Forty-second Legislature, 1978. Various portions of this Uniform Probate Code, designated as Title 75, either embody, supersede, or conflict with statutes contained principally in Titles 74 and 75, UTAH CODE ANNOTATED. The Repealing Clause of Chapter 150 is set forth following Section 75-1-101.

Annotations to decisions under the former law and later cases are included through Volume 578 Pacific Reporter; 97 Supreme Court Reporter; 575 Federal Reporter (2nd Series) and 449 Federal Supplement. Also contained in this volume as notes, are the official Comments prepared by the Joint Editorial Board for the Uniform Probate Code, an arm of the National Conference of Commissioners on Uniform Probate Code. The Comments have been edited occasionally for adaptation to the Utah version of the Code.

The index to the Uniform Probate Code prepared by the Joint Editorial Board, modified in substance as required by variations in the Utah adoption, begins on page 319.

6

Wills: Execution, Deposit, and Contractual Arrangements

(Parts 5, 7, and 9 of Article II)

PART 5

WILLS

GENERAL COMMENT

Part 5 of Article II deals with capacity and formalities for execution and revocation of wills. If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple. The basic intent of these sections is to validate the will whenever possible. To this end, the age for making wills is lowered to eighteen, formalities for a written and attested will are kept to a

minimum, holographic wills written and signed by the testator are authorized, choice of law as to validity of execution is broadened, and revocation by operation of law is limited to divorce or annulment. However, the statute also provides for a more formal method of execution with acknowledgment before a public officer (the self-proved will).

Section 2-501. [Who May Make a Will.]

Any person 18 or more years of age who is of sound mind may make a will.

COMMENT

This section states a uniform minimum age of eighteen for capacity to execute a will. "Minor"

is defined in Section 1-201, and may involve a different age than that prescribed here.

Section 2-502. [Execution.]

Except as provided for holographic wills, writings within Section 2-513, and wills within Section 2-503,

every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least 2 persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

COMMENT

The formalities for execution of a witnessed will have been reduced to a minimum. Execution under this section normally would be accomplished by signature of the testator and of two witnesses; each of the persons signing as witnesses must "witness" any of the following: the signing of the will by the testator, an acknowledgment by the testator that the signature is his, or an acknowledgment by the testator that the document is his will. Signing by the testator may be by mark under general rules relating to what constitutes a signature; or the will may be signed on behalf of the testator by another person signing the testator's name at his direction and in his presence. There is no requirement that the testator pub-

lish the document as his will, or that he request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses if he later acknowledges to the witnesses that the signature is his or that the document is his will, and they sign as witnesses. There is no requirement that the testator's signature be at the end of the will; thus, if he writes his name in the body of the will and intends it to be his signature, this would satisfy the statute. The intent is to validate wills that meet the minimal formalities of the statute.

A will that does not meet these requirements may be valid under Section 2-503 as a holograph.

CONSTRUCTION

68-3-2

68-3-2. Statutes in derogation of common law liberally construed — Rules of equity prevail.

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.

History: R.S. 1898 & C.L. 1907, § 2489; C.L. 1917, § 5839; R.S. 1933 & C. 1943, 88-2-2.

tion; law and equity administered in same action, Utah Const., Art. VIII, Sec. 19; Rule 2, U.R.C.P.

Cross-References. — One form of civil ac-

Utah Code Ann. §68-3-11 (1953)

68-3-11. Rules of construction as to words and phrases.

Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.

History: R.S. 1898 & C.L. 1907, § 2497; **Cross-References.** — Duty of court to construe statutes, § 78-21-3.
C.L. 1917, § 5847; R.S. 1933 & C. 1943, 88-2-11.

Utah Code Ann. §74-1-5(4) (1953, 1976 reprint ed.)
(repealed 1975 effec. 1977)

74-1-5. Manner of execution and attestation.—Every will, other than a nuncupative will, must be in writing, and every will, other than an olographic or a nuncupative will, must be executed and attested as follows:

- (1) It must be subscribed at the end thereof by the testator himself;
- (2) The subscription must be made in the presence of the attesting witnesses;
- (3) The testator must at the time of subscribing the same declare to the attesting witnesses that the instrument is his will; and,
- (4) There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request, in his presence, and in the presence of the other.

History: R. S. 1898 & C. L. 1907, § 2735;
C. L. 1917, § 6315; R. S. 1933 & C. 1943,
101-1-5.

Utah Code Ann. §75-1-102 (1978)

75-1-102. Purposes—Rule of construction.—(1) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this code are:

(a) To simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;

(b) To discover and make effective the intent of a decedent in distribution of his property;

(c) To promote a speedy and efficient system for administering the estate of the decedent and making distribution to his successors;

Utah Code Ann. §75-1-201(20) (Supp. 1986, as amended 1979)

DEFINITIONS

75-1-201

(20) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matters involved in, any proceeding.

Utah Code Ann. §75-2-101 (1978)

75-2-101. Intestate estate.—Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this code.

History: C. 1953, 75-2-101, enacted
by L. 1975, ch. 150, § 3.

Utah Code Ann. §75-2-102 (1978)

75-2-102. Share of the spouse.—(1) The intestate share of the surviving spouse is:

(a) If there is no surviving issue or parent of the decedent, the entire intestate estate;

(b) If there is no surviving issue but the decedent is survived by a parent or parents, the first \$100,000, plus one-half of the balance of the intestate estate;

(c) If there are surviving issue all of whom are issue of the surviving spouse also, the first \$50,000, plus one-half of the balance of the intestate estate;

(d) If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

History: C. 1953, 75-2-102, enacted
by L. 1975, ch. 150, § 3.

Utah Code Ann. §75-2-103 (1978)

75-2-103. Share of heirs other than surviving spouse.—(1) The part of the intestate estate not passing to the surviving spouse under section 75-2-102, or the entire intestate estate if there is no surviving spouse, passes as follows:

- (a) To the issue of the decedent by representation.
- (b) If there is no surviving issue, to his parent or parents equally.
- (c) If there is no surviving issue or parent, to the issue of the parents or either of them by representation.
- (d) If there is no surviving issue, parent, or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.
- (e) If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, then the entire estate passes to the next kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote.

History: C. 1953, 75-2-103, enacted
by L. 1975, ch. 150, § 3.

75-2-502. Execution.—Except as provided for holographic wills, writings within section 75-2-513, and wills within section 75-2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will. The signing by the witnesses must be in the testator's presence and in the presence of each other.

History: C. 1953, 75-2-502, enacted by L. 1975, ch. 150, § 3.

Editorial Board Comment.

The formalities for execution of a witnessed will have been reduced to a minimum. Execution under this section normally would be accomplished by signature of the testator and of two witnesses; each of the persons signing as witnesses must "witness" any of the following: the signing of the will by the testator, an acknowledgment by the testator that the signature is his, or an acknowledgment by the testator that the document is his will. Signing by the testator may be by mark under general rules relating to what constitutes a signature; or the will may be signed on behalf of the testator by another person signing the testator's name at his direction and in his presence. There is no requirement that the testator publish the document as his will, or that he request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses if he later acknowledges to the witnesses that the signature is his or that the document is his will, and they sign as witnesses. [Last sentence in Utah version omitted in official text of Code.] There is no requirement that the testator's signature be at the end of the will; thus, if he writes his name in the body of the will and intends it to be his signature, this would satisfy the statute. The intent is to validate wills which meet the minimal formalities of the statute.

A will which does not meet these requirements may be valid under section 75-2-503 as a holograph.

Cross-References.

Probate and administration, 75-3-101 et seq.

Proof of will, 78-25-12.

Collateral References.

Wills—111, 113-123.

94 C.J.S. Wills §§ 169-177, 182-197.

79 Am. Jur. 2d 430, Wills § 210.

Also see Am. Jur. 2d, New Topic Service, Uniform Probate Code.

Admissibility and credibility of testimony of subscribing witness tending to impeach execution of will or testamentary capacity of testator, 79 A. L. R. 394.

Admissibility of evidence other than testimony of subscribing witnesses to prove due execution of will, or testamentary capacity, 63 A. L. R. 1195.

Admissibility of testator's declarations upon issue of genuineness or due execution of purported will, 62 A. L. R. 2d 855.

Assistance: validity of will signed by testator with the assistance of another, 98 A. L. R. 2d 824.

"Attestation" or "witnessing" of will, required by statute, as including witnesses' subscription, 45 A. L. R. 2d 1365.

Beneficiary under nuncupative will as witness thereto, 23 A. L. R. 2d 796.

Character as witness of one who signed will for another purpose, 8 A. L. R. 1075.

Character of instrument as will, or its admissibility to probate as such, as affected by its failure to make any disposition of property or by fact that there is no beneficiary entitled to take thereunder, 147 A. L. R. 636.

Codicil as affecting application of statutory provision to will, or previous codicil not otherwise subject, or as obviating objections to lack of testamentary ca-

75-3-303. Informal probate—Proof and findings required.—(1) In an informal proceeding for original probate of a will, the registrar shall determine whether:

- (a) The application is complete;
- (b) The applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;
- (c) The applicant appears from the application to be an interested person as defined in subsection 75-1-201 (20);
- (d) On the basis of the statements in the application, venue is proper;
- (e) An original, duly executed and apparently unrevoked will is in the registrar's possession;
- (f) Any notice required by section 75-3-204 has been given and that the application is not within section 75-3-304; and
- (g) It appears from the application that the time limit for original probate has not expired.

(2) The application shall be denied if it indicates that a personal representative has been appointed in another county of this state or except as provided in subsection (4) below, if it appears that this or another will of the decedent has been the subject of a previous probate order.

(3) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under sections 75-2-502, 75-2-503, or 75-2-506 have been met shall be probated without further proof. In other cases, the registrar may assume execution if the will appears to have been properly executed, or he may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.

(4) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.

(5) A will from a place which does not provide for probate of a will after death and which is not eligible for probate under subsection (1) above may be probated in this state upon receipt by the registrar of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place.

History: C. 1953, 75-3-303, enacted
by L. 1975, ch. 150, § 4.

Part 4

Formal Testacy and Appointment Proceedings

75-3-401. Formal testacy proceedings—Nature—When commenced.—

(1) A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by an interested person filing a petition as described in subsection 75-3-402 (1) in which he requests that the court, after notice and hearing, enter an order probating a will, or a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application, or a petition in accordance with subsection 75-3-402 (3) for an order that the decedent died intestate.

(2) A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated.

A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

(3) During the pendency of a formal testacy proceeding, the registrar shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

(4) Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of his office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

History: C. 1953, 75-3-401, enacted
by L. 1975, ch. 150, § 4; L. 1977, ch. 194,
§ 27.

75-3-402. Formal testacy or appointment proceedings—Petition—Contents.—(1) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing, and contain further statements as indicated in this section. A petition for formal probate of a will:

(a) Requests an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs;

(b) Contains the statements required for informal applications as stated in subsection 75-3-301 (2) and the statements required by subsections 75-3-301 (3) (b) and (c), and, if the petition requests appointment of a personal representative, the statements required by subsection 75-3-301 (4); and

(c) States whether the original of the last will of the decedent is in the possession of the court or accompanies the petition.

(2) If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will and indicate that it is lost, destroyed, or otherwise unavailable.

(3) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by subsections 75-3-301 (2) and 75-3-301 (5) and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case, the statements required by subsection 75-3-301 (5) (b) above may be omitted.

History: C. 1953, 75-3-402, enacted by L. 1975, ch. 150, § 4; L. 1977, ch. 194, § 23.

Utah Code Ann. §75-3-409 (1978)

75-3-409. Formal testacy proceedings—Order—Foreign will.—After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the court finds that the testator is dead, venue is proper and that the proceeding was commenced within the limitation prescribed by section 75-3-107, it shall determine the decedent's domicile at death, his heirs, and his state of testacy. Any will found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by section 75-3-612. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

History: C. 1953, 75-3-409, enacted
by L. 1975, ch. 150, § 4.

Utah Code Ann. §75-3-703(1). (1978)

75-3-703. General duties—Relation and liability to persons interested in estate—Standing to sue.—(1) A personal representative is a fiduciary who shall observe the standard of care applicable to trustees as described by section 75-7-302. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

MISCELLANEOUS PROVISIONS

78-27-57

78-27-56. Attorney's fees — Award where action or defense in bad faith.

In civil actions, where not otherwise provided by statute or agreement, the court may award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.

History: L. 1981, ch. 13, § 1.

Utah R. App. P. 2 (with Advisory Committee Note)

Rule 2. Suspension of Rules.

In the interest of expediting a decision, the Supreme Court on its own motion or for extraordinary cause shown, may, except as to the provisions of Rules 4(a), 4(e) and 5(a), suspend the requirements or provisions of any of these Rules in a particular case and may order proceedings in that case in accordance with its direction.

ADVISORY COMMITTEE NOTE

The principal objective of this Rule is to reaffirm the power of the Supreme Court to

or avoid a manifest miscarriage of justice.

It is not intended by this Rule that the time fixed for taking an appeal to or seeking review by the Supreme Court may be extended or suspended. Rule 22(b) prohibits the Supreme

suspend any one or more of these Rules in order to either expedite the appellate process

Court from extending or suspending the time for appeal or review and the district court is likewise prohibited except as provided by Rule 4(e).

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS.

Rule 3. Appeal as of Right: How Taken.

(a) *Filing Appeal from Final Orders and Judgments.* An appeal may be taken from a district court to the Supreme Court from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney's fees.

Rule 4. Appeal as of Right: When Taken.

(a) *Appeal from Final Judgment and Order.* In a case in which an appeal is permitted as a matter of right from the district court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; provided however, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 10 days after the date of entry of the judgment or order appealed from.

(b) *Motions Post Judgment or Order.* If a timely motion under the Utah Rules of Civil Procedure is filed in the district court by any party: (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional

findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the district court by any party: (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the district court disposing of the motion as provided above.

(c) *Filing Prior to Entry of Judgment or Order.* Except as provided in paragraph (b) of this Rule, a notice of appeal filed after the announcement of a decision, judgment or order but before the entry of the judgment or order of the district court shall be treated as filed after such entry and on the day thereof.

(d) *Additional or Cross Appeal.* If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this Rule, whichever period last expires.

(e) *Extension of Time to Appeal.* The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this Rule. Any such motion which is filed before expiration of the prescribed time may be ex parte unless the district court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with the district court rules of practice. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

ADVISORY COMMITTEE NOTE

Paragraph (a). Coupled with Rule 3, this paragraph requires that a notice of appeal be filed with the clerk of the district court within 30 days after the date of entry of judgment or order from which the appeal is taken. There are two significant changes in appellate procedure from prior practice under Rule 73(a) URCivP: (1) the time frame within which the appeal must be taken is 30 days rather than one month; and (2) the 30-day period commences to run after the date of the "entry of the judgment or order" rather than "from the

date of the entry of the judgment or order in the Register of Actions".

The one month time frame under prior Rule 73(a) was determined to be both inconsistent and confusing, at least measured against a more definite 30-day time limit. Computation of time is defined under Rule 22(a). It is intended that the 30-day time limit within which to appeal from a final judgment or order of the district court or a juvenile court shall be applicable in all cases, notwithstanding a statute or other rule to the contrary (see 78-2-4

Utah Code Ann. 1953 as amended), with the exception that in statutory forcible entry and unlawful detainer actions, an appeal shall be taken within 10 days from the entry of the final judgment or order appealed from. The 30-day time limit will qualify the "one month" appeal period set out in 78-3a-51 Utah Code Ann. 1953 as amended, for a direct appeal from a juvenile court.

Because of the conversion to microfilm filing process by the clerks of the various district courts, the Register of Actions Book is no longer maintained in some counties as contemplated in prior Rule 73(a) and 79(a) URCivP. The date of "entry of the judgment or order" from which the appeal is taken is considered to be the day on which the judgment or order is "filed" with the district court clerk. See Rule 58A(c) URCivP. It is the Committee's judgment that when the clerk receives and stamps in the judgment or order, the document is "filed" under Rule 58A and under this Rule 4.

This paragraph requires that a notice of appeal from a final judgment or order in a criminal case be filed within 30 days after the date of entry of the judgment or order appealed from. *State v. Johnson*, 635 P.2d 36 (Utah 1981), except that in a capital case where the death sentence has been imposed, the case is automatically appealed to and reviewed by the Court. Rule 26(h) URCrimP. It is the Committee's view that even in capital cases involving the death sentence, a notice of appeal should be filed under this paragraph so that the appellate process incident to preparation and transmittal of the record may commence in a timely manner.

Paragraph (b). This paragraph retains the concept under prior Rule 73(a) URCivP that a timely filed motion under Rule 50(b), 52(b) or Rule 59 shall toll the date from which the time for appeal commences to run. In the event of such a motion, the time for appeal under

paragraph (a) commences from the date of entry of the order denying a new trial or granting or denying any other motion. The paragraph adopts the provision of Rule 4(a)(4) FRAP that a notice of appeal filed before the disposition of a motion under Rule 50(b), 52(b), or 59 has no effect and must be filed within the prescribed time after the entry of the order by the district court disposing of the motion.

Paragraph (c). This paragraph has no counterpart in prior Utah practice. It is, in substantial part, an adoption of Rule 4(a)(2) FRAP.

Paragraph (d). This paragraph changes the practice in Utah with regard to cross-appeals (see prior Rule 74(b) URCivP) and requires that a notice of the cross-appeal be filed within 14 days after the date of the first notice of appeal. The paragraph adopts substantially the time period and concept of cross-appeal in Rule 4(a)(3) FRAP.

Paragraph (e). This paragraph retains the prior practice under Rule 73(a) URCivP that the time for filing a notice of appeal may be extended by the district court, upon a showing of excusable neglect or good cause, if a motion for extension is filed not later than 30 days after the expiration of the time prescribed in paragraphs (a) or (b). The application shall be on motion and may be ex parte (although ex parte practice is not encouraged) if filed prior to the expiration of the time for appeal. The district court may not grant an extension exceeding 30 days past the original time for appeal or 10 days from the date of entry of the order granting the motion, whichever occurs later. Excusable neglect or good cause under this paragraph refers generally to an extraordinary circumstance that prevented the movant from filing a timely notice of appeal and not to inadvertence or oversight on the part of counsel or to the failure of the client to authorize an appeal.

- I. General Consideration.
- II. When Appeal to Be Taken.
- III. Cross-Appeals.

Rule 22. Computation and Enlargement of Time.

(a) *Computation of Time.* In computing any period of time prescribed by these Rules, by an order of the Court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this Rule "legal holiday" includes days designated as holidays by the President, the Congress of the United States or the State of Utah.

(b) *Enlargement of Time.* The Court for good cause shown may upon motion enlarge the time prescribed by these Rules or by its order for doing any act, or may permit an act to be done after the expiration of such time, but the Court may not enlarge the time for filing a notice of appeal, or a petition for review from an order of an administrative agency, except as specifically authorized by law. A motion for enlargement of time shall:

- (1) state with particularity the reasons for granting the motion;
- (2) state whether the movant has previously been granted an enlargement of time, and if so, the number and duration of such enlargements; and
- (3) state when the time will expire for doing the act for which the enlargement of time is sought.

(c) *Ex Parte Motion.* Except as to enlargements of time for filing and service of briefs under Rule 26(a), a party may file one ex parte motion for enlargement of time not to exceed 14 days if no enlargement of time has been previously granted, if the time has not already expired for doing the act for which the enlargement is sought, and if the motion otherwise complies with the requirements and limitations of paragraph (b) of this Rule.

(d) *Additional Time After Service by Mail.* Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period.

ADVISORY COMMITTEE NOTE

Paragraph (a). This Rule on computation and enlargement of time comports with prior practice and procedure in Utah, see Rule 6(a), (b) and (e), URCivP, and follows the principal provisions of Rule 26, FRAP.

Paragraph (c). For judicial convenience and flexibility in the time requirements of an appeal, this paragraph allows for a filing of one ex parte motion for an enlargement of time not to exceed 14 days if no enlargement of time has been previously granted, if the motion is

supported by good cause, and if the time has not already expired for doing the act for which the enlargement is sought. However, the paragraph does not permit an ex parte motion for an enlargement of time for the filing of appellate briefs under Rule 26. Moreover, this paragraph does not authorize an ex parte motion for an enlargement of time to file a notice of appeal or a petition for review. See paragraph (b).

Utah R. Civ. P. 11 (prior to 1985 Amendment)

Rule 11. Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed in his individual name by at least one attorney who is duly licensed to practice in the state of Utah. The address of the attorney and that of the party shall be stated. Every party who is not represented by an attorney shall sign his pleadings and state his address. Except when otherwise specifically provided by rule, pleadings need not be verified or accompanied by an affidavit. The signature of any attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule it may be stricken as sham and false and the action may proceed as though the pleading had not been filed. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Utah R. Civ. P. 11 (as amended, effec. Sept. 4, 1985)
(1986 Michie paperbound ed.)

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah. The attorney's address also shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(Amended, effective Sept. 4, 1985.)

Utah R. Civ. P. 52(a) (as prior to amendment effec. Jan. 1, 1987)

Rule 52. Findings by the Court.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

COMMITTEE NOTE: Rule 56(c) was amended by the Supreme Court on June 30, 1965, effective October 1, 1965. The amendment inserted "answers to interrogatories" in the third sentence.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

COMMITTEE NOTE: Rule 56(e) was amended by the Supreme Court on June 30, 1965, effective October 1, 1965. The amendment added the words "Defense Required" in the caption, inserted "answers to interrogatories" after "depositions" and deleted the word "by" before "further affidavits" in the third sentence, and added the last two sentences.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Utah R. Civ. P. 58A(c) and (d) (1986 paperbound Michie ed.)

Rule 58A

UTAH RULES OF CIVIL PROCEDURE

Rule 58A

(c) *When Judgment Entered; Notation in Register of Actions and Judgment Docket.* A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) *Notice of Signing or Entry of Judgment.* The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court.

Utah R. Civ. P. 58(c) and (d) (1953 and Supp. 1986)

(c) **When Judgment Entered; Notation in Register of Actions and Judgment Docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Judgment After Death of a Party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

Utah R. Civ. P. 58(c) and (d) (Supp. 1986)

JUDGMENT

Rule 59

(c) When Judgement Entered; Notation in Register of Actions and Judgment Docket.

"Filed."

Compliance with Rule 2.9(b), Rules of Practice — Dist. and Cir. Ct., which requires that a copy of proposed findings or judgments be served on opposing counsel before being pre-

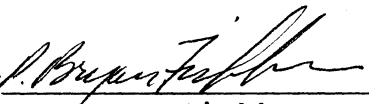
sent to the Court, is necessary before a judgment is considered "filed" under this rule and, therefore, appealable. *Wayne Garff Constr. Co. v. Richards* (Utah 1985) 706 P.2d 1065.

(d) Judgment After Death of a Party. If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF RESPONDENTS - ADDENDUM was mailed, postage fully prepaid this 15 day of April, 1987, to the following:

A. Howard Lundgren
Attorney for Plaintiff
Judge Building
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Salt Lake City, Utah 84111

By 
P. Bryan Fishburn
Attorney for Defendants

By 
Carol Metcalf

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