

1980

# Valley Bank & Trust Company v. Helen Chlepa : Brief of Respondent

Utah Supreme Court

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Richard c. Dibblee; Attorney for Appellant; Harold A. Hintze; Attorney for Respondant;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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VALLEY BANK & TRUST COMPANY, :  
the Personal Representative :  
with Will Annexed of the :  
Estate of Penelope Kopoulos, :

Plaintiff- :  
Appellant, :

Case No. 16787

vs. :

HELEN CHLEPAS, :

Defendant- :  
Respondent. :

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BRIEF OF RESPONDENT

---

APPEAL FROM THE JUDGMENT OF  
THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
HONORABLE DEAN E. CONDER, JUDGE

---

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FILED

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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VALLEY BANK & TRUST COMPANY,	:	
the Personal Representative	:	
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vs.	:	
	:	
HELEN CHLEPAS,	:	
	:	
Defendant-	:	
Respondent.	:	

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BRIEF OF RESPONDENT

---

STATEMENT OF THE CASE

Plaintiff, as the personal representative with Will annexed of the estate of Penelope Kopoulos, brought an action to determine the ownership of two certificates of deposit issued in the name of the deceased, Penelope Kopoulos, and the defendant Helen Chlepas, as joint tenants with full rights of survivorship.

DISPOSITION IN THE LOWER COURT

The District Judge, Honorable Dean E. Conder, sitting without a jury, found the issues in favor of the defendant and against the plaintiff. The Trial Court entered Findings of Fact and

Conclusions of Law, and based thereon entered a Judgment awarding defendant the certificates of deposit free and clear of any claim by the estate.

#### RELIEF SOUGHT ON APPEAL

Appellant seeks to have this Court reverse the Judgment entered in this matter. Respondent seeks to have this Court affirm the decision of the District Court.

#### STATEMENT OF FACTS

Penelope Kopoulos died testate on February 24, 1977. At the time of her death there existed two savings certificates (total face value of \$60,000.00) held in joint tenancy with full rights of survivorship with the defendant Helen Chlepas. Those certificates had been taken out three years prior to the death of Penelope Kopoulos.

Penelope was married to George Kopoulos. Both were of Greek ancestry and lived in the United States from 1934 until their respective deaths. George Kopoulos died in 1973. At the time of his death a joint English will of George and Penelope was admitted to probate. In addition, the following joint tenancy accounts existed between George and Penelope and passed to Penelope upon George's death by right of survivorship:

- 1) A Lockhart Co. Diamond Thrift Certificate  
No. 7216 for \$2,000 to George J. Kopoulos  
or Penelope Kopoulos.
- 2) An American Savings & Loan Association

Certificate No. HOCD40267 for \$10,014.82  
to George J. Kopoulos and Penelope Kopoulos.

- 3) Deseret Federal Savings & Loan Association  
Savings Certificate No. 311055 for \$18,369.91  
to George J. Kopoulos and Penelope Kopoulos.
- 4) A joint tenancy certificate with George  
Kopoulos which was cashed to open a joint  
checking account with Helen Chlepas as  
joint tenant.

Penelope served as the Executrix of George's estate and  
signed the Affidavit of Appraisal for inheritance tax purposes  
regarding the joint tenancy certificates.

After George's death Penelope placed their residence for  
sale and signed all of the customary English-written documents  
relating to listing, sale and conveyance of the property as  
follows:

- 1) Signed a listing agreement with Liljenquist  
Realty (P. 3 of Exhibit 8).
- 2) Signed an Earnest Money Receipt and Offer  
to Purchase (Diamant's testimony).
- 3) Signed a Warranty Deed conveying the  
property (Diamant's testimony).
- 4) Signed a Receipt for Disbursement checks  
and seller's Closing Statement (Exhibit 8).

The proceeds from the sale of this residence were used by  
Penelope to purchase the two joint tenancy certificates herein



sued upon. The joint tenancy was created by Penelope with Helen Chlepas. Helen was the goddaughter of Penelope, Penelope having no children of her own and no other close relatives. Possession of the joint tenancy certificates was given to Helen Chlepas on the day of their creation and remained with her throughout Penelope's remaining life and until placed into court for determination of ownership. The interest on the joint tenancy accounts was used during the lifetime of Penelope to pay her living and maintenance expenses.

#### ARGUMENT

POINT I: THE TRIAL COURT PROPERLY APPLIED THE  
DECISIONS OF THIS COURT CONSTRUING  
UTAH CODE ANNOTATED, SECTION 75-6-104(1)<sup>1</sup>

The applicable statutory provision governing this case is Section 75-6-104(1) of Utah Code Annotated which provides as follows:

Sums remaining on deposit after the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account was created.

(emphasis added)

A mere preponderance of evidence to rebut the presumption of rightful survival ownership is insufficient--the statute requiring that the presumption must be overcome by "clear and convincing" evidence.

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<sup>1</sup> Erroneously cited in Appellant's Brief as Section 75-6-105(1).

"Clear and convincing" evidence was defined by this court in the case of Greener v. Greener, 160 Utah 571, 212 P.2d 194 (1949). The Greener case involved a similar fact situation to the case on appeal herein in that the validity of a joint account with rights of survivorship was being challenged. This Court, following the common law rule, announced the intent of the parties, as established by the written joint tenancy agreement, would be presumed and upheld unless it was shown by "clear and convincing" evidence that the parties intended to have a different effect than that expressed in the writing. In a long discussion as to the meaning of "clear and convincing" evidence, this Court stated:

...that proof is convincing which carries with it not only the power to persuade the mind as to the probable truth or correctness of the fact it purports to prove, but has the element of clinching such truth or correctness. Clear and convincing truth clinches what might be otherwise only probable to the mind...

\* \* \*

But for the matter to be clear and convincing to a particular mind it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion. A mind which was of the opinion that it was convinced and yet which entertained, not a slight but a reasonable doubt as to the correctness of its conclusion, would seem to be in a state of confusion.

Id. at 204-05.

In the case of Paulsen v. Coombs, 123 Utah 49, 253 P.2d 621 (1953) this Court held that a written contract would only be found void for mistake where there was clear and convincing evidence, and that in order to be clear and convincing the

evidence "...must be such that there is not serious nor substantial doubt what the true intent is." Id. at 624.

In addition, the "clear and convincing" evidence must show present intention to create other than joint ownership with survivorship rights at a specified time, that time being "...at the time the account was created," and evidence or inference of subsequent different intent is irrelevant. The fact that the joint creator of the joint tenancy account may have changed her mind as to her intentions is irrelevant to the validity of the joint tenancy at issue here. The rule in Section 75-6-104(1) is essentially the same as the common law prior to 1977. In Tangren v. Ingalls, 12 Utah 2d 388, 367 P.2d 179 (1961), the Court enunciated a rule similar to the present statute, and noted that

...such rule is applicable whether the parties are living or where death has intervened. Nor would the fact that the original owner may have changed his mind after the creation of the account alter the applicability of that rule.

Id. at 184.

In the Tangren case the decedent had established a joint account with the defendant. Four days before the decedent's death he filed an action against the defendant seeking an adjudication that the accounts were his sole property and that the defendant had no interest therein. Notwithstanding this obvious change of mind on the part of the decedent, the Court upheld the validity of the joint accounts and, as evidenced by the above-quoted cite from said case, held that the crucial time at which

the intent of the decedent is relevant is the time of the creation of the account and a subsequent change of mind does not affect the validity of the joint account.

A recent case directly in point on this issue is Pagano v. Walker, 539 P.2d 452 (Utah 1975). In that case the evidence showed that prior to her death the deceased placed \$73,544.00 in joint tenancy with one of her daughters. Four other children of the deceased later came into court and testified that the surviving joint tenant told each of them prior to their mother's death that the mother had stated she wanted the joint tenant daughter to divide the proceeds equally among all the children. The trial court accepted such statements as evidence of an intent not to pass ownership by survivorship to the joint tenant, and imposed a trust on the money for the benefit of all the children. This Court reversed that decision and upheld the joint account stating:

The joint account is a tripartite contract between the bank and the joint depositors; and it is also a contract between the joint depositors themselves. Upon a showing of its due execution, it is entitled to the presumption of validity and should be given effect according to its terms. That is, it creates an ownership of the funds in joint-tenancy, with a right of survivorship so that upon the death of one, the other becomes the owner of the funds. It is of course subject to attack only on the same basis as any other written agreement or contract, by showing that because of fraud, duress, undue influence, mistake, incapacity or other infirmity that in equity and good conscience it should not be enforced. But because of the verity accorded written

instruments, its effect can be overcome only by clear and convincing evidence.

\* \* \*

In order to establish such a trust, [destroy the joint-tenancy with one daughter and divide it up among all the children] it would have to appear that such was the intention of the settlor at the time of the creation of the joint account. That is, if the account was originally created as a true joint account with right of co-ownership and survivorship in Mary [daughter], as it appears to have been, that status would not be changed even if the mother Lucy had at some subsequent time orally made the hereinabove quoted declaration to Mary.

Id. at 454-55. (emphasis is that of the Court and not added by this writer)

The estate's sole evidence in this case that the deceased did not intend to create a joint tenancy account and that her godchild Helen Chlepas received the funds by survivorship was the testimony, received over the objection of the defendant, that eleven days prior to her death the deceased allegedly met with an attorney for the purpose of preparing a new will (not the one herein admitted to probate) wherein she reallocated or made a different distribution of her estate than would be effective if the joint tenancy certificates remained in force at her death. The will was never prepared and never signed or executed. The trial court found, in regards to said evidence:

4. The estate introduced evidence that on or about February 13, 1977 (eleven days prior to her death), the decedent met with an attorney for the purpose of preparing a new Will and there gave instructions concerning the distribution of her property which, on its face, infers a different intent than manifest on the joint-tenancy certificates insofar as distribution of her entire estate is concerned. The proposed



new Will, however, was never prepared nor executed by the deceased prior to her death.

5. The estate offered no evidence of any intention at the time the joint accounts were opened to create a relationship any different than that expressed on the contracts themselves, to wit: that ownership of the certificates was in the deceased and the defendant as joint tenants with full rights of survivorship.

6. The court finds no evidence that at the time the accounts were created the deceased was acting under duress, fraud, undue influence or incapacity, or that the parties intended an agreement any different than that expressed on the face of the certificates. The court finds no evidence which would justify equitable reformation of the certificates.

Findings of Fact, Paragraphs 4, 5 and 6.

In doing so, the District Court correctly followed and applied the following rules laid down by this Court:

Tangren: "Nor would the fact that the original owner may have changed his mind after the creation of the account alter the applicability of that rule." Id.

Pagano: "In order to establish such a trust, it would have to appear that such was the intention of the settlor at the time of the creation of the joint account. That is, if the account was originally created as a true joint account with rights of co-ownership and survivorship in Mary, as it appears to have been, the status would not be changed even if the mother Lucy had at some subsequent time orally made the hereinabove quoted declaration to Mary." Id.

Not only did the estate fail to offer "clear and convincing" evidence of a different intent "at the time of creation of the account," the trial record shows evidence that the account was indeed established for purpose of creating a survivorship/ownership intent.

Under the most recent case of this Court dealing with the identical issues as are involved herein, "possession" of the passbook or certificates was a significant indicia of ownership/survivorship rights. In the case of McCullough v. Wasserback, 30 Utah 2d 398, 518 P.2d 691 (1974) the decedent created a joint tenancy account with the defendant four years prior to her death, and two weeks before she died and at a time when she was ill and going to the hospital she delivered possession of the certificates to the defendant. This Court, in upholding the validity of the joint tenancy account, said that such conduct (possession) was persuasive by noting:

If there is merit to plaintiff's [the estate] argument that Anna's [the deceased] keeping possession of the passbook and certificate shows an intention to retain ownership, there is also merit to defendant's [the survivor] argument that turning them over to her before she went to the hospital indicates recognition of the joint ownership and right of survivorship.

Id. at 694.

This Court in upholding the joint tenancy account further noted:

We can see no possible justification for saying that it was 'solely for convenience' in handling Anna's [the deceased] money to put it jointly in Joyce's [the survivor] name four years prior to going to the hospital, or to turn possession over to Joyce.

Id. at 694. (emphasis added)

In this case the deceased gave the passbooks to her god-daughter on the day they were created, and more than three years prior to her death, and the goddaughter had them in her possession

until placed into this Court for determination of ownership.

In addition, the record shows that the deceased was very close to her goddaughter, Helen Chlepas, and that said goddaughter was the natural object of her bounty and affection. Without any family or relatives to turn to, the deceased relied upon her religious obligation, right and responsibility of godmother and godchild relationship with Helen Chlepas, and Helen took an interest in and care of the deceased and a bond developed between them that was very evident in the record. Another relative testified and described the relationship between the deceased and Helen Chlepas as follows:

- Q. (By Mr. Hintze) Were you able to personally observe any type of a relationship existing between those two individuals?
- A. Do you mean before her death or after?
- Q. Before yes. Before Penelope's death.
- A. They were very close. In fact--shall I go further back like when Helen's husband died?
- Q. Summarize after the death of Mr. Kopoulos what you personally observed regarding those--
- A. She depended on Helen for everything. Her grocery shopping...
- Q. Just if you will, Mrs. Bowden, describe what you observed or what you heard in relationship to that apparent relationship.
- A. Well, I would go with Helen to Mrs. Kopoulos' house. Helen would take groceries to her because she was unable to go grocery shopping. She would ask Helen to do different things she had in her house. She used to talk to her privately and I could hear because I was just about next to her.



- Q. How often would you say, between the death of Mr. Kopoulos in 1973 to November of 1974, how often would you observe Helen and Penelope Kopoulos together?
- A. At least twice a week.
- Q. And would that usually occur at Mrs. Kopoulos' home or where?
- A. Just because she was really unable to travel unless Helen took her to a doctor's appointment or wherever she had to go. She depended on Helen to take her to these places.
- Q. Were you able to hear at any time any conversation or in that relationship between Helen and Penelope was described by either party?
- A. I don't understand that.
- Q. Well, you are familiar with the term Goddaughter?
- A. Yes. I sure am.
- Q. Are you Greek Orthodox?
- A. Yes. I am.
- Q. --by religion?
- A. Yes.
- Q. And did you understand what that term meant in the Greek Orthodox religion?
- A. Yes. I do.
- Q. You ever hear Mrs. Kopoulos speak to Helen wherein that relationship was discussed at all?
- A. Yes.
- Q. And where did that discussion occur?
- A. Oh, at the hospital, at Helen's home, up at the nursing home where the lady that was taking care of Mrs. Kopoulos--
- Q. That the same conversation, which I take it has occurred more than one time?

A. Many times.

Q. And would that be during what period of time?

A. Can't say specific time, but it was all the time.  
Trial Transcript, pp. 58-60.

The record shows that the deceased made numerous comments of her "intent" to "take care of Helen," an obvious reference to a bequest of some kind.

Q. (By Mr. Hintze) What did Mrs. Kopoulos say in regard to her Goddaughter?

A. To her Goddaughter? Just kept telling her-- begging her to stay with her because she had no one else. She depended on her to do things for her and not to leave her, because she didn't know where to turn to. Helen kept telling her we are not going to leave you. There is a lot of us here to take care of you. She called Helen words like Manaraki.

Q. A Greek word, meaning what now?

A. It's an endearment word, my dear, or darling, or something. But this is how she referred to Helen all the time.

Q. At any time in those conversations at Mrs. Kopoulos' home, or any time after George Kopoulos' death, and say prior to November of 1974, did you have occasion to ever hear any conversations between Mrs. Kopoulos and Helen Chlepas regarding whether or not Mrs. Kopoulos was going to take care of Helen?

A. Yes. She always made comments like that.

Trial Transcript, pp. 60-61.

After the creation of the joint tenancy accounts in November of 1974, the deceased prior to her death often referred to having left money to Helen:

Q. (By Mr. Hintze) Tell us when such conversations occurred. Is that the first time you can recall, as best as you can in dates?

A. ... And the minute we would walk in the door, she would say to Helen this word Manaraki again. Welcome my dear, or whatever. And she would say to her God bless her, and tell her that she was going to take care of her.

Q. How often did you hear that statement made?

A. I always heard it when Helen brought her to my house for dinner on Sundays.

Q. Now, after November of 1974, did you ever have occasion to receive telephone calls from the deceased?

A. Two or three times a week.

Q. And what customarily would be the substance of those conversations?

\* \* \*

A. Well, she would call me on the phone and say can you get in touch with Helen? And I would say have you tried to call her? And she would say yes. But maybe I'm dialing wrong or something, because of some other voice would come on--someone that was working at Helen's place. I don't know. So I said maybe Helen can't get away right now. Probably busy and has to hire someone to work for her. And she said to me, "Look, with what I have left, Helen, she doesn't have to work." Always this. I heard this three, four times a week.

Trial Transcript, pp. 61-62.

Clearly the Court reached the proper result in failing to find by clear and convincing evidence an intent different from that shown on the written joint tenancy certificates, that at the time they were created the intent was to pass ownership by right of survivorship of the certificates to Helen Chlepas.

POINT II: THE TRIAL COURT DID NOT ERR IN REFUSING TO FIND THAT THE ESTATE'S ARGUMENTS REGARDING THE DECEASED'S ILLITERACY ALTERED THE PRESUMPTION OF VALIDITY OF THE JOINT TENANCY WRITTEN CONTRACTS.

It should be pointed out, initially, that no allegation or averment exists anywhere in the pleadings that the deceased lacked capacity or other state of mind to enter into a joint tenancy savings contract or that the joint tenancy accounts arose through fraud, duress, mistake, or undue influence. When the inability of the deceased to read or write was first mentioned in the trial, timely objection was made to that evidence.

Mr. Hintze: May the record just show that my objection goes to any statement regarding the deceased's capacity on the basis that that has not been pled and is irrelevant. My continuing ongoing objection on Rule 9(d) requiring that fraud, mistake, or conditions of the mind must be affirmatively pled.

The Court: You may have a continuing objection for the record.

Trial Transcript, pp. 7-8.

Without having pled lack of capacity or fraud, that issue was never properly before the Court. In Holt v. Bayles, 85 Utah 364, 39 P.2d 715 (1934) this Court stated:

Where there is a joint agreement executed by the parties which clearly declares the intention to create a joint interest of each in the deposit or credit, the courts will sustain such intention thus expressed, especially where the contract is not attacked for fraud, mistake, incapacity, or other infirmity. ...

Where such intention is clearly expressed in a written contract executed by the parties, which remained unaltered, and there is no fraud, undue influence, mistake, or other infirmity alleged, the question of intention ceases to be an issue and the courts are bound by the agreement.

Id. at 718-19. (emphasis added)

The trial court properly found, in regards to the significance of the deceased's illiteracy, as follows:

3. During her lifetime the decedent did not write or speak the English language, but it was her practice to conduct business utilizing the English language by having the written documents read and explained to her. Specifically, the evidence showed that she entered into and signed a real estate Listing Agreement, Earnest Money Receipt and Offer to Purchase, Warranty Deed, Receipt for Disbursement & Closing Statement, and that she was familiar with the use, creation and function of joint tenancy accounts as she and her husband, before his death, had numerous joint tenancy savings and/or checking accounts. This court has admitted to probate a document written in the English language and signed by the deceased as her Last Will and Testament.

Findings of Fact, No. 3.

Such finding is amply supported by the evidence and, in fact, Appellant admits that such a finding is amply supported by the evidence.

The Trial Court properly found from the evidence in Finding of Fact No. 3 (Tr. 37):

"During her lifetime, the decedent did not write or speak the English language."

However, contrary to the evidence, the following statement was included:

"But it was her practice to conduct business utilizing the English language by having the written documents read and explained to her."

Plaintiff contends that this last statement is supported by the evidence but was not applicable to the facts involved in this case.

Appellant's Brief, p. 11.

Appellant then argues that the defendant did not prove that she followed that established practice and explained the joint tenancy transaction to the deceased. Two things are wrong with that argument. First, Helen Chlepas cannot, by reason of the dead man's statute, even offer such testimony and Appellant is aware of that fact and made vehement objection to her proffered testimony on any subject (see Trial Transcript, pp. 51-53). Second, the burden of proof lies on the estate to establish the fraud, mistake, or lack of capacity and not on the survivor to show that the transaction was free of those conditions. Furthermore, the survivor is entitled to the legal presumption of validity of contracts executed by an illiterate individual.

The law is very clear that the illiteracy of an individual who signed a written contract does not affect the validity or presumption of validity of said contract unless there is evidence of fraud.

As a general rule, one who accepts a written contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by another contracting party.

\* \* \*

The rule that one who signs a contract is presumed to know its contents has been applied even to contracts of illiterate persons on the ground that if such persons are unable to read, they are negligent if they fail to have the contract read to them. If a person cannot read the instrument, it is as much his duty to procure some reliable person to read and explain it to him, before he signs it, as it would be to read it before he signed it if he were able to do so...

(emphasis added)

17 Am. Jur. 2d, Sec. 149 "Contracts" pp. 490-9.

In Sutherland v. Sutherland, 358 P.2d 766 (Kan. 1961) the contracting party was an elderly woman with a 4th grade education and substantially illiterate, and suit was filed challenging a contract to sell real property. The court in considering the validity of the contract stated:

The general rule is that a contracting party is bound by an agreement to which he assents, where the assent is uninfluenced by fraud, violence, undue influence, or the like, and he will not be permitted to say he did not intend to agree to its terms. A contracting party is under a duty to learn the contents of a written contract before signing it, and if, without being a victim of fraud, he fails to read the contract or otherwise to learn its contents, he signs the same at his peril and is estopped to deny his obligations thereunder. If a person cannot read an instrument, it is as much his duty to procure some reliable person to read and explain it, before he signs it, as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents.

Id. at 776, 785.



See also, Maltby v. Sumner, 219 P.2d 395 (Kan. 1950); Johnson v. Allen, 158 P.2d 134 (Utah 1945) at 137 and cases cited therein under headnote [2.3].

No presumption of invalidity arises merely because a person is illiterate.

Nor is a presumption of undue influence raised merely by evidence of inability to read or write.

25 Am. Jur. 2d, Sec. 43, p. 403

The party who alleges fraud as the basis of a cause of action or defense has the burden of establishing it by the requisite quantum of proof in order to prevail in the action. Since in the absence of particular circumstances, the presumption is in favor of good faith, innocence and honesty, and against fraud...

37 Am. Jur. 2d, Sec. 437, pp. 596-7

The facts in this case clearly establish that the deceased was able to transact business by having explained to her the English writings to which she then assented by signing the same or by giving instructions that documents be prepared expressing in writing her desires and intent.

Indeed, the Appellant is hardly in a position to advance an argument that the deceased lacked capacity to enter into written agreements of any kind, since it is the duly appointed executor of the estate of Penelope Kopoulos to probate a document written in English and signed by the deceased as her Last Will and Testament. It would be a blatant incongruity to hold that the illiteracy of the deceased prevented her from entering into a



written joint tenancy agreement and thereby allow the sums therein on deposit to be distributed pursuant to a written Will executed by the same deceased.

#### CONCLUSION

The trial court properly construed and applied the existing law concerning joint tenancy accounts and, since there was no "clear and convincing" evidence of any intent different than that inferred by reason of the written joint tenancy account, the judgment in favor of the defendant should be affirmed.

Respectfully submitted,

/s/  
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FOX, EDWARDS & GARDINER  
Attorneys for Respondent

CERTIFICATE OF MAILING

This is to certify that the undersigned mailed two copies of the foregoing BRIEF OF RESPONDENT to Richard C. Dibblee of Roberts, Black & Dibblee, Attorneys for Appellant, 400 Ten Broadway Building, Salt Lake City, Utah 84101, by placing said copies in the U.S. mail, postage prepaid, this 7<sup>th</sup> day of March, 1980.

Jean Ann Smith