

1999

Harold F. Hupe v. Jeffrey Paul Hupe : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Harold F. Hupe v. Jeffrey Paul Hupe*, No. 990001 (Utah Court of Appeals, 1999).
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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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IN THE MATTER OF THE ESTATE OF)	
)	
HUPE, JAMIE PETER,)	
)	
Deceased)	
)	
HAROLD F. HUPE,)	
)	Trial Court No. 973300019ES
Petitioner and Appellant,)	
)	Appellate Court No. 990001-SC
v.)	
)	Priority No. 15
JEFFREY PAUL HUPE,)	
)	
Cross-Petitioner and Appellee.)	
)	

BRIEF OF THE APPELLANT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, UTAH, CIVIL ACTION NO. 973300019ES,
HON. RONALD E. NEHRING

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION.....	1
ISSUE PRESENTED FOR REVIEW	1
STANDARD OF APPELLATE REVIEW.....	1
APPLICABLE STATUTORY PROVISIONS.....	2
STATEMENT OF THE CASE AND FACTS.....	4
I. Nature of the Case	4
II. Statement of Facts	4
STATEMENT OF FACTS	5
SUMMARY OF ARGUMENT	7
STATUTORY BACKGROUND.....	9
ARGUMENT.....	10
I. AS THE PERSON WITH STATUTORY PRIORITY FOR APPOINTMENT AS PERSONAL REPRESENTATIVE HAROLD HUPE IS ENTITLED TO ATTORNEY FEES FOR LITIGATION UNDERTAKEN IN GOOD FAITH TO PROBATE THE APPARENTLY INTESTATE ESTATE AND DEFEND IT AGAINST AN ALLEGED LOST HOLOGRAPHIC WILL THAT THE TRIAL COURT LATER ADMITTED TO PROBATE	10
A. Harold Hupe is Entitled to Attorney Fees under the Plain Language of Section 75-3-719 of the Utah Uniform Probate Code, which Establishes that Personal Representatives or Nominee Personal Representatives are Entitled to Reimbursement of the Costs of any Proceeding Undertaken in Good Faith, Whether Successful or Not.....	10
B. Denial of Harold Hupe's Attorney Fees Undermines the Primary Legislative Purpose of the Utah Uniform Probate Code, by Depriving Representatives of Intestate Estates of the Protections Afforded by the Code and Thereby Creating a Disincentive for Parties to Bring Intestate Estates Forward for Probate	14
C. Denial of Harold Hupe's Attorney Fees Offends Basic Principles of Equity Because His Actions Conferred Benefit on the Estate as a Whole and the Estate Should Be Required To Reimburse Him for this Benefit and Because Equity Demands that the Decedent's Estate Bear the Burden of the Decedent's Own Failure to Leave a Clear Record of his Testamentary Purpose.....	16
CONCLUSION.....	17
ADDENDUM	20

TABLE OF AUTHORITIES

STATE CASES

<u>Berube v. Fashion Centre, Ltd.</u> , 771 P.2d 1033 (Utah 1989)	1
<u>Estate of Ashton</u> , 898 P.2d 824 (Ut. Ct. App. 1995)	8, 13, 16
<u>Estate of Foster</u> , 102 N.M. 707, 699 P.2d 638 (N.M. Ct. App. 1985)	17
<u>Estate of Wheadon</u> , 579 P.2d 930 (Utah 1978)	6
<u>In re Estate of Katschor</u> , 637 P.2d 855 (Okla. 1981)	17
<u>In re Yonk's Estate</u> , 113 Utah 367, 195 P.2d 255 (Utah 1948)	16
<u>State v. Brooks</u> , 908 P.2d 856 (Utah 1995)	2
<u>Town of Alta v. Ben Hame Corp.</u> , 836 P.2d 797 (Utah Ct. App. 1992)	1
<u>Ward v. Richfield City</u> , 798 P.2d 757 (Utah 1990)	1

STATE STATUTES

Utah Code Ann. § 75-1-1-3 (1975)	16
Utah Code Ann. § 75-1-102	2
Utah Code Ann. § 75-1-102(b) (1996)	8, 15
Utah Code Ann. § 75-1-201(24) (1998 Supp.)	12
Utah Code Ann. § 75-1-308b (1975)	1
Utah Code Ann. § 75-3-203(1)	11
Utah Code Ann. § 75-3-203(3)	11
Utah Code Ann. §75-3-203	2, 5, 7, 11
Utah Code Ann. § 75-3-719 (1971)	4, 6-8, 10-12, 14-15
Utah Uniform Probate Code (UUPC), Utah Code Ann. § 75-1-101 - 8-101	2

STATEMENT OF JURISDICTION

The Utah Supreme Court has original appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 75-1-308b (1975), which gives the Court authority to review probate proceedings under the Utah Uniform Probate Code.

ISSUE PRESENTED FOR REVIEW

IS APPELLANT HAROLD HUPE AS THE PERSON WITH STATUTORY PRIORITY FOR APPOINTMENT AS PERSONAL REPRESENTATIVE ENTITLED TO ATTORNEY FEES FOR LITIGATION UNDERTAKEN IN GOOD FAITH TO PROBATE AN APPARENTLY INTESTATE ESTATE AND DEFEND IT AGAINST AN ALLEGED LOST HOLOGRAPHIC WILL THAT THE TRIAL COURT LATER ADMITTED TO PROBATE?

The sole issue in this case is whether the Appellant Harold F. Hupe (“Harold Hupe”), the person with priority for appointment as personal representative and a person nominated as personal representative under the Utah Uniform Probate Code, is entitled to reimbursement by the estate of his deceased son Jamie Peter Hupe for attorney fees incurred in bringing the estate into probate and defending the intestate estate against an alleged testamentary instrument that was later admitted into probate.

STANDARD OF APPELLATE REVIEW

The issue concerns the trial court’s interpretation of Utah Code Ann. § 75-3-719. “The trial court’s interpretation of a statute presents a question of law reviewed for correctness without deference.” Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Utah Ct. App. 1992); see also Ward v. Richfield City, 798 P.2d 757, 759 (Utah 1990); Berube v. Fashion Centre, Ltd., 771 P.2d

1033, 1038 (Utah 1989). “The standard of review for a simple legal interpretation of a rule or statute is correctness. . . . When reviewing legal determinations, an appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law.” State v. Brooks, 908 P.2d 856 (Utah 1995) (citations omitted). Thus, the trial court’s denial of necessary fees and expenses in this case should be reviewed for correctness.

This issue was raised below in Harold Hupe's Motion for Attorney Fees and Motion to Reconsider Denial of Attorney Fees. See Addendum at A1-A3 and A39-A46.

APPLICABLE STATUTORY PROVISIONS

The following provisions of the Utah Uniform Probate Code (UUPC), Utah Code Ann.

§§ 75-1-101 to -8-101, are dispositive of this appeal:

Utah Code Ann. § 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 distributions to his successors;
 - (d) To facilitate use and enforcement of certain trusts; and
 - (e) to make uniform the law among various jurisdictions.

Utah Code Ann. § 75-3-203. Priority among persons seeking appointment as personal representative.

- (1) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:
 - (a) the person with priority as determined by a probated will, including a person nominated by a power conferred in a will;

- (b) the surviving spouse of the decedent who is a devisee of the decedent;
 - (c) other devisees of the decedent;
 - (d) the surviving spouse of the decedent;
 - (e) other heirs of the decedent;
 - (f) forty-five days after the death of the decedent, any creditor.
- (2) An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in Subsection (1) apply except that:
- (a) If the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person;
 - (b) In case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than one-half of the probable distributable value, or, in default of this accord, any suitable person.
- (3) A person entitled to letters under Subsections 1(b) through 1(f) and a person aged 18 and over who would be entitled to letters but for his age, may nominate a qualified person to act as personal representative. Any person aged 18 and over may renounce his right to nominate or to an appointment by appropriate writing filed with the court. When two or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them or in applying for appointment in informal proceedings. Before appointing fewer than all persons who share a priority and who have not renounced or nominated another, the court must determine that those sharing the priority, although given notice of the formal proceedings, have failed to request the appointment or to nominate another for appointment, and that administration is necessary.
- (4) Conservators of the estates of protected persons, or if there is not conservator, any guardian, except a guardian ad litem of a minor or incapacitated person, may exercise the same right to nominate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.
- (5) Appointment of one who does not have priority under Subsection (1) or priority resulting from renunciation or nomination determined pursuant to this section may be made only in formal proceedings. Before appointing one without priority, the court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment, and that administration is necessary.
- (6) No person is qualified to serve as a personal representative who is:
- (a) under the age of 21;

- (b) a person whom the court finds unsuitable in formal proceedings.
- (7) A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representative in this state and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.
- (8) This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator.

Utah Code Ann. § 75-3-719. Expenses in estate litigation.

If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorneys' fees incurred.

STATEMENT OF THE CASE

I. Nature of the Case

This appeal involves Harold Hupe's entitlement to attorneys fees for litigating in probate his son's apparently intestate estate and defending the estate against a claim of an alleged lost holographic will. Although the trial court ultimately accepted the lost holographic will and admitted it to probate, Harold Hupe is entitled to his attorneys fees because he was the nominated personal representative and litigated the issue in good faith.

II. Course of Proceedings/Disposition Below

Harold Hupe filed a motion and supporting memorandum in the trial court requesting attorneys fees. See Addendum at A1-A13. After briefing, the trial court denied the motion. Id. at A33-A36. Harold Hupe then filed a motion to reconsider. Id. at A39-A46. After briefing, the trial court summarily denied that motion. Id. at A55.

STATEMENT OF FACTS

1. The decedent, Jamie Peter Hupe, died with no issue and with no spouse. He was survived by his father Harold Hupe and by three brothers, including Appellee Jeffrey Paul Hupe (“Jeff Hupe”). As the father of decedent, Harold Hupe was his sole heir at law. See Addendum at A1, A4, A5.

2. Six months after decedent’s death, Harold Hupe filed a petition for informal probate on the understanding that his son had died intestate. Id. at A1, A4, A41. Jeff Hupe knew of the decedent’s death as he had been the decedent’s main caretaker during his final illness. However, Jeff Hupe did not announce the existence of a will or initiate probate in the first six months after the decedent’s death. Id. at A4, A5, A26, A41. Thus, when Harold Hupe filed his petition for probate Jeff Hupe was not even an interested person with standing to participate in decedent’s probate in intestacy under Utah Code Ann. § 75-1-201(24) (1998 Supp.) or to nominate a personal representative under Utah Code Ann. § 75-3-203 (1975). Harold Hupe was therefore the only person with standing to initiate probate and nominate himself or a third party as the decedent’s personal representative under the intestacy laws of the Utah Uniform Probate Code.

3. After Harold Hupe filed for informal probate, nominating himself as the decedent’s personal representative, Jeff Hupe contested the probate petition. Id. at A5, A26. Jeff Hupe alleged that the decedent had made a holographic will naming Jeff Hupe as his sole heir and personal representative. Id. Jeff Hupe never produced this will, and he could not identify the two witnesses who had attested to the alleged will. Id. Furthermore, Jeff Hupe himself

maintained that the alleged holographic will was last seen in the decedent's possession. Id. This fact created a statutory presumption that the decedent had repudiated the will by destroying it. See Estate of Wheadon, 579 P.2d 930, 931 (Utah 1978) ("A well-established presumption of law exists as follows: when it is shown that the testator made a will of which he had possession, or access to, but that it could not be found at his death, the law presumes the testator destroyed it himself, with the intent of revoking it.")

4. After trial on the challenge to Harold Hupe's petition, the district court ultimately found that the holographic will had been lost rather than destroyed by the decedent, and it admitted the lost will to probate based on the testimony of Jeff Hupe and other witnesses to the lost will's contents. Id. at A5. As a result of these findings, the trial court denied Harold Hupe's petition for appointment as personal representative and appointed appellee as the decedent's personal representative under the newly admitted will. Id.

5. Following this order, Harold Hupe requested an award of attorney fees for his expenses in initiating and pursuing the probate proceeding. Id. at A1-A3. The trial court denied Harold Hupe's request. Id. at A33-A36. The trial court denied this motion on the grounds that Harold Hupe was not entitled to collect attorney fees under Utah Code Ann. § 75-3-719 (1971) because he was not the personal representative nominated in decedent's will. Id. Harold Hupe then filed a Motion to Reconsider Denial of Attorney Fees. Id. at A39-46. The trial court denied the motion to reconsider. Id. at A55.

SUMMARY OF ARGUMENT

Harold Hupe is entitled to his attorneys fees because he was nominated as a personal representative of his deceased son's estate and defended the estate in good faith against a claim of a lost holographic will. The award of attorney fees under these circumstances is an issue of first impression in Utah. This is likely because Section 75-3-719 of the UUPC is clear on its face. The provision states: "If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorney fees incurred." Id. Despite this provision, the trial court concluded that Harold Hupe was not entitled to attorney fees in this case because, since Jeff Hupe's challenge was ultimately successful, Harold Hupe was never actually appointed as the decedent's personal representative. This conclusion contradicts the plain language of Section 75-3-719 and undermines the fundamental legislative purpose of the UUPC.

Harold Hupe was a "person nominated as personal representative" as contemplated by Sections 75-3-203 and 75-3-719 of the UUPC. Harold Hupe incurred his attorney fees and other expenses by initiating probate proceedings as the decedent's sole heir at law and hence as the sole statutory nominee. He defended the intestate estate against Jeff Hupe's challenge. Harold Hupe took both actions in good faith; he initiated probate six months after the decedent's death on the reasonable assumption that the decedent had died intestate. He then defended decedent's estate against a challenge based on the alleged prior existence of an holographic will that was last seen in the decedent's possession and which was never found after his death. This challenge was ultimately successful because the trial court found that decedent had not destroyed the will and

that there was sufficient evidence of its contents for it to be admitted into probate. However, Section 75-3-719 states that the nominee personal representatives is entitled to fees and expenses for “any action, whether successful or not.” Id. Thus, the trial court’s denial of Harold Hupe’s attorney fees was in error.

Furthermore, the trial court’s denial of attorneys fees creates significant problems in light of the language and legislative intent of Section 75-3-719. First, the denial of Harold Hupe’s attorney fees contradicts this Section’s mandate that attorney fees will be awarded for “any proceeding in good faith, regardless of whether successful or not...” Second, denial of his attorneys fees contravenes the established principle of probate law that litigants in probate proceedings are entitled to reimbursement from the estate or other heirs for any expenses incurred to further probate of the estate as a whole. See e.g., Estate of Ashton, 898 P.2d 824, 826 (Ut. Ct. App. 1995) (distinguishing between fees incurred to contest for a share of an estate and fees incurred to probate or otherwise benefit an estate as a whole). Third, denial of attorneys fees in this case discriminates between testate and intestate estates by stripping the statutorily prioritized representatives of intestate estates of the protection against personal liability for probate expenses that has been built into the UUPC. Finally, this decision creates a disincentive for relatives to serve as personal representatives because of the risk that a subsequent challenge will leave them personally liable for probate costs. This disincentive threatens the UUPC's primary purpose, which is to encourage probate proceedings as the preferred means “to discover and make effective the intent of a decedent in distribution of his property.” Utah Code Ann. § 75-1-102(b) (1996).

For these reasons, this Court should vacate the trial court's Order denying attorneys fees and remand this case for a determination of reasonable attorneys fees.

STATUTORY BACKGROUND

The trial court's denial of attorney fees was based on a misunderstanding of the role of fees and expenses awarded in probate proceedings. Thus, before addressing the specific issues involved in Harold Hupe's case, it is necessary to examine briefly the structure and legislative goals of the UUPC.

The statutory mechanism through which state-supervised distribution of decedents' property is accomplished is the probate process. The alternative to this process is distribution, without court supervision, in which the distribution of decedents' property is determined without supervision by the individuals who happen to have control of the property at the time of death. Such unofficial and unsupervised distributions are susceptible to serious abuses, and the probate system was designed to prevent them. Thus, a primary goal of the UUPC and other probate codes is to encourage survivors and interested parties to distribute decedents' property through the probate process.

The personal representative plays an indispensable role in the probate process. In order for a probate to be initiated, an interested person must petition for probate and accept appointment as personal representative. Thus, provisions for awards of attorneys fees and other probate expenses to personal representatives play a central role in promoting initiation of probate proceedings. A fundamental tenet of the probate system is that a decedent's estate must reimburse the personal representative for all costs associated with probating and otherwise

administering an estate. This tenet rests on common law notions of equity, but is also fundamental to the structure of the UUPC.

For these reasons, an award of attorneys fees to a personal representative under the UUPC involves very different considerations of equity and public policy from those which govern an award of attorney fees under most other statutes. Most statutes authorizing attorney fees are designed to discourage meritless litigation by awarding fees to the prevailing party. In contrast, award of fees in probate proceedings is designed to encourage probate proceedings by insuring that, absent bad faith, individual participants will bear the cost of those proceedings only in proportion to the benefit that they actually receive from the estate itself.

ARGUMENT

I. AS THE PERSON WITH STATUTORY PRIORITY FOR APPOINTMENT AS PERSONAL REPRESENTATIVE, HAROLD HUPE IS ENTITLED TO ATTORNEY FEES FOR LITIGATION UNDERTAKEN IN GOOD FAITH TO PROBATE THE APPARENTLY INTESTATE ESTATE AND DEFEND IT AGAINST AN ALLEGED LOST HOLOGRAPHIC WILL THAT THE TRIAL COURT LATER ADMITTED TO PROBATE

A. Harold Hupe is Entitled to Attorney Fees Under the Plain Language of Section 75-3-719 of the Utah Uniform Probate Code, Which Establishes That Personal Representatives or Nominee Personal Representatives are Entitled to Reimbursement of the Costs of Any Proceeding Undertaken in Good Faith, Whether Successful or Not

Harold Hupe is entitled to attorneys fees under the plain language of Section 75-3-719 of the UUPC because he incurred these fees in good faith as the statutorily nominated personal representative of decedent's intestate estate. Section 75-3-719 states: "If any personal representative or person nominated as a personal representative defends or prosecutes any

proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorney fees incurred.” Id.

1. Harold Hupe Was a Person Nominated As Personal Representative Under the UUPC

Harold Hupe was clearly a “person nominated as personal representative” as contemplated in Sections 75-3-203 and 75-3-719 of the UUPC. As the decedent’s only heir in intestacy, Harold Hupe was the sole person with priority for appointment as personal representative under Section 75-3-203(1) of the UUPC. Persons with priority for appointment under the intestacy provisions may “nominate a qualified person to act as personal representative.” Utah Code Ann. § 75-3-203(3). Persons may nominate themselves, and the process through which such nomination occurs is the filing of a petition for probate and appointment of personal representative. Thus, when Harold Hupe, the only person with priority for appointment under the statute in the case of intestacy, filed a petition for appointment as personal representative nominating himself, he clearly became a person “nominated as personal representative” under Section 75-3-719. Consequently, Harold Hupe was “entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorneys’ fees incurred.” Id.

The trial court appears to have assumed that Harold Hupe was not a person nominated as personal representative because he was not the personal representative allegedly appointed in decedent’s lost holographic will. However, this assumption conflicts with the use of the term “nominated” in Section 75-3-203.

2. Harold Hupe Participated in the Probate Proceeding Below in Good Faith

Harold Hupe also participated in the proceedings below in good faith. He did not file his petition for informal probate and appointment of personal representative until six months after decedent's death, at which time it was more than reasonable to assume that any heirs under any will of decedent would have come forward with their claims. Furthermore, Jeff Hupe's challenge, while ultimately endorsed by the trial court, was certainly subject to a good faith challenge and serious scrutiny by the trial court. Jeff Hupe's claim was based on a lost holographic will to which Jeff Hupe could produce no witnesses. Also, the claim had to overcome both the presumption against admitting a holographic will based solely on witness testimony and the presumption that a lost will last seen in a decedent's possession was destroyed by the decedent himself and has therefore been repudiated. Thus, Harold Hupe is entitled to his expenses and attorney fees under the plain language of Section 75-3-719.

3. Harold Hupe Incurred These Fees in His Capacity as Personal Representative and Not in His Capacity as a Claimant of the Estate

Harold Hupe is entitled to his attorney fees and other expenses because he incurred them in his capacity as the decedent's personal representative and not in his capacity as a claimant of the estate. Under Section 75-1-201(24) of the UUPC, standing to participate in probate proceedings is limited to persons "with a financial interest founded on or defeated by" the proceedings. Utah Code Ann. § 75-1-201(24). Thus, every personal representative necessarily wears two hats by statutory requirement: one hat as a potential heir whose claims may conflict

with those of other heirs, and a second hat as a fiduciary of the estate with the responsibility to probate and fairly administer the estate in accordance with the decedent's testamentary instructions.

It is well-established that probate participants, regardless of their personal interest in the proceeds of an estate, are entitled to all fees and expenses incurred in their capacity as personal representative. See, e.g., Estate of Ashton, 898 P.2d 824, 826 (Utah Ct. App. 1995) (distinguishing between a personal representatives role "as personal representative" and her role "as a claimant with interests that conflict with other heirs of the estate"). No Utah case has defined the line of demarcation between a participant's actions as personal representative and a participant's actions as a potential heir of the estate. However, cases in other jurisdictions have distinguished between actions taken to establish, defend or distribute a decedent's estate and actions taken to resolve disputes between heirs about the relative amounts of their inheritances under testamentary instruments. See, e.g., Estate of Foster, 699 P.2d 638, 644 (N.M. Ct. App. 1985 (distinguishing disputes over validity of a will and cases where "the issue was how the will disposed of the property").

Harold Hupe's actions in this case were clearly the actions of a personal representative. He initiated probate of the estate, nominated himself as personal representative, and defended the estate against a challenge based on an alleged will that was presumed to be repudiated by the decedent under Utah case law. These actions were either necessary administrative prerequisites to probating the estate or appropriate fiduciary measures of a personal representative whose responsibility was to ensure that the decedent's testamentary wishes were made effective. Thus,

Harold Hupe is entitled to reimbursement from the estate for the fees and other expenses arising from these actions.

4. Harold Hupe Is Entitled to Attorneys Fees Regardless of Whether He Was Successful

Finally, the trial court appears to have assumed that since Harold Hupe's petition for probate and appointment of personal representative was not granted, Harold Hupe is not entitled to fees. However, this conclusion directly contradicts the language of Section 75-3-719, which mandates award of fees to persons nominated as personal representative who "defends or prosecutes any proceeding in good faith, whether successful or not." Id. The trial court denied Harold Hupe's fees for the sole reason that because his action in defense of the intestate estate was unsuccessful, he was not appointed as decedent's personal representative. This decision amounts to a holding that nominated personal representatives of intestate estates will not be awarded expenses and attorney fees unless their actions in probate court are successful. Thus, it renders meaningless this Section's entitlement to fees for actions undertaken in good faith "whether successful or not." Id.

B. Denial of Harold Hupe's Attorneys Fees Undermines the Primary Legislative Purpose of the Utah Uniform Probate Code by Depriving Representatives of Intestate Estates of the Protections Afforded by the Code And Thereby Creating a Disincentive for Parties to Bring Intestate Estates Forward for Probate

Denial of Harold Hupe's attorneys fees also undermines the legislative goals and structure of the UUPC. As noted above, a primary purpose of the UUPC is "to discover and make effective the intent of a decedent in distribution of his property" by bringing estates into

probate instead of allowing individuals to conduct unsupervised distributions. Utah Code Ann. § 75-1-102(b) (1996).

The UUPC encourages interested parties to initiate probate proceedings by offering a number of statutory protections in exchange for the parties' participation. These protections include the assurance that attorneys fees and other expenses created by a decedent's estate will be born by the estate itself rather than by parties who expend their own money in order to initiate and move forward probate proceedings.

This legislative goal creates a functional difference between awards of necessary fees and expenses in probate proceedings and awards of attorneys fees in other types of civil proceedings. Whereas awards of fees in other civil proceedings are part of the courts' arsenal of discretionary sanctions, awards of necessary fees and expenses in probate proceedings are designed to encourage initiation of probate proceedings by guaranteeing that the costs of probating an estate will be born by the estate itself and not by the individuals who spend their own money to initiate or pursue probate of the estate.

The unusual function of fee awards in probate proceedings is reflected in the language of Section 75-3-719. Unlike other attorney fees provisions, Section 75-3-719 does not grant the trial court discretion to determine whether to award attorney fees. Rather, it states that personal representatives and persons nominated as personal representatives who engage in good faith actions are "entitled to receive from the estate . . . necessary expenses and disbursements, including reasonable attorney fees incurred." Id. This language reflects the two fundamental tenets of fees awards in the context of probate proceedings. First, that the estate itself should bear all the costs of probate, including extraordinary probate costs that are necessitated by a

decedent's failure to leave clear testamentary instructions. Second, that the costs of probate should ultimately be born on a pro rata basis by the individual heirs who actually receive the property at issue in the probate proceeding.

C. Denial of Harold Hupe's Attorney Fees Offends Basic Principles of Equity Because His Actions Conferred Benefit on the Estate as a Whole and the Estate Should Be Required to Reimburse Him for This Benefit and Because Equity Demands That the Decedent's Estate Bear the Burden of the Decedent's Own Failure to Leave a Clear Record of His Testamentary Purpose

Basic principles of equity also support Harold Hupe's right to reimbursement for attorney fees incurred to probate this estate. "Unless displaced by particular provisions of [the UUPC], the principles of law and equity supplement its provisions." Utah Code Ann. § 75-1-1-3 (1975). These principles, as well as the case law specific to probate proceedings, support Harold Hupe's claim for reimbursement from the estate for his necessary expenses.

The probate process imposes specific, unavoidable expenses on participants. These expenses include the costs and attorneys fees required for filing a petition for probate, providing public notice of probate proceedings, and preparing for and attending probate hearings. When these expenditures confer a benefit on the estate as a whole, it is well-established that the estate, and not the personal representative, should bear the burden of paying for them. See Estate of Ashton, 898 P.2d 824, 826 (Utah Ct. App. 1995) (distinguishing between fees incurred as personal representative and fees incurred "as a claimant with interests that conflict with other heirs to the estate"); In re Yonk's Estate, 195 P.2d 255, 257 (Utah 1948) (stating that even a stranger to the estate appointed over the protest of heirs is entitled to reimbursement for "the reasonable value of services performed").

Harold Hupe was not a stranger to the estate. Rather, he was the decedent's sole heir at law at the time he filed his petition and was therefore the only person with standing to petition for probate or nominate a personal representative. Harold Hupe's actions conferred significant benefits on the estate by initiating probate and by defending the estate against an allegedly lost testamentary instrument that faced a legal presumption of invalidity under current Utah case law. See Estate of Foster, 699 P.2d 638, 646 (N.M. Ct. App. 1985) ("The services of counsel in preventing distribution under invalid instruments must be held to confer a benefit upon the estate.") (quoting In Re Estate of Katschor, 637 P.2d 855 (Okla. 1981)). Equitable principles demand that the estate should repay Harold Hupe, who has received nothing from the estate, for these benefits, and that he should not bear any part of the costs of probate.


CONCLUSION

Harold Hupe was a person nominated as personal representative under the intestacy provisions of the UUPC. He incurred attorney fees and expenses in the proceedings below in good faith. He incurred these fees in his capacity as the nominated personal representative rather than in his capacity as a claimant under the Utah intestacy provisions. Harold Hupe conferred a substantial benefit on the estate by initiating probate and by defending the estate against a claim that, though ultimately successful, warranted serious scrutiny. The language and legislative goals of the UUPC dictate that the decedent's estate, rather than Harold Hupe, should bear the cost of these proceedings. Furthermore, basic principles of equity demand that the estate should reimburse Harold Hupe for the benefit he conferred on it.

For all the reasons stated above, the district court's Order should be reversed and this Court should remand to the district court with directions to award a reasonable attorneys fee.

DATED this 10th day of March, 1999.


PARSONS BEHLE & LATIMER


PATRICIA D. WHITE
ELIZABETH CONLEY
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing BRIEF OF THE APPELLANT was served on Cross-Petitioner and Appellee by mailing two true copies thereof to his attorney of record, by First Class Mail, postage prepaid, this 10th day of March, 1999, in an envelope addressed as follows:

Leslie Van Franck
Cohne Rappaport & Segal
525 East 100 South #500
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Elizabeth Conley

ADDENDUM

ELIZABETH S. CONLEY (4815)
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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

In the Matter of the Estate of

JAMIE HUPE

Deceased.

MOTION FOR ATTORNEY FEES


Case No. 973300019 ES

Harold Hupe ("Mr. Hupe") by and through his attorneys moves for an award of attorneys fees from the estate of Jamie Hupe.

Mr. Hupe, as apparent sole intestate heir filed for the probate of Jamie Hupe's estate and defended the estate in trial against proponents of a lost holographic will.

For the reasons stated in the accompanying Memorandum in Support of Motion for Attorneys Fees Mr. Hupe as nominee personal representative acting in good faith should be awarded attorneys fees in determining the disposition of the decedent's estate.

DATED this 22^d day of June, 1998.



ELIZABETH S. CONLEY
PARSONS BEHLE & LATIMER
Attorneys for Petitioner Harold Hupe

CERTIFICATE OF SERVICE

I hereby certify that on the 22^d day of June, 1998, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing MOTION FOR ATTORNEY FEES to the following:

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

In the Matter of the Estate of

JAMIE HUPE

Deceased.

MEMORANDUM IN SUPPORT OF
MOTION FOR ATTORNEY FEES

Case No. 973300019 ES

Harold Hupe, by and through his counsel, submits the following MEMORANDUM IN
SUPPORT OF MOTION FOR ATTORNEY FEES.

INTRODUCTION

Harold Hupe ("Mr. Hupe") seeks relief from this Court for expenses he incurred on behalf of the estate of Jamie Hupe. Jamie Hupe, a single man with no children, died on October 11, 1996. His estate consisted primarily of an annuity which listed his estate as the beneficiary. No will was presented for probate and Mr. Hupe filed petition for informal probate with an application for Informal Personal Representative.

As Jamie's father, Mr. Hupe is Jamie's sole intestate heir and under Utah law is the nominee personal representative of Jamie's estate. Therefore, unless and until an alternate personal representative was assigned Mr. Hupe had a fiduciary duty to administer Jamie Hupe's estate. After Mr. Hupe filed his petition, Jeff Hupe, one of Jamie Hupe's three brothers, filed an Objection to the Petition and petitioned to admit a lost will into probate. Jeff Hupe submitted affidavits from two of his friends stating that they had seen the lost will and that the material provisions were in decedent's handwriting and was signed by the decedent. The lost will was reported to be a form will witnessed by two persons and affixed with a notary seal. No witness to the lost will was named or came forward. Neither of the witnesses who said they saw the lost will recalled the names of the witnesses to the lost will or the notary, the date of the lost will or the place it was made.

The matter was brought to the probate court to determine whether the proponents of the lost will presented sufficient evidence that such a will had existed; that it fulfilled the requirements of a valid will; what its dispositive provisions said; and that there was sufficient evidence to overcome the presumption that the will had been revoked. Mr. Hupe defended the Objection and after he submitted a motion for summary judgment based on the lack of witnesses to the will, Jeff Hupe presented a cross motion for summary judgment on the basis that the lost will was a holographic will. Mr. Hupe withdrew his motion and the court denied Jeff Hupe's cross motion and the matter went to trial. After trial, the court admitted the lost will to probate and did not appoint Mr. Hupe as personal representative. Nevertheless, Mr. Hupe is entitled to compensation

for the reasonable expenses he incurred while administering the estate because he served the estate in good faith in fulfilling his fiduciary duty as the nominee personal representative.

ARGUMENT

I. UNDER UTAH LAW, MR. HUPE IS ENTITLED TO REIMBURSEMENT FROM THE ESTATE OF JAMIE HUPE BECAUSE HE INCURRED HIS EXPENSES IN GOOD FAITH WHILE PERFORMING HIS FIDUCIARY DUTIES AS THE NOMINEE PERSONAL REPRESENTATIVE.

Utah law entitles Mr. Hupe to recover the expenses he incurred in good faith while serving Jamie Hupe's estate as nominated personal representative. The Utah Probate Code states, "If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorneys' fees incurred." Utah Code Ann. § 75-3-719 (1997). Mr. Hupe is entitled to compensation for his expenses under Utah law because he is a person nominated as personal representative and he performed his services in good faith.

Utah law prefers the intestate heir when appointing a personal representative to the estate. Mr. Hupe acted as a nominee personal representative in serving the estate of Jamie Hupe. The Utah Probate Code states (in pertinent part) as follows:

75-3-203. Priority among persons seeking appointment as personal representative.

(1) Whether the proceedings are formal or informal, persons who are not disqualified have *priority for appointment* in the following order:

- (a) the person with priority as determined by a probated will, including a person nominated by a power conferred in a will;
- (b) the surviving spouse of the decedent who is a devisee of the decedent;
- (c) other devisees of the decedent;
- (d) the surviving spouse of the decedent;
- (e) *other heirs of the decedent*;
- (f) forty-five days after the death of the decedent, any creditor.

Utah Code Ann. §75-3-201 (1997)(emphasis added). After Jamie Hupe's death, no will was presented for probate, no devisees named, and Jamie did not leave a spouse. Therefore, under sentence (e), “other heirs of the decedent,” or intestate heirs, are given preference for appointment as personal representative. Mr. Hupe is sole intestate heir of Jamie Hupe’s estate.

Furthermore, final appointment as personal representative is not required to be considered a nominee personal representative. The court in In re Estate of Reimer, 229 Neb. 406, 427 N.W.2d 293 (1988) allowed a person nominated in a will and given priority under state law to collect attorney fees incurred while seeking probate and defending a contested will, even though the nominee later renounced his priority and was not appointed as personal representative. .

The Utah Probate Code reflects the need to reimburse persons who care for the estate prior to appointment of a official personal representative. The Code states that “powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring

thereafter.” Utah Code Ann. § 75-3-701 (1997). Referring to the language of the Uniform Probate Code §3-720, as codified in Maryland law, the Maryland courts wrote that the legislature must have intended “that a defense of a will by either a personal representative (who presumably has qualified) or by a person nominated as a personal representative (who presumably has not qualified) should similarly be at the expense of the estate.” Webster v. Webster, 268 Md. 153, 170, 299 A.2d 814, 823 (1973). The law encourages responsible estate management by compensating persons who serve the estate in the interim period prior to official appointment of a personal representative.

In this case, after Jamie Hupe died, Mr. Hupe was the sole intestate heir to the estate. Under the Utah Probate Code, Mr. Hupe was preferred for appointment as personal representative and was therefore a nominee personal representative. Mr. Hupe fulfilled his fiduciary duties by seeking administration of the estate. Because the estate consisted of an annuity, a court order determining who inherited the estate was necessary prior to the payment out of funds. Although Mr. Hupe was never officially appointed as personal representative, he is a ‘person nominated as personal representative’ under Utah Probate Code Section 75-3-719 and is therefore entitled to compensation for the services he rendered on behalf of the estate.

Second, by acting in good faith, Mr. Hupe is entitled to reimbursement for expenses he incurred on behalf of Jamie Hupe’s estate. A nominee personal representative has an implied duty to administer the estate. Courts have held that, “[e]ven if the will is challenged before it is admitted to probate and a personal representative appointed, the personal representative named in

the will has the duty to defend in a will contest.” In re Killen, 188 Ariz. 569, 574, 937 P.2d 1375, 1380 (1996). See also, Re Swanson’s Estate, 240 Iowa 1011, 1016, 38 N.W.2d 652, 655 (1949) (finding a nominee executor had a duty to propound a will for probate and to resist threatened contests, and attorney fees reasonably incurred would be allowable against the estate) and, Re Vaughn’s Estate, 149 Wash. 291, 293, 270 P. 1030, 1031 (1928)(awarding attorney fees to nominated executor who sought probate of an estate and defended the estate in will contest).

Administering and defending an estate in a will contest are of benefit to the estate and good faith services. In allowing attorney fees, the court in Salmon v. Salmon, 9 Tex. Sup. J. 34, 395 S.W.2d 29, 31 (1965), stated, “a person named as executor in a will is deemed to be acting for the benefit of the estate when he, in good faith and with probable cause, employs attorneys to defend the will or prosecute an action to probate the same.” The court also found the “right to allowance of a reasonable attorney’s fees out of the assets of the estate is not affected by his interest in the outcome of the litigation or by the fact that he acted contrary to the wishes of other beneficiaries.” Id. at 33. Furthermore, courts have found the “estate as an entity is benefited when genuine controversies as to validity or construction of will are litigated and finally determined.” Matter of Estate of Flaherty, 484 N.W.2d 515 (N.D. 1992) see also, Matter of Estate of Peterson, 561 N.W.2d 618 (N.D. 1997) (finding “benefit to estate” includes personal representative’s good faith attempts to effectuate testamentary intent) and, Matter of Estate of Stenson, 243 Mont. 17, 792 P.2d 1119 (1990)(upholding trial courts award of attorney fees incurred when attorneys’ services resulted in determination of rightful heir and benefit to estate).

By seeking to administer an estate and in defending an estate in a will contest to determine the testator's intent, a nominee personal representative acts in good faith in benefiting the estate.

A representative can only be reimbursed for services performed on behalf of the estate. In Ashton v. Ashton, 898 P.2d 824, 826 (Utah App. 1997), the court did not award costs incurred by an administrator "in her role as a claimant with interests that conflict with other heirs to the estate, not as personal representative for the estate." In *Ashton*, the administrator and beneficiary incurred costs when she appealed a trial courts finding of the testators' intent, forcing Mrs. Ashton to divide the estate between herself and her husband's children from a former marriage. Id. at 824. Mrs. Ashton was not entitled to compensation from the estate because her appeal was solely for personal benefit.

However, a nominee personal representative is entitled to compensation for services rendered the estate, even though they may also be a beneficiary of the estate. In Estate of Killen, 188 Ariz. 569, 576, 937 P.2d 1375, 1381 (1996), the court found the Uniform Probate Code "does not exclude a right to reimbursement from the estate if the personal representative is also a beneficiary of the will," arguing a "personal representative who is also a devisee of the will should not have to fulfill his duty to defend the validity of the will under the risk that he will have to personally bear the expense of the defense merely because he is also a beneficiary." Therefore, although courts do not reimburse for personal actions, a representative is entitled to reimbursement for serving the estate even though he would benefit from a successful defense.


As a nominee personal representative, Mr. Hupe had a duty to administer and defend the estate of Jamie Hupe. Mr. Hupe expedited the administration of the estate by filing for informal probate and appointment of a personal representative. Since no will was presented following Jamie Hupe's death, the law presumes all wills were revoked by the testator. Litigation costs were incurred in defending the estate while proponents of the lost holographic will sought to rebut this presumption. This litigation was necessary to determine the disposition of the estate. It was necessary for Mr. Hupe as nominee personal representative, to defend the estate at trial ultimately and benefiting the estate. At all times he was acting in good faith. Therefore, the estate should bear the costs. Although the lost holographic will was ultimately admitted and Mr. Hupe was not officially appointed as personal representative, Mr. Hupe acted in good faith throughout the proceedings and the administration of the estate to this point is the direct result of Mr. Hupe's services. Mr. Hupe should be reimbursed the reasonable expenses he incurred in seeking administration of Jamie Hupe's estate.

CONCLUSION

Mr. Hupe is entitled to recover from the estate reasonable costs he incurred while serving the estate in good faith. In the absence of a will, Utah law gives the intestate heir preference in seeking appointment as personal representative. As sole intestate heir, Mr. Hupe is given this preference and is therefore a nominee personal representative in the law. Mr. Hupe sought to administer the estate and defended the estate in a will contest. In these actions, Mr. Hupe served the estate in good faith by fulfilling his duty as nominee personal representative and

benefiting the estate by seeking the testator's intent. Therefore, as nominee personal representative, Mr. Hupe is entitled to reimbursement of reasonable attorney fees he incurred in good faith on behalf of the estate.

DATED this 22^d day of June, 1998.



ELIZABETH S. CONLEY
PARSONS BEHLE & LATIMER
Attorneys for Petitioner Harold Hupe

CERTIFICATE OF SERVICE

I hereby certify that on the 22^d day of June, 1998, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY FEES to the following:

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

IN THE MATTER OF THE ESTATE OF HUPE, JAMIE PETER, (Deceased)	MEMORANDUM IN OPPOSITION TO HAROLD HUPE'S MOTION FOR ATTORNEYS FEES Case No. 973300019ES
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Jeffrey P. Hupe ("Jeff"), by and through his undersigned counsel, files the following Memorandum in Opposition to Harold Hupe's ("Harold") Motion for Attorneys Fees.

INTRODUCTION

Harold's argument that he is entitled to attorneys fees rests on the erroneous premise that he qualifies under the statute at issue as a "person nominated as personal representative." The premise is unsupported by any law, and would lead to the unacceptable consequence that all will contests are to be funded solely by the decedent's estate. Harold's argument is soundly contradicted by the case law to which Harold has cited as well as the policy underpinning the entire Probate Code. Harold provided no benefit to Jamie's estate, and he is not entitled to attorneys fees under the statute.

1. **HAROLD HUPE IS NOT A “PERSON NOMINATED AS PERSONAL REPRESENTATIVE.”**

The Utah Probate Code at §75-3-719 allows “any personal representative or person nominated as personal representative” to defend or prosecute any proceeding in good faith, successfully or not, and to receive from the estate “his necessary expenses and disbursements, including reasonable attorneys fees incurred.” The key language in the statute is that one who seeks to recover thereunder *must be either appointed by the Court as the personal representative or be “nominated as personal representative.”* Harold admits that he was never appointed, but argues that he acted as a “nominee personal representative” because he allegedly had priority under §75-3-203 to be appointed as personal representative, and he claims he provided services on behalf of the estate. This fallaciousness of this argument can be seen by examining the invalidity of the various premises on which it is based:

Harold Provided No Benefit to the Estate. As Harold admits, a personal representative can only be reimbursed for services performed on behalf of the estate. (Harold’s Memorandum, p. 7). But Harold did not provide services to the estate – instead, in contravention of the expressed purposes of the Probate Code, i.e., to discover and make effective the intent of a decedent in distribution of his property, §75-1-102(2)(b), Harold sought to defeat Jamie’s intent and to prevent Jamie’s Will from being probated. Despite having knowledge of the Will even prior to filing his petition seeking intestacy, Harold went ahead and asked the court for an order determining that Jamie died intestate. In essence, Harold pursued his own self-interest to ensure that Jamie’s intent that Jeff receive the assets contained within the estate would never be effectuated.

Estate of Ambers, 477 N.W.2d 218 (N.D. 1991) is instructive with regard to Harold's non-entitlement to attorneys fees. In that case, the individual nominated as personal representative in the will filed a petition for appointment and for formal probate of the will. Several heirs objected to the petition, and filed a cross-petition for adjudication of intestacy, alleging that the execution of the will was procured by fraud. The jury ruled in favor of testacy, and the initial petition was granted, appointing the individual nominated in the will as personal representative of the estate. The personal representative was then allowed to recover costs and disbursements associated with the will contest directly from the unsuccessful will contestants. The contestants appealed, asserting that a statute identical to the one in the case at bar required the personal representative to recover the costs from the estate. In denying the contestants' appeal, the court ruled:

Contestants' challenge of [the will] did not benefit the estate and was not intended to benefit the estate. The purpose of the challenge was limited to effecting a change in who received the estate. Furthermore, to rule as the Contestants urge would diminish the estate and the Nelsons, as the sole beneficiaries of the will, would have to bear the entire expense of upholding the will challenged by the Contestants. "It seems to us that the probate code should [**18] not be construed so as to permit one heir or devisee to finance his or her lawsuit against another heir or devisee out of the funds of the estate." *Estate of Kjørvestad*, 375 N.W.2d 160, 171 (N.D. 1985), quoting *Estate of Kesting*, 220 Neb. 524, 371 N.W.2d 107, 109 (1985). Nor should a devisee be forced to bear the expense of upholding a will challenged by an heir or another devisee in a proceeding that was not intended to benefit the estate.

Estate of Ambers, 477 N.W.2d at 224. Under the same principles by which the personal representative in *Ambers* was allowed to collect costs and disbursements from the will contestants, the will contestants would be prevented from collecting their own costs and disbursements that they had incurred from the estate. Harold contested the Will -- he did not attempt to uphold the Will. He is not entitled to fund his challenge to the Will out of the funds of the estate.

Harold Was Never Nominated as Personal Representative. None of the statutes to which Harold has cited support Harold's argument that the phrase "nominated as personal representative" in the attorneys fees statute makes reference to one who has priority for appointment. Instead, in each and every case to which Harold has cited, the individual entitled to his/her attorneys fees was either (a) actually appointed by the court as personal representative, or (b) was acting as personal representative pursuant to a nomination in the deceased's will. The statute that allows fees to individuals nominated in a will is predicated in the notion that such individuals have a fiduciary duty to defend the document which appointed them:

... [T]he personal representative of an estate has a duty to defend the validity of the decedent's will if the will is challenged. The Arizona Supreme Court stated in *Monaghan's Estate*, 60 Ariz. 346, 351-52, 137 P.2d 390, 391-92 (1943), executor appointed by will . . . must, in duty to his trust, protect the instrument when it is assailed in court." More recently, the supreme court affirmed this rule in *In re Harber's Estate*, 104 Ariz. 79, 89, 449 P.2d 7, 17 (1969), when it adopted the rule set forth in *In re Corotto*, 125 Cal. App. 2d 314, 270 P.2d 498 (Cal. App. 1955) that "after a will has been admitted to probate, it is the duty of the executor to defend and uphold it against subsequent attack, and that this duty rests primarily upon him and not the legatees and devisees." Even if the will is challenged before [***14] it is admitted to probate and a personal representative appointed, the personal representative named in the will has the duty to defend in a will contest. *In re Pitt's Estate*, 1 Ariz. App. 533, 541, 405 P.2d 471, 479 (1965). Thus, as the personal representative named in the will, Marion clearly had a duty to defend Mrs. Killen's will in the will contest.

In re Killen, 188 Ariz. 569, 937 P.2d 1375 (1996) (emphasis added) (cited in Harold's Memorandum at pp. 6 and 7). Thus, one who is nominated as a personal representative in a will and who has the fiduciary obligations imposed by the document should be allowed "to in good faith pursue appropriate legal proceedings without unfairly compelling the representative to risk personal

financial loss by underwriting the expenses of those proceedings.” *Estate of Flaherty*, 484 N.W.2d 515 (N.D. 1992) (cited by Harold at p. 6 of his Memorandum).

The Editorial Board Comment to §75-3-719, the attorneys fees statute on which Harold has relied, reflects this need to protect those who have fiduciary obligations imposed by nomination in a will:

A personal representative is a fiduciary for successors of the estate (§75-3-703). Though the will naming him may not yet be probated, the priority for appointment conferred by §75-3-203 on one named executor in a probated will *means that that the person named has an interest, as a fiduciary, in seeking the probate of the will. . . . [T]he Code changes the idea followed in some jurisdictions that an executor lacks standing to contest other wills which, if valid, would supersede the will naming him, and standing to oppose other contests that may be mounted against the instrument nominating him.*

§75-3-719 Ed. Bd. Comment (emphasis added).

It is apparent from this comment that the drafters of the Uniform Probate Code as well as the Utah Legislature intended by this statute only to protect the fiduciary responsibilities of persons actually named as personal representative or persons named as a personal representative in a will. In the absence of those fiduciary responsibilities, the statute has no application. There is no question that Harold was not nominated in Jamie’s Will as the personal representative. Thus, Harold had no fiduciary obligation to effectuate Jamie’s intent as expressed in that Will.

Priority for Appointment Does Not Create Status as “A Person Nominated As Personal Representative.” Harold claims status as “a person nominated as personal representative” only because he had priority for appointment. Harold has cited to nothing in support of that claim. But by definition, the fiduciary obligations of one who has been nominated as personal representative *do not* attach simply as a result of having priority under the statute. A “fiduciary” is defined as “a

person having duty, created by his undertaking, to act primarily *for another's benefit* in matters connected with such undertaking.” *Black's Law Dictionary*, Fifth Ed. (1979). One who acts in a “fiduciary capacity” does not act for “his own benefit, but for the benefit of another person.” *Id.* And a “nominee” . . .

. . . ordinarily indicates *one designated to act for another* as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, in representation of another, or as the grantee of another.

Cisco v. Van Lew, 60 Cal.App.2d 575, 584; 141 P.2d 433, 438 (1943) (emphasis added), *quoting Schuh Trading Co. v. Commissioner of Internal Revenue*, 95 F.2d 404, 411, (7th Cir. 1938).

Fiduciary duties do not attach simply as a result of having priority under the statute. For example, a surviving spouse of the decedent who is a devisee has priority for appointment over other devisees or heirs. §75-3-201(b). But this same surviving devisee spouse who is *not* nominated by the will as personal representative has no fiduciary obligation to submit the will for probate. Instead, the surviving spouse may exercise his/her right to take an elective share of the estate pursuant to §75-2-201 and allow the other devisees to take steps to probate the will. *See, e.g., In re Little*, 22 Utah 204, 61 P. 899 (1900) (renunciation by widow of her rights under deceased spouse's will does not nullify other devisees' right to take under will).

Harold was not a nominee for anyone and had no fiduciary duty to anyone. In accordance with his own argument, as the sole intestate heir, he had the ability to be *directly appointed*. His petition reflects that that is exactly what he did -- apply directly for appointment. Thus, he is not “a

person nominated as personal representative” -- and he is not entitled to his attorneys fees under the statute.

Harold Acted Only In His Own Personal Self-Interest. Regardless, Harold still asserts (without authority) that he did, in fact, have a fiduciary obligation -- one which he owed to the estate. (Harold’s Memorandum, p. 5). Harold does not assert that he undertook to safekeep property of the estate or to pursue claims on behalf of the estate for recovery of property. What he asserts is that he fulfilled his fiduciary obligation by seeking a court order “determining who inherited the estate.”¹ (Harold’s Memorandum, p. 5). In other words, he filed the initial petition seeking an order of intestacy -- as well as a determination that he was the sole heir. The petition was a form document -- his attorney could have prepared it in less than an hour. All of the rest of Harold’s involvement in this case was spent in attempting to *defeat* Jamie’s intent and to *prevent* Jamie’s Will from being probated. These efforts were taken in direct contravention of the purposes and policies underlying the Probate Code, which are, in part, “to discover and make effective the intent of a decedent in distribution of his property” and to do so in an efficient and speedy manner. §75-1-102(2)(b) and (c). The fact that Harold beat Jeff to the courthouse steps and filed his petition first does not transmute his subsequent selfish efforts into some pretentious fiduciary responsibility to the estate. If that were so, then anyone could file a petition in intestacy and challenge a will, all at no risk. The “good faith” required by the attorneys fees statute is a very low standard -- any challenge, no matter

¹ Harold asserts that the presumption of intestacy that accompanied the loss of Jamie’s Will somehow affects his responsibilities to the estate. In fact, the presumption of intestacy applies in *all* probate proceedings -- until a will is probated, the decedent is presumed to have died intestate. *Linger v. Upshaw Co.*, 144 S.E.2d 689, 696 (W.Va. 1965). The presumption becomes final after three years in the absence of a probated will. U.C.A. §75-3-107(3).

how attenuated, that met at least Rule 11 requirements, would require *all* will contests to be made solely at the expense of the estate.

The law does not support Harold's argument. In none of the cases that Harold has cited was the will contestant, successful or not, awarded attorneys fees. Instead, each and every case to which Harold has cited indicates that the estate will pay for the fees of one who has a fiduciary obligation to pursue litigation on behalf of the estate -- an obligation that arises out of a formal appointment as personal representative or as one who has been nominated by a will to be personal representative. *See, Webster v. Webster*, 268 Md. 153, 299 A.2d 814 (1973) (cited at p. 5 of Harold's Memorandum) (personal representative nominated in will and appointed by court allowed attorneys fees incurred in defending will); *In re Killen*, 188 Ariz. 569, 937 P.2d 1375 (1996) (cited at pp. 6 and 7 of Harold's Memorandum) (same); *Estate of Flaherty*, 484 N.W.2d 515 (N.D. 1992) (cited at p. 6 of Harold's Memorandum) (same); *Matter of Estate of Peterson*, 561 N.W.2d 618 (N.D. 1997), (cited at p. 6 of Harold's Memorandum) (same); *In re Estate of Reimer*, 229 Neb. 406, 427 N.W.2d 293 (1988) (cited at p. 4 of Harold's Memorandum) (individual who was allowed to collect attorneys fees for will contest had been nominated in the will as personal representative and defended the contested will); *Estate of Vaughan*, 270 P. 1030 (Wash 1928) (cited at p. 6 of Harold's Memorandum) (same); *Salmon v. Salmon*, 395 S.W.2d 29, 33 (Tex. 1965) (cited at p. 6 of Harold's Memorandum) (same); *In re Swanson*, 240 Iowa 1011, 38 N.W. 2d 652 (1949) (cited at p. 6 of Harold's Memorandum) (individuals nominated in will as executors entitled to attorneys fees incurred in defending will); *In re Stenson*, 792 P.2d 1119 (Mont. 1990) (personal representative appointed by court entitled to attorneys fees in pursuing heirship proceedings); *In re Ashton*, 898 P.2d 824 (Utah App. 1995)

(personal representative appointed by court not awarded attorneys fees incurred in pursuing own personal interests in having property pass to her outside of the estate).

In none of the cases cited was the will contestant awarded attorneys fees for the challenge. Absent the fiduciary obligations that accompany formal court appointment as a personal representative or the nomination in a will, an intestate heir who challenges a will is acting in one's own personal self-interest. In the instant case, Harold fought tooth and nail to *prevent* Jamie's intent from being effectuated. Harold's efforts were in direct contravention of the best interests of the estate -- nothing that Harold did was calculated to ensure that Jamie's intent was carried out. Everything that Harold did was done in his own self-interest that Jamie's intent *not* be effectuated, but that the estate be determined to pass intestate to Harold.

Harold Did Not Have Priority for Appointment as Personal Representative. Pursuant to §75-3-203, it was Jeff, and not Harold, who had priority to be appointed as personal representative. That statute states that "persons who are not disqualified have priority for appointment in the following order: (a) the person with priority as determined by a probated will, including a person nominated by a power conferred in a will; . . . (e) other heirs of the decedent." Unquestionably, since Jamie's Will not only nominated Jeff as the personal representative, but the Will was also probated, Jeff had and has priority for appointment.

Harold Does Not Fall Within the Class of Individuals To Whom the Statute Allowing Attorneys Fees is Directed. As set forth above, Harold was not "a person nominated as personal representative" and is not entitled to his fees pursuant to §75-3-719.

2. HAROLD WAIVED ANY CLAIM THAT HE MAY HAVE HAD TO RECOVER ATTORNEYS FEES.

Harold has waived his claim to attorneys fees in this will contest by not pleading it, raising it until after the close of evidence. While no technical forms of pleadings are required under Rule 8(e), U.R.Civ.P., Utah is a notice pleading state. To preserve attorneys fees, Harold had to have at least made passing reference to the claim in his opening petition or at least in response to Jeff's cross-petition. *See, Sears v. Riemersma*, 655 P.2d 1105, 1110 (Utah 1982) (prayer for attorneys fees set out in counterclaim is sufficient to preserve claim). Because Harold failed to assert any claim for fees, Harold is now prevented from raising the issue.

Harold has further waived his claim for attorneys fees by failing to present any evidence at trial concerning them. Failure to present evidence on a claim at issue is generally viewed as a waiver of the claim. *Interiors Contracting Inc. v. Navalco*, 648 P.2d 1382, 1391 (Utah 1982). Harold made no reference to attorneys fees until his post-trial motion, and has yet to present any evidence thereon. Even to the extent that Harold could be considered to be a "person nominated as personal representative" (which he is not), Harold has waived any right to assert his claim for fees in this proceeding.

CONCLUSION

For the foregoing reasons, Harold's Motion for Attorneys Fees should be denied.

DATED this 13th day of July, 1998.

COHNE, RAPPAPORT & SEGAL, P.C.

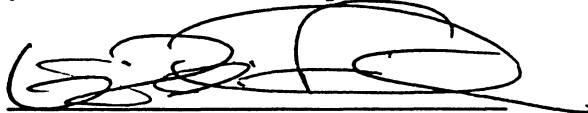


Leslie Van Frank
Attorneys for Jeffrey Paul Hupe

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing document
was hand-delivered on this 13th day of July, 1998, to the following:

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

* * * * *

In the Matter of the Estate of

JAMIE HUPE

Deceased.

**REPLY MEMORANDUM IN
SUPPORT OF MOTION FOR
ATTORNEY FEES**

Case No. 973300019 ES

* * * * *

Harold Hupe ("Mr. Hupe"), by and through his counsel, submits the following **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY FEES**.

INTRODUCTION

Public policy as reflected in the uniform probate code supports Mr. Hupe claim for attorneys fees in his petition for appointment as personal representative of the estate of Jamie Hupe and defense against Jeff Hupe's ("Jeff") cross petition.

The uniform probate code sets out rules governing how the property of one generation shall be transferred to another. A will may be presented for probate or in the absence of a will then intestate provisions govern the transfer of the estate.

In this case no will or copy of a will was ever produced. More than six months after decedent's death, Mr. Hupe filed for probate. Jeff Hupe, the proponent of a will claimed that there was a lost holographic will naming him as personal representative and sole heir. However, Jeff did not file for probate of the lost will until after Mr. Hupe's petition was filed. There was insufficient evidence to establish that a lost will had been made, properly executed and not revoked. As the sole intestate heir of the estate Mr. Hupe was the logical person to seek to administer the estate. In that context Mr. Hupe filed his petition. In order to bring the estate to a conclusion, it was appropriate for Mr. Hupe, the sole intestate heir, to file his petition and to insure that the estate passed as it was intended. Mr. Hupe's defense against Jeff's cross petition effected that purpose.

ARGUMENT

I. MR. HUPE IS ENTITLED TO REIMBURSEMENT FROM THE ESTATE OF JAMIE HUPE BECAUSE HE SERVED THE ESTATE IN MAKING THE PROPONENT OF A LOST WILL ESTABLISH THE FACT THAT A WILL HAD BEEN PROPERLY EXECUTED AND NOT REVOKED.

Jeff argues that Mr. Hupe is not a "person nominated as personal representative." He argues that in order to be a "person nominated as personal representative" one must provide benefit to the estate (Jeff's Memorandum, p. 2), be nominated as personal representative (Jeff's Memorandum, p. 4), and not act out of self-interest (Jeff's Memorandum, p. 7). However, Jeff's

argument fails to acknowledge that at the time Mr. Hupe acted on behalf of the estate, the will Jeff relies upon was under considerable question since it is a holographic will and the testator's intent was yet to be established through witness testimony.

A. Because No Will or Copy of the Will Was Ever Produced, No Attorney or Witness to the Execution of the Will Came Forward, It was Necessary to Demand that Jeff Present Sufficient Evidence of a Lost Will.

When Mr. Hupe sought to probate the estate of Jamie Hupe there was no will recognized by law. This fact is essential to the question of attorney fees because had the will been available and legally recognized, there would have been no question as to whose role it was to care for the estate. Jeff objected to Mr. Hupe's efforts to informally probate the estate, arguing that a lost will was prepared. Two friends of Jeff's testified that they saw a will in decedent's handwriting but did not remember who the witnesses were or who notarized the will. Certainly, anyone would question the validity of a lost holographic will in such attenuated circumstances. When Mr. Hupe acted on behalf of Jamie Hupe's estate, the lost will was not legally recognized and, therefore, Mr. Hupe acted reasonably in not relying on what Jeff's friends said was in the will.

B. Mr. Hupe Stood As the Nominee Personal Representative with Fiduciary Responsibilities in Representing the Estate.

The law does not define a "person nominate as personal representative." In the absence of a clear definition, Mr. Hupe relied upon his fiduciary obligation as the sole intestate heir in seeking to probate the estate. Jeff uses Black's Law Dictionary to argue that Mr. Hupe had no fiduciary obligation. (Jeff's Memorandum, p. 6). However, he refuses to recognize that *at the time* of Mr.

Hupe's actions, Mr. Hupe was the *sole* heir to the estate and was preferred over all others interested in becoming the personal representative. See, Utah Code Ann. §75-3-203 (1997) (giving priority to heirs of the estate in absence of a probated will or surviving spouse). Even the Editorial Board Comment Jeff refers to in his Opposition states that a personal representative has a fiduciary duty to seek probate. §75-3-719 Ed. Bd. Comment (cited in Jeff's Memorandum, p. 5).

C. Until The Lost Will Was Admitted to Probate, The Estate Could Not Be Concluded.

Jeff makes every effort to convince this court that Mr. Hupe did not benefit the estate. However, this determination must be made by considering the facts at the time the services were rendered. Mr. Hupe took the most efficient and cost effective means of probating the estate and seeking resolution of questions regarding the validity of the lost will. Jeff merely wishes he had not been forced to meet his legal obligation of proving the validity of the lost will. By seeking probate and defending the estate in consideration of a lost will, Mr. Hupe insured that the testator's intent is followed.

Jeff refers to Estate of Ambers, 477 N.W.2d 218 (N.D. 1991) as instructing in the issue of attorney fees for a personal representative. (Jeff's Memorandum, p. 3). However, the facts are dissimilar. In Ambers the challengers to the estate claimed that a 1955 will should control over a 1989 will, claiming undue influence. The court points out that the challengers used a contingency fee arrangement with the devisees of the 1955 will, seemingly indicating that the challengers had no real interest in justly determining the testator's intent. Mr. Hupe is not similar to the

challengers in Ambers. In fact, Mr. Hupe resembles the individual nominated as personal representative whom the court awarded attorney fees against the challengers.

Jeff argues that Mr. Hupe was never nominated as personal representative and therefore the cases we cite were not effective because they all deal with persons appointed or nominated in wills. (Jeff's Memorandum, p. 4). Jeff emphasized the Arizona Supreme Court's statement that "[e]ven if the will is challenged before it is admitted to probate and a personal representative appointed, the personal representative named in the will has the duty to defend in a will contest." In re Killen, 188 Ariz. 569, 937 P.2d 1375 (1996). However, had Mr. Hupe prevailed at trial, then the cases cited in his memorandum would apply equally to Jeff Hupe. The only difference in application of the case law is the issue of who was proposing a will. It is not logical to say that a proponent of a will who does not prevail may, nevertheless, be awarded attorneys fees but not an opponent of a will. This argument particularly lacks credibility in light of the fact that no will or copy of a will was ever presented to the court.

Mr. Hupe's actions ultimately benefited the estate. The purpose and policy of the Probate Code is "to discover and make effective the intent of a decedent in distribution of his property" and to do so in an efficient and speedy manner. Utah Code Ann. §75-1-102(2)(b) and (c). Again, in looking at the facts at the time of Mr. Hupe's services, Mr. Hupe used all possible means to determine the intent of Jamie Hupe in an efficient and speedy manner. After filing for informal probate, Mr. Hupe moved for summary judgment in order to efficiently determine the validity of the lost will.

II. A MOTION FOR ATTORNEYS FEES IS NOT WAIVED SO LONG AS IT IS MADE PRIOR TO THE SIGNED ENTRY OF JUDGMENT.

In a recent Utah case the Supreme Court set out a bright line test for the time when a motion for attorneys fees must be made. In Meadowbrook, LLC v. Flower 343 Utah Adv. Rep. 27 (Utah, 1998), the court states that the time in which a motion for attorneys fees must be filed is the signed entry of final judgment. The court noted three policy reason for its decision. First, requiring parties to present evidence of attorneys fees at trial would contravene judicial economy. Second, determination of reasonable attorneys fees is an issue generally left to the discretion of the court. Third, there must be a time of finality when a claim for attorney fees must be raised or waived. "That time is the signed entry of final judgment." Id. At 29, citing Fair Housing Advocates Ass'n v. James, 682 N.E.2d 1045, 1047 (Ohio Ct. App. 1996).

CONCLUSION

In this case Mr. Hupe was acting as the nominee personal representative in his status as sole intestate heir of the estate. Before a distribution of the estate could occur, a court order identifying the heir of the estate had to be entered. As the sole heir in an intestate succession, Mr. Hupe was qualified to be nominated as personal representative and absent Jeff Hupe's contest would have been so appointed. Mr. Hupe filed his petition not, in a rush to the courthouse steps, but more than six months after decedent's death. In a situation that could not be resolved by summary judgment, it was reasonable for Mr. Hupe to insist that the fact of a lost will be firmly established. He did so and the estate was benefited.

DATED this **23** day of July, 1998.


ELIZABETH S. CONLEY
PARSONS BEHLE & LATIMER
Attorneys for Petitioner Harold Hupe

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of July 1998, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY FEES to the following:

Leslie Van Frank, Esq.
COHNE RAPPAPORT & SEGAL
525 East 100 South, #500
Salt Lake City, Utah

Elizabeth Conley

No.
FILED
OCT 22 1998
By Third District Court
Deputy Clerk, Summit County *JO*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

IN THE MATTER OF THE ESTATE OF: : MINUTE ENTRY
HUPE, JAMIE PETER : CASE NO. 973300019
(Deceased)
:

For the reasons set forth below, Harold Hupe's Motion for Attorney's Fees is denied.

Mr. Hupe seeks an award of attorney's fees pursuant to the Utah Probate Code ("Code") section which states, "If any personal representative or person nominated as a personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorney's fees incurred." Utah Code Ann., Section 75-3-719 (1997). Mr. Hupe was neither the personal representative of the Estate of Jamie Hupe, nor a person nominated as a personal representative and is not, therefore, eligible to recover fees under this section. Contrary to the assertions made in Mr. Hupe's Memoranda in Support of his Motion for Attorney's Fees, he never held the status as a "nominee" to be the personal representative of Jamie Hupe's Estate. A nominee, to be a personal representative, is a person whose

candidacy for appointment is the result of an act of an individual and not by operation of law. This distinction is reinforced in Utah Code Ann., Section 75-3-203, which establishes priority among those seeking appointment as personal representative. This section consistently uses the term "nominate" or one of its allied forms, in the context of describing the acts of individuals, be they decedents speaking through a will, minors, or conservators. A nominee refers, in almost every context, legal or otherwise, to a specific person designated by name. As used in the Code, a nominee can be distinguished from a class of persons defined by the nature of their relationship to a decedent who are rendered eligible for designation as a personal representative by operation of law.


The distinction between nominees and candidates for personal representative who acquire their status by operation of law can be harmonized easily by the statutory objectives of Utah Code Ann., Section 75-3-719. A bona fide nominee, having been expressly singled out by a decedent to serve as personal representative, is likely to feel duty-bound to resist challenges to the decedent's express desires.¹ When made in good faith, a nominee's defense of

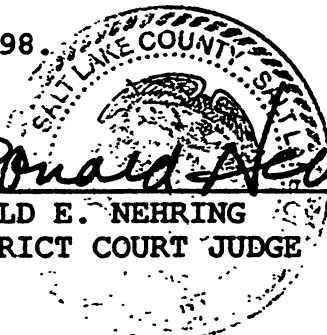
¹Estate of Ambers, 477 N.W.2d 218 (N.D. 1991), does not alter this observation. In that case, the alleged nominee's claim to status as personal representative, together with his assertion of entitlement to attorney's fees based on that claim were rejected because the decedent's will and the personal representative's nomination were fraudulently procured.

his claim to be appointed personal representative is, therefore, subject to the provisions of Utah Code Ann., Section 75-3-719. Moreover, I am persuaded of the merits of the argument made by Jeffrey Hupe that while a fiduciary duty inevitably attaches to a nominee, the same cannot be said for a candidate as personal representative who has acquired his status by operation of law.

Jeff Hupe's counsel shall prepare an Order consistent with this Minute Entry.

Dated this 16 day of October, 1998.


RONALD E. NEHRING
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 22nd day of October, 1998:

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**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH**

IN THE MATTER OF THE ESTATE OF

**HUPE, JAMIE PETER,
(Deceased)**

**ORDER DENYING MOTION
FOR ATTORNEYS FEES**

Case No. 973300019ES

The motion of Harold Hupe for attorneys fees having come before the Court, the Court having reviewed the parties' memoranda and having previously entered its minute entry denying the same, and for good cause otherwise appearing,

IT IS HEREBY ORDERED that Harold Hupe's Motion for Attorneys Fees is denied.

DATED this _____ **day of October, 1998.**

BY THE COURT:

**Ronald E. Nehring
District Court Judge**

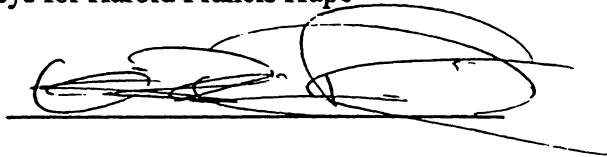
**APPROVED AS TO FORM:
PARSONS, BEHLE & LATIMER, P.C.**

**Elizabeth S. Conley, Esq.
Attorneys for Harold Hupe**

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing document
was hand-delivered on this 21st day of October, 1998, to the following:

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Attorneys for Harold Francis Hupe

A handwritten signature in black ink, appearing to be "Kent B. Alderman", written over a horizontal line.

F:\LESLIE\OCT98\HUPEORD.OCT

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

* * * * *

In the Matter of the Estate of

JAMIE HUPE

Deceased.

**MOTION TO RECONSIDER
DENIAL OF
ATTORNEY FEES**

Case No. 973300019 ES

* * * * *

Harold Hupe ("Mr. Hupe"), by and through his counsel, submits the following MOTION TO RECONSIDER DENIAL OF ATTORNEY FEES.

INTRODUCTION

Mr. Hupe requests this Court reconsider its denial of attorney fees and grant him attorney fees for the following reasons. First, the Utah Uniform Probate Code requires award of attorney fees to personal representatives for probate proceedings prosecuted or defended in good faith, regardless of their outcome. Second, Mr. Hupe is entitled to attorney fees because his actions to probate the estate benefited the estate as a whole. Third, equity demands that the estate bear the

cost of the decedent's own failure to make sure that his testamentary intent was properly documented. Fourth, denial of attorney fees in this situation discourages interested persons from involving themselves in probate proceedings and threatens the Uniform Probate Code's policy objective of ensuring that the testamentary intent of decedents is promptly and accurately determined through probate proceedings.

ARGUMENT

I. THE UTAH UNIFORM PROBATE CODE ENTITLES PERSONAL REPRESENTATIVES TO BE REIMBURSED FOR THE EXPENSES OF GOOD FAITH PROBATE PROCEEDINGS, REGARDLESS OF THE OUTCOME OF THOSE PROCEEDINGS.

The Utah Uniform Probate Code states: "If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorneys' fees incurred." Utah Code Ann. § 75-3-719 (1997). This statutory language clearly contemplates that there will be meaningful provision for award of attorneys fees on a case-by-case basis, and not that attorney fees will be awarded by law to whichever party ultimately prevails in the probate proceeding. Nonetheless, Jeff Hupe has argued, and the court has apparently accepted, that attorneys fees should not be awarded to a person with priority for appointment under the statute who comes forward to probate the will but is not ultimately appointed as the personal representative. This result is both inequitable and contrary to the clear policy objects of the Utah Uniform Probate Code.

Mr. Hupe came forward six months after the decedent's death to probate the estate. At the time Mr. Hupe applied for appointment as personal representative, Jeff Hupe had not produced the holographic will or initiated any probate proceeding, and was not an interested person with standing to participate in the probate proceedings. Thus Mr. Hupe was the only person with standing to act as personal representative and prosecute probate proceedings on behalf of the estate. To argue, in hindsight, that the estate should not reimburse Mr. Hupe's attorneys fees because the court ultimately admitted a later-discovered will into probate that named Jeff Hupe, instead of Mr. Hupe, as the personal representative, creates the dangerous precedent that applicants for personal representative whose applications are successfully challenged may not seek reimbursement for legal expenditures made in good faith to probate the estate in the face of questionable alleged wills. Such a rule would force personal representatives in intestacy to choose between withdrawing from the proceedings and allowing the proponents of alleged testamentary instruments to go forward uncontested, or proceeding with probate in the knowledge that if the challenge to probate is successful, he will be forced to bear all of the costs of probate.

II. MR. HUPE IS ENTITLED TO ATTORNEY FEES BECAUSE HIS ACTIONS TO PROBATE THE ESTATE WERE TO THE BENEFIT OF THE ESTATE AS A WHOLE.

Mr. Hupe is also entitled to attorney fees in this case because his actions in probating the intestate estate benefited the estate as a whole. Jeff Hupe cites numerous cases denying attorney fees to unsuccessful individual claimants in contested probate proceedings. However, these

cases are dissimilar from the Hupe case because they involved disputes solely over the distribution of estate assets under uncontested testamentary instruments. In contrast, the issue in this case was the validity of a lost holographic will last seen in the hands of the decedent. Numerous states have held that “[t]he services of counsel in preventing distribution under invalid testamentary instruments must be held to confer a benefit upon the estate.” The New Mexico Appeals Court dealt with this issue in In Re Estate of Foster, 102 N.M. 707, 713, 699 P.2d 638, 644 (N.M. Ct. App. 1985). In that case, the New Mexico Appeals Court held that litigation to contest an alleged will benefited the decedent’s estate as a whole because such litigation “protected the assets of the estate from being distributed pursuant to an invalid will.” Id., 699 P.2d at 644. Similarly, In Re Estate of Kaschor, 637 P.2d 855 (Okl. 1981) litigation to prevent the probate of an invalid will is a benefit to the entire estate. See In Re Limberg’s Estate, 257 App. Div. 827, 11 N.Y. S. 2d 908, 909 (1939).

Jeff Hupe appears to argue that Mr. Hupe’s actions were for his own benefit, rather than for the benefit of the estate, merely because Mr. Hupe would have been the decedent’s heir in intestacy. However, this argument applies equally to Jeff Hupe, who was the sole heir under the lost holographic will. The Uniform Probate Code gives priority as personal representative to the heirs or devisees of decedents, and it is thus inevitable that participants in probate proceedings will act both in the estate’s interest and in their own interest. Jeff Hupe’s suggestion that Mr. Hupe’s status as an heir in intestacy should bar him from recovering fees creates a dangerous precedent and runs counter to the basic structure of the Uniform Probate Code, which mandates

that the participants in probate proceedings must be limited to those persons with a financial interest in the proceedings. Furthermore, it contradicts established case law in Utah and other jurisdictions mandating award of attorney fees to persons whose actions benefit the estate in probate.

III. EQUITY DEMANDS THAT THE ESTATE RATHER THAN MR. HUPE BEAR THE COST OF THE DECEDENT'S OWN FAILURE TO MAKE SURE THAT HIS TESTAMENTARY INTENT WAS PROPERLY DOCUMENTED.

Equity also demands that Mr. Hupe be reimbursed for fees incurred to probate the estate in this case. A fundamental tenet of probate law is that the estate should bear the necessary costs of its own administration. The cost of contesting the alleged lost holographic will is a cost created by the estate in this case, and not a cost created by Mr. Hupe. Mr. Hupe was not responsible for causing this proceeding. The ultimate responsibility for this proceeding rests with the decedent, who either failed to produce a will or lost or destroyed the alleged holographic will.

Jeff Hupe argues that because Mr. Hupe's petition for appointment as personal representative was ultimately defeated in the course of the probate proceedings, Mr. Hupe had no fiduciary duty to probate the estate and is not entitled to reimbursement for any of the necessary probate expenses. However, the result of this position is that, because of Jeff Hupe's ultimately successful challenge, the estate itself is relieved of any responsibility for its own probate costs. This result is both inequitable and contrary to the principle that the estate should pay its own necessary costs of administration in probate.

IV. DENIAL OF ATTORNEYS FEES IN THIS SITUATION CREATES A DISINCENTIVE FOR HEIRS TO INVOLVE THEMSELVES IN PROBATE PROCEEDINGS, AND THREATENS THE UNIFORM PROBATE CODE'S POLICY OBJECTIVE OF ENSURING THAT THE TESTAMENTARY INTENT OF DECEDENTS IS PROMPTLY AND ACCURATELY DETERMINED THROUGH PROBATE PROCEEDINGS.

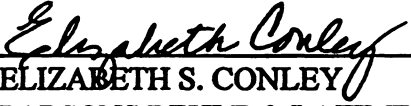
Finally, denial of attorney fees in this case contradicts the purposes of the Utah Uniform Probate Code. The purpose of the Utah Uniform Probate code is to “to discover and make effective the intent of a decedent in distribution of his property.” Utah Code Ann. § 75-1-102(b) (1996). A key means to accomplish this purpose is the involvement of interested persons as personal representatives to administer the estate and pursue probate proceedings. By denying Mr. Hupe’s attorney fees, this court has established the precedent that the party who prevails in any contested probate proceeding will automatically be awarded attorney fees. This precedent contradicts that clear language of the Utah Uniform Probate Code, which entitled personal representatives to reimbursement of all necessary expenses incurred, whether in successful or unsuccessful actions. More fundamentally, however, this ruling means that interested persons who seek appointment as personal representative must bear the risk that if their appointment is successfully contested, the estate will have no obligation to pay any of their attorney fees. Imposing this level of risk on individuals seeking appointment as personal representative creates a strong disincentive for interested persons to come forward in any probate proceedings that they suspect might be contested. Such a result seriously undercuts the stated purpose of the Uniform Probate Code by creating a situation in which parties undertaking probate of intestate wills could

do so only at the risk of incurring unreimbursed legal fees in the event a later-discovered will was ultimately accepted into probate.

CONCLUSION

Denial of attorneys fees to Mr. Hupe is contrary to the plain language and policy objectives of the Utah Uniform Probate Code. Furthermore, it creates an inequitable result insofar as it requires Mr. Hupe to pay necessary costs of administering the estate in probate. Jeff Hupe's characterization of Mr. Hupe's actions as self-serving is based solely on the court's subsequent determination to admit the lost will into probate, and this characterization does not reflect the reality of the case at the time these actions were taken. This is not a case, like those Jeff Hupe has cited, in which the only dispute is over division of property under an uncontested testamentary instrument. Rather, Mr. Hupe's actions in contesting the lost holographic will were a good faith effort to ensure that the estate was distributed in accordance with the testamentary intent of the decedent. For the above reasons, Mr. Hupe respectfully requests this court reconsider its order denying attorney fees.

DATED this 26th day of October, 1998.


ELIZABETH S. CONLEY
PARSONS BEHLE & LATIMER
Attorneys for Petitioner Harold Hupe

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October, 1998, I caused to be hand delivered, a true and correct copy of the foregoing **MOTION TO RECONSIDER DENIAL OF ATTORNEY FEES** to the following:

Leslie Van Frank, Esq.
COHNE RAPPAPORT & SEGAL
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_____

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Attorneys for Petitioner, Jeffrey Paul Hupe

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH**

**IN THE MATTER OF THE ESTATE OF

HUPE, JAMIE PETER,
(Deceased)**

**MEMORANDUM IN OPPOSITION TO
HAROLD HUPE'S MOTION TO
RECONSIDER DENIAL OF
ATTORNEYS FEES**

- ORAL ARGUMENT REQUESTED -

**Case No. 973300019ES
Hon. Ronald E. Nehring**

Jeffrey P. Hupe ("Jeff"), by and through his undersigned counsel, files the following Memorandum in Opposition to Harold Hupe's ("Harold") Motion to Reconsider Denial of Attorneys Fees.

**A. HAROLD'S MOTION TO RECONSIDER SHOULD BE DENIED BECAUSE
IT IS NOTHING MORE THAN AN ATTEMPTED
SECOND "BITE AT THE APPLE"**

While motions to reconsider are allowed under Rule 54(b) when a final judgment has not yet been entered, a litigant who hopes to change the court's mind should be prepared to demonstrate that at least one of the following factors is present:

(1) the matter is presented in a ‘different light’ or under ‘different circumstances;’ (2) there has been a change in the governing law; (3) a party offers new evidence; (4) “manifest injustice” will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1311, (Utah Ct.App. 1994), *quoting State v. O’Neill*, 848 P.2d 694, 697, fn. 2 (Utah Ct.App.) *cert den.*, 859 P.2d 585 (Utah 1993). Harold has not only failed to cite to this controlling law, he has also completely failed to demonstrate that any of the *Trembly* factors is present.

The arguments that Harold has raised in his Motion to Reconsider either could have been raised in the original Motion for Attorneys Fees, or were fully briefed that original motion and have already been rejected by this Court. As such, Harold has failed to meet the requirements of Rule 54(b) for reconsideration of his original motion.

**B. HAROLD’S ARGUMENT THAT HE IS ENTITLED TO HIS FEES
BECAUSE OF HIS ALLEGED PRIORITY FOR APPOINTMENT
AS PERSONAL REPRESENTATIVE UNDER THE PROBATE CODE
HAS ALREADY BEEN REJECTED BY THIS COURT.**

Harold asserts in his both his first and fourth points set forth in his Motion to Reconsider that as the applicant for status as personal representative of the estate, he is entitled to his attorneys fees. The Court has already considered and rejected this argument. As the Court has recognized and ruled, the statute on which Harold has predicated his request for attorneys fees allows “personal representatives” and “persons nominated as personal representative” their reasonable attorneys fees incurred. U.C.A. §75-3-719 (1997). Harold is neither — he was not appointed as personal

representative, nor Jamie ever nominate him as personal representative. Thus, Harold is not eligible under the statute for an award of fees.¹

Harold has not challenged the Court's careful statutory analysis of this point, but rather argues that the Court's ruling creates a disincentive for interested persons to seek intestacy probate, because they may be forced in the face of a proffered will to choose from withdrawing from the proceedings or risk bearing their own attorneys fees in an unsuccessful challenge to a will. (See Harold's Motion at pps. 3 and 6). On its face, this may be an argument for lobbying the legislature to change the statute. But it is not a basis on which Harold can urge this Court to ignore the statutory language of §75-3-719 and reverse its prior ruling against Harold.

Moreover, an analysis of Harold's argument reveals that Harold does not take into consideration the opposite effects of his risk analysis. By allowing attorneys fees to be paid out of the estate to unsuccessful will challengers, the law would *encourage* those who stand to benefit from the rejection of a will to raise even the most attenuated challenges to its probate. Thus, *both sides of all* will contests would funded solely at the expense of the estate. As Jeff explained in his prior opposition to Harold's original motion, the law does not support Harold's position. (See pps. 7-9 of Jeff's Memorandum in Opposition to Harold's Motion for Attorney's Fees). Harold has yet to cite to a case in which an unsuccessful will contestant who was not a court-appointed personal representative or nominated as the personal representative in the will has been awarded his attorneys

¹ In his reconsideration motion, Harold repeats his assertion that he was the only person with standing to act as personal representative and prosecute probate proceedings on behalf of the estate. (Harold's Motion to Reconsider, p. 3). This is incorrect. As Jeff pointed out in his opposition to Harold's original motion, as the person nominated in Jamie's Will as personal representative, Jeff had not only standing, but priority over Harold for appointment as personal representative. (Jeff's Memorandum in Opposition to Harold's Motion for Attorney's Fees, p. 9)

fees. None of the cases that Harold cited in his original motion awarded attorneys fees to such an individual (See p. 8 of Jeff's Memorandum in Opposition to Harold's Motion for Attorney's Fees). Nor do any of the three new cases that Harold has cited. *Estate of Foster*, 102 N.M. 707, 699 P.2d 638 (1985) awarded attorneys fees to will contestants, several of whom had been appointed by the court as special co-administrators, who were successful in preventing the will from being probated. *In re Limberg's Estate*, 257 App.Div. 827, 11 N.Y.S.2d 908 (1939) also involved the award of attorneys fees to the successful challengers. And as for *Estate of Kaschor*, 637 P.2d 855 (Okla. 1981), the court *denied* attorneys fees to the will challengers, even though they were successful.

Finally, Harold's argument that the Court's ruling creates a disincentive for interested persons in general to challenge wills is wholly disingenuous in the context of this litigation. Harold himself had tremendous incentive to challenge Jamie's Will -- if Harold had succeeded in his efforts to challenge Jamie's Will, Harold would not only have been entitled to have the estate reimburse him his fees, but Harold would have inherited Jamie's entire estate. The risk that Harold undertook in this case is no different than that which many civil litigants undertake -- if you win, you might be awarded your attorney's fees, but if you lose, then the court will not award your fees.

**C. HAROLD'S ARGUMENT THAT HE IS ENTITLED TO HIS FEES
BECAUSE HE BENEFITED THE ESTATE HAS ALREADY BEEN REJECTED.**

Although the benefit that Harold provided to the estate was challenged in the original motion that Harold filed and ultimately rejected by this Court, Harold cites to three new cases in his Motion to Reconsider in support of his proposition that one who benefits the estate is entitled to an award of his fees. As set forth above, none of these three new cases involved the award of attorneys fees to individuals who unsuccessfully challenged a will. One of the cases denied attorneys fees to

successful will challengers. *Estate of Kaschor, supra*. The other two cases indicate that a court may award attorneys fees under its equitable powers, but to will contestants who are *successful* in their efforts to prevent an *invalid* will from being probated. *In re Limberg's Estate, supra*; *Estate of Foster, supra*.

An analysis of *Foster* and *Limberg* reveals that these courts were willing to award attorneys fees to the successful will contestant because it would be unfair to require one will contestant to bear the burden of all the attorneys fees at the expense of the other intestate heirs who benefitted from the will contestant's efforts. As the court in *Limberg* stated:

If an allowance out of the general assets were denied, an anomalous situation would ensue. A contestant would then have to bear the expense for the attorneys' fees out of his own share despite the fact that his efforts resulted in equal benefit to all remaining distributees, who would thereupon profit by their inaction.

In re Limberg's Estate, 11 N.Y.S.2d at 908. The *Foster* court quoted *Limberg*, explaining that all of the intestate heirs had benefited from the services of the challenging attorneys. *Estate of Foster*, 699 P.2d at 646.

Charging the estate with the attorneys fees in the circumstances described in *Foster* and *Limberg* is perhaps reasonable under the circumstances set forth in those cases, in that one intestate heir who successfully challenges a will does not suffer at the expense of the others that he has benefitted. But it does not follow *a fortiori* that the services of counsel that attempted *unsuccessfully* to prevent distribution under a *valid* will, as are the circumstances in the case at bar, are of similar benefit. Indeed, the court in *Estate of Kaschor, supra*, denied the award of attorneys fees to even

successful will contestants, noting that “benefit” under the Oklahoma cases means an increase in the assets of the estate. *Estate of Kaschor*, 637 P.2d at 857.

Harold did nothing in this case to increase the assets of the estate. Nor did Harold’s actions benefit any other heirs. If anything, Harold’s actions harmed Jeff, the sole heir to the estate. And Harold did everything he could to defeat Jamie’s Will -- a document which this Court has found to be a valid testamentary instrument. In reality, what Harold sought to do was to effectuate a change in who would receive the assets of the estate. While preventing an estate from being distributed unlawfully may provide a benefit to the estate, *Estate of Foster*, 699 P.2d at 646, Harold fought to *prevent* Jamie’s estate from being distributed in the lawful manner in which Jamie intended. As explained above, Harold’s position that attorneys fees should be paid out of the estate to unsuccessful will challengers would encourage those who stand to benefit from the rejection of a will to raise even the most attenuated challenges to its probate. Harold’s reargument of this issue should be rejected.

**D. HAROLD HAS OFFERED NO FACTS OR CIRCUMSTANCES
THAT WOULD JUSTIFY THE COURT’S EXERCISE OF
ITS EQUITABLE POWERS TO AWARD ATTORNEYS FEES.**

~~Without~~ Without authority, Harold asserts that a fundamental tenant of probate law is that the estate should bear the necessary costs of its own administration. Harold goes on to assert that unless he is awarded his own attorneys fees, the estate itself will be relieved of any responsibility for its own probate costs and that that would be inequitable. (Harold’s Motion to Reconsider, p. 5). Harold is flatly wrong.

Attorneys fees may be awarded under the Probate Code under the very specific circumstances outlined in §75-3-719. This court has already convincingly ruled that Harold does not qualify under

that statute for an award of fees. While *Estate of Foster*, 699 P.2d at 645, recognizes that the New Mexico probate statutes are supplemented by court's inherent equitable powers to award fees, *Foster* also notes that the award of fees under the court's equitable powers "depends on the facts of the case and the exercise of equitable power must be used with discretion. An award of attorneys fees is not automatic even if there is no dispute about the benefit [provided to the estate]." *Estate of Foster*, 699 P.2d at 646.

In his invocation of the Court's equitable powers in this case, Harold has offered nothing other than his assertion that it was Jamie's fault that the Will was lost, and that since estates should bear the necessary costs of their own administration, it would be unfair for Harold to have to pay his own attorneys fees.² But in every will contest there is an element of fault in the testator's failure to effectuate his intent in a manner in which there could be no challenge to the will. Under Harold's argument, an award of attorneys fees to unsuccessful will challengers would be automatic, for in every will contest, the testator (and thus the estate) would have been responsible for causing the proceeding. Even if this Court were willing to exercise its equitable powers under a *Foster*-type analysis, there are no facts in this case sufficient to justify overriding the Probate Code's otherwise clear instructions about who is entitled to attorneys fees in a will contest.³

² Harold also asserts that unless he is awarded his fees, the estate itself will be relieved of any responsibility for its own probate costs. (Harold's Motion to Reconsider, p. 5). Harold forgets Jeff's own (substantial) expenditures in advancing Jamie's Will, which will ultimately be paid directly or indirectly from the estate. Under the circumstances of this case, since Jeff is the estate's sole heir, what Harold is really asking is that *Jeff* pay Harold's attorney's fees.

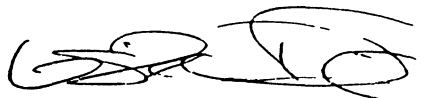
³ As Jeff noted in his opposition to Harold's original motion, Harold failed to raise the attorneys fees issue in his pre-trial pleadings or at trial. Had he done so, the facts that would be
(continued...)

CONCLUSION

Harold has failed to satisfy Rule 54(b)'s requirements for reconsideration of his original motion. As a result, and for the reasons set forth above, Harold's Motion to Reconsider Denial of Attorneys Fees should be denied.

DATED this 30th day of October, 1998.

COHNE, RAPPAPORT & SEGAL, P.C.

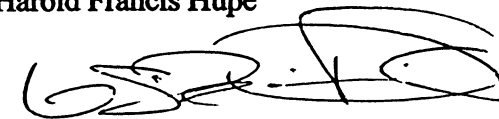


Leslie Van Frank
Attorneys for Jeffrey Paul Hupe

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing document was hand-delivered on this 30th day of October, 1998, to the following:

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³(...continued)
necessary to defend against (or, indeed, to justify) the exercise of the Court's equitable powers could have been explored. Having failed to raise the attorneys fee issue until after the trial was completed, Harold has waived it.

In The District Court Of The Third Judicial District

~~Salt Lake County~~, State of Utah

Summit

In the matter of the
Estate of Hope Plaintiff,

vs.

Defendant.

MINUTE ENTRY

Case No. *97330019*

Harold Hope's
The _____ Plaintiff's _____ Defendant's

Motion *for Reconsideration*

Is _____ Granted _____ Denied.

Comments: _____

Plaintiff

Defendant

To Prepare order.

DATED

