

1980

In the Matter of the Estate of George R. Powell,
Deceased. Central Bank and Trust Company,
(Administrator) and the Heirs of Florence Case
No. Eunice Powell v. Lamar P. West : Brief of
Appellant

Utah Supreme Court

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M. Dayle Jeffs; Attorney for Amicus Curiae Hugh W. Colton; Attorney for Appellant John L. Valentine; Attorneys for Administrator-Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

N THE MATTER OF THE ESTATE OF :

GEORGE R. POWELL, :

Deceased. :

CENTRAL BANK AND TRUST COMPANY, :
(Administrator) and THE HEIRS OF :
FLORENCE EUNICE POWELL, :

Respondents, :

vs. :

Case No. 16,877

LAMAR P. WEST, :

Appellant. :

BRIEF OF APPELLANT

This is an Appeal from an Order and Decree of Distribution made by
the Honorable J. Robert Bullock, District Judge, in the Fourth Judicial District
Court of the State of Utah, in and for Utah County.

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FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF	:	
	:	
GEORGE R. POWELL,	:	
	:	
Deceased.	:	
	:	
CENTRAL BANK AND TRUST COMPANY,	:	
(Administrator) and THE HEIRS OF	:	
FLORENCE EUNICE POWELL,	:	
	:	
Respondents,	:	
	:	
vs.	:	
	:	Case No. 16,877
LAMAR P. WEST,	:	
	:	
Appellant.	:	

BRIEF OF APPELLANT

This is an Appeal from an Order and Decree of Distribution made by the Honorable J. Robert Bullock, District Judge, in the Fourth Judicial District Court of the State of Utah, in and for Utah County.

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF :

GEORGE R. POWELL, :

Deceased. :

CENTRAL BANK AND TRUST COMPANY :
(Administrator) and THE HEIRS OF :
FLORENCE EUNICE POWELL, :

Respondents, :

vs. :

LAMAR P. WEST, :

Appellant. :

Case No. 16,877

BRIEF OF APPELLANT

This is an Appeal from the Findings of Fact and Conclusions of Law and an Order and Decree of Distribution made by the Honorable J. Robert Bullock, District Judge in the Fourth Judicial District Court of the State of Utah, in and for Utah County.

DISPOSITION IN THE LOWER COURT

Judge Bullock's Decision in Utah County Probate Number 17,578 (Exhibit) held that the previous Decision that the Will was void was res Judicata and then proceeded to distribute one-third of the assets of the Estate pursuant to the terms of that void Will.

RELIEF SOUGHT ON APPEAL

That the case be remanded to the lower Court with instructions to the Administrator to begin the Probate proceedings anew where all of the various issues of this case may be determined by one Court, or that the case be remanded with instructions that the Will was determined void and, therefore, the beneficiaries named therein are not entitled to any of the Estate and as if there were no Will.

STATEMENT OF FACTS AND CHRONOLOGICAL
SEQUENCE OF ACTIONS IN THIS MATTER

June 10, 1974: The Decedent, George R. Powell, died in Uintah County, State of Utah but was alleged to have been a resident of Utah County.

June 3, 1974: Decedent executed a purported Will, which Will was admitted to Probate and Letters Testamentary issued to Lamar P. West in Utah County, by Judge Bullock, Probate Number 17,578.

February 18, 1976: Thereafter, an apparent conflict of interest arose and the Central Bank and Trust Company of Provo, Utah was appointed Administrator with Will annexed. Lamar P. West filed action against Florence Powell in the Fourth Judicial District Court in and for Uintah County, State of Utah, Civil Number 7416, in which the Administrator intervened to determine the ownership of one Time Certificate of Deposit #3215 of the Bank of American Fork in the amount of \$50,000.00 and one Time Certificate of Deposit #3224 of the Bank of American Fork in the amount of \$20,000.00. The above Certificates of Deposit were in the names of George R. Powell and Lamar P. West, but claimed by Florence Powell. These certificates were in the safety deposit box in Zion's First National Bank, Vernal, Utah.

January 27, 1977: This case was tried before Honorable David Sam, District Judge. A Stipulation was entered into by the parties as shown in Exhibit "A" wherein Lamar P. West allegedly stipulated and agreed in open Court that: (1) the two above mentioned Certificates of Deposit for \$70,000.00 (2) a certain Trust account, Exhibit "B", held by Heber Grant Ivins in the amount of \$20,000.00 wherein Lamar P. West was given the residue of the Trust following the death of her mother, (3) a motor home in the name of George Powell, William West, and Lamar West as joint tenants, Exhibit "C", and (4) a motor boat in the names of George R. Powell or Lamar P. West, Exhibit "D",

would be considered as assets of the Estate of George R. Powell. Notwithstanding the fact that in the said action Lamar P. West stated to the Court that she understood and agreed to the Stipulation, she later testified that she did not understand it, did not see the Stipulation before it was signed and approved by her then counsel, that it was made in open Court late in the final day of the trial and that she was not supplied with a copy of the Stipulation signed by her attorney or the Judgment entered in that case for a period of several months when she read it in the files of the case in Vernal, Utah.

February 3, 1977: An Order declaring Will void, Exhibit 'E', Decree and Findings were dated and signed by District Court Judge David Sam, Exhibit 'F'. While signed by Appellant's attorney, appellant testified she did not know -- it was signed and was not aware of it for months after when she went to Vernal and found it had been filed and that she did not knowingly agree to the contents of the Stipulation. This matter was heard by the Honorable Judge J. Robert Bullock on the 29th day of October, 1979. In his ruling, Judge Bullock held that the Decree and Findings dated November 3, 1977 was res judicata and the Appellant had failed to appeal that case within the time allowed by law.

February 22, 1979: Civil Number 9,169, Uintah County consolidated with Probate Number 17,578, Utah County. The case Central Bank and Trust Company, Inc. (Administrator in the Estate of George R. Powell) vs. Florence A. Powell and Florence Eunice Powell (Appellant or other heirs were not made parties), Exhibit 'G' Probate Number 17,578, was heard by George E. Ballif, District Judge. This action brought to determine which Florence Decedent had meant when mentioned in purported Will.

March 12, 1979: Honorable George E. Ballif, District Judge-
Judgement:

1. Will not ambiguous.
2. Florence Eunice Powell was the Florence named in Will and qualifies for distribution thereunder.
3. Children, assignees, qualifies for distribution of Florence's share pursuant to the Will of George R. Powell (which Will was declared null and void and set aside February 3, 1977 by Judge David Sam who then directed the Administrator to proceed with the Probate of the Estate as if the Decedent had died intestate.

May 18, 1979: Administrator filed "Motion for Declaratory Relief"

June 27, 1979: Appellant filed "Protest to Motion for Declaratory Relief".

September 26, 1979: Hearing held on Objection before Honorable J. Robert Bullock, District Judge.

October 9, 1979: Decision, Judge Bullock, granting Motion for Declaratory Relief, Exhibit "H".

November 8, 1979: Appellant filed Motion and Amendment of proposed Order and Decree of Distribution.

January 24, 1980: Order denying Motion to amend Findings and Decree of Distribution and issued the Order and Decree of Distribution by marked Exhibit "I".

From this Order Appellant appeals.

ARGUMENT

POINT I: This matter was begun in Utah County District Court where purported Will of Decedent was admitted to Probate by Judge J. Robert Bullock and Appellant was appointed as Executrix, in accordance with the terms of the Will. The Will was dated June 3, 1974. Decedent died June 10, 1974. The Will was prepared in Vernal, Utah at the request of Florence Powell and Owen A. Powell, half brother of Decedent with whom Decedent was living just prior to his death.

At the time of his death, Decedent had one Time Certificate Deposit in the name of George R. Powell and Lamar P. West in the amount of \$50,000.00 and another in the same names in the amount of \$20,000.00. These certificates were in a safety deposit box in Zion's First National Bank in Vernal, the key to which Florence Powell had. She was the wife of Decedent's half brother, Owen A. Powell. For this reason, Florence Powell claimed the two certificates. Decedent had endorsed them. Appellant knew of the certificates and by reason of her name being on the certificate as joint tenant, claimed these two certificates. At this time, Appellant was advised that there may be a conflict of interest between her as Executrix, and claimant of the two certificates. She and one of her brothers then consulted the attorney for the present Administrator who advised that due to the conflict she should withdraw as Executrix, which she did, and the present Administrator was appointed.

The conflicting claims for the said certificates of deposit arose and Appellant instituted suit against Florence Powell in the Uintah County District Court. The Administrator intervened in that action claiming that the certificate belonged to the Estate. This matter was tried before the Honorable David Sam, District Judge, in Uintah County. Before the trial

ended, all of the interested parties, excepting only Florence Eunice Powell, joined in the Stipulation and Agreement concerning settlement of the Uintah County case, Civil Number 7416. The Court held the Will was invalid and that a Stipulation made in the Uintah County case be consolidated with the Utah County Probate case. However, Judge Sam, sua sponte, set aside the said Will declaring it null and void, a fraud upon the Court, and the Administrator was directed to proceed with the Probate of the Estate as if the Decedent had died intestate. See Exhibit "E".

Appellant, later in her protest to the Administrator's Motion for Declaratory Judgment, testified she had not understood the Stipulation and Agreement and although the records show she told the Court she understood and agreed to it, but in reality she had not. However, in this hearing Judge Bullock held the Uintah County case was res judicata. Appellant does not dispute the fact that she did not appeal the Uintah County case within the statutory time due to a misunderstanding between her and her then attorney.

During this time, Appellant in the case of West vs. Heber Grant Ivins Trustee, filed an action for another Time Certificate Deposit in the amount of \$20,000.00 claiming this amount as beneficiary under a Trust where Mr. Ivins was made Trustee by the Decedent (See Exhibit "B"). This part of the case was assigned to Judge Sorensen who considered the original complaint and delayed action thereon until other interested parties were brought into the case. However, this matter was never heard due to the Administrator's claim that under the Uintah County case the matter was res judicata.

Later, when the question arose as to who "Florence Powell" was, a suit was initiated in the Utah County District Court where Judge Ballif heard the case. The issue was which Florence Powell did Decedent intend to name as beneficiary in his purported Will. The Will said my Daughter-in-law, Florence, and even though his son and Florence Eunice Powell had been divorced

for several years and Eunice remarried, the Court, nevertheless, held he intended Florence Eunice Powell.

However, in the Stipulation and Agreement all parties thought that Florence A. Powell was the party they were dealing with. The Stipulation gave Florence A. Powell a new automobile, other items, and a ten (10%) percent interest of the residue of the Estate. The heirs did not agree that "Florence" would receive one-third of that Estate.

Judge Ballif in his Decision, "Exhibit "G", held that the Decedent intended Florence Eunice Powell to be the beneficiary, and that her interest had been transferred to her three children, "who will qualify for distribution of her share pursuant to the Will".

Appellant contends that Judge Ballif's decision does not hold the Will to be valid. Judge Ballif's Decision does nothing more than to establish who "Florence" was. If the Will was void as held by Judge Sam, then Florence Powell would take nothing for she is not an heir. If Judge Sam's Decision that the Will is res judicata, then Judge Ballif's Decision to distribute her (Florence share "pursuant to the Will" cannot stand.

POINT II: Judge Sam's Decision ordered filed in the Utah County Probate Number 17,578, declared the purported Will null and void and this case was held to be res judicata.

POINT III: The Order of Judge Sam, dated February 3, 1977 (Exhibit "E") in Probate Number 17,578, is significant and seems to consider and should be considered as a ruling on the validity of the Will and it is in this Order the Judge states, "On the basis of the testimony and evidence therein introduced, the Court determined that the Will, dated June 4, 1974, was executed by the Decedent in error and that the Will was in fact not the Last Will and Testament of the Decedent and as submitted constituted a fraud upon the Court and the Court

therefore, sua sponte, sets aside the said Will, declares it null and void, and directs the Administrator to proceed with the Probate of the Estate as if the Decedent had died intestate". This Order was prepared by counsel for the Administrator and dated the same day as the Findings of Fact and Conclusion of Law upon which the Administrator bases the Judgment in Civil Number 7416, which was held by Judge Bullock to be res judicata.

POINT IV: The Order and Decree of Distribution by Judge Bullock (Exhibit J) held Civil Case Number 7416 in Uintah County res judicata and yet ordered the Administrator to distribute one-third interest of the net Estate to the assignees of Florence Eunice Powell who, if the Will was void, would have no interest. This is the point Appellant brings to this Court and claims it was error for Judge Bullock to approve distribution of one-third of the Estate to the Respondent, the assignees of Florence Eunice Powell. The Will was void, Florence Eunice Powell was not an heir, and, therefore, has no interest in the Estate.

CONCLUSION

In conclusion, Appellant contends that the entire Probate proceeding should be remanded with instructions to have the entire Probate retried and all of the matters pertaining to this Estate be determined by the same Court, or that the case should be remanded with instructions that if the Will was void, the respondents, assignees of Florence Eunice Powell, have no interest in the Estate and that the Estate should be distributed to the heirs of the Decedent.

Respectfully submitted this 19th day of April,

COLTON & HAMMOND
Attorneys for Appellant


Hugh W. Colton

MAILING CERTIFICATE

I hereby certify that I mailed two (2) true and correct copies of Appellant's Brief to Mr. John L. Valentine, of HOWARD, LEWIS, and PETERSON, Attorneys at Law, P. O. Box 778, Provo, Utah 84601, and to Mr. M. Dayle Jeffs, Attorney for Heirs of Florence Eunice Powell, 90 North 100 East, Provo, Utah 84601, on the 21st day of April, 1980.

Cheryl Jean Weeks
Cheryl Jean Weeks/Secretary

SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF	:	
	:	
GEORGE R. POWELL,	:	
	:	
Deceased.	:	
	:	
CENTRAL BANK AND TRUST COMPANY,	:	
(Administrator) and THE HEIRS OF	:	
FLORENCE EUNICE POWELL,	:	
	:	
Respondents,	:	
	:	
vs.	:	
	:	Case No. 16,877
LAMAR P. WEST,	:	
	:	
Appellant.	:	

EXHIBITS

Exhibit "A"	Judgment signed by Judge Sam on February 3, 1977.
EXHIBIT "B"	Copy of two Time Certificates of Deposit
EXHIBIT "C"	Copy of Certificat of Title for Motor Home
EXHIBIT "E"	Order signed by Judge David Sam on February 3, 1977.
EXHIBIT "F"	Findings of Fact and Conslusions of Law signed by Judge David Sam on February 3, 1977
EXHIBIT "G"	Decision of Judge George E. Ballif signed March 13, 1979.
EXHIBIT "H"	Findings of Fact and Conclusions of Law signed by Judge J. Robert Bullock.
EXHIBIT "I"	Decision of Judge J. Robert Bullock on October 9, 1979.
EXHIBIT "J"	Order and Decree of Distribution signed by Judge J. Robert Bullock

EXHIBIT "A"

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ATTORNEYS AND COUNSELORS AT LAW
120 EAST 300 NORTH STREET
PROVO, UTAH 84601
TELEPHONE: 373-6345

Attorneys for Intervenor

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UINTAH COUNTY, STATE OF UTAH

LAMAR P. WEST, :

Plaintiff, :

vs. : JUDGEMENT

FLORENCE POWELL, :

Defendant, :

and :

CENTRAL BANK & TRUST, : Civil No. 7416

Administrator of the estate
of George R. Powell, :

Intervenor. :

This matter having come on regularly for trial on the 27th day of January, 1977, before the Honorable David Sam, sitting with a jury, and the plaintiff having been present and represented by her attorney, Ray Eugene Gammon, and the defendant having been present and having been represented by her attorney, Gayle F. McKeachnie, and the intervenor having been represented by its attorney, Jackson Howard, and the matter having been tried to the jury for two days, and all of the evidence having been received, and the plaintiff having rested her case, and the parties having represented to the Court that all testimony had been received except approximately ten minutes to be presented by the defendant and whereupon the parties reached a settlement which was stipulated into the record of the Court,

NOW THEREFORE, upon the basis of that Stipulation and upon the basis of the Court's own findings,

IT IS HEREBY ORDERED ADJUDGED, AND DECREED:

*Issue of
Case*

1. The intervenor is granted judgment against the plaintiff and against the defendant of no cause of action on their respective complaint and counterclaim and their respective pleadings against the intervenor.

2. The intervenor is granted judgment declaring the estate the sole and only owner of the two certificates of deposit totaling \$70,000.00 and described as follows:

Time Certificate of deposit No. 3215 of the Bank of American Fork in the amount of \$50,000.00.

Time Certificate of deposit No. 3224 of the Bank of American Fork in the amount of \$20,000.00.

3. The intervenor is granted an order entered in the probate file, in the matter of the estate of George R. Powell, deceased, in and for Utah County, Probate No. 17,578, in accordance with the findings of fact stated above and the stipulation of the parties entered in open Court.

DATED at Provo, Utah, this 31 day of February, 1977.

BY THE COURT:

DAVID SAM, JUDGE

APPROVED:

RAY EUGENE GAMMON
Attorney for Plaintiff

GAYLE F. MCKEACHNIE
Attorney for Defendant

Jackson Howard
JACKSON HOWARD
Attorney for Intervenor

BANK OF AMERICAN FORK

AMERICAN FORK, UTAH

August 27, 1973

Pay to the order of Mr. or Mrs. Lamar P. West

Pay to the order of Mr. or Mrs. Lamar P. West

SOCIAL SECURITY NUMBER

529-21-7091

20000.00 DOLLARS \$ 20,000.00

Interest, to either or any of said owners or survivors, upon presentation and surrender of this certificate properly endorsed 12 months.

Interest shall be paid as hereinafter provided. This certificate will be automatically renewed at maturity for additional successive periods of 12 months unless the owner(s) within 10 days after a maturity date for payment or of such maturity date. The bank reserves the right not to renew this certificate if the registered owner(s) at his address last shown on the bank's records a notice of its election not to renew.

Interest shall be paid to the owner based at the first maturity date and such rate shall continue except that the rate of interest to be paid after the first maturity date by mailing the owner of the above address at least thirty days' advance notice of such change.

BANK OF AMERICAN FORK

45-280-5

NOT NEGOTIABLE

AUTHORIZED SIGNATURE

⑆5102⑈0800⑆

BANK OF AMERICAN FORK

AMERICAN FORK, UTAH

July 17, 1973

Pay to the order of Mr. or Mrs. Lamar P. West

Pay to the order of Mr. or Mrs. Lamar P. West

SOCIAL SECURITY NUMBER

529-21-7091

50000.00 DOLLARS \$ 50,000.00

Interest, to either or any of said owners or survivors, upon presentation and surrender of this certificate properly endorsed 30 months.

Interest shall be paid as hereinafter provided. This certificate will be automatically renewed at maturity for additional successive periods of 30 months unless the owner(s) within 10 days after a maturity date for payment or of such maturity date. The bank reserves the right not to renew this certificate if the registered owner(s) at his address last shown on the bank's records a notice of its election not to renew.

Interest shall be paid to the owner based at the first maturity date and such rate shall continue except that the rate of interest to be paid after the first maturity date by mailing the owner of the above address at least thirty days' advance notice of such change.

BANK OF AMERICAN FORK

45-280-5

NOT NEGOTIABLE

AUTHORIZED SIGNATURE

⑆5102⑈0800⑆

EXHIBIT *Interview*
WITNESS *Mrs. West*
DATE *7-8-76*
LANETTE SHINDURLING C.S.R.
SALT LAKE CITY, UTAH

WILLIAM HOWARD, for:
 M. L. LEWIS & PETERSEN
 ATTORNEYS AT LAW
 100 NORTH STREET
 PROVO, UTAH 84601
 TELEPHONE 373-6345

Estate

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

LETTER OF THE ESTATE :

ORDER

OF :

W. POWELL,

Probate No. 17,578

Deceased. :

The Court having sat as Judge in Civil No. 7416 in and
 Utah County, and having heard testimony and received evi-
 dence, and being fully advised in the premises and having con-
 sidered the pleadings in the case referred to, incorporates the
 Findings of Fact and Conclusions of Law and Judgment in that case
 by order by reference and orders that a copy of said Findings
 and Conclusions of Law and Judgment be filed herein.
 On the basis of the testimony and evidence therein introduced,
 the Court determined that the Will dated June 4, 1974, and ad-
 mitted to probate in this case on the 24th day of October, 1974,
 was executed by the decedent in error and that the will was in
 fact the last will and testament of the decedent and as sub-
 stantiated a fraud upon the Court and the Court, there-
 upon, sets aside the said will, declares it null and
 void and directs the administrator to proceed with the probate of
 the estate as if the decedent had died intestate.

DATED at Provo, Utah, this 30 day of February, 1977.

BY THE COURT:


 JUDGE, DAVID SAM

EXHIBIT "F"

JACKSON HOWARD, for:
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ATTORNEYS AND COUNSELORS AT LAW
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TELEPHONE: 373-6345

Attorneys for Intervenor

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR UINTAH COUNTY, STATE OF UTAH

LAMAR P. WEST,	:	
Plaintiff,	:	
vs.	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
FLORENCE POWELL,	:	<i>Not Deceit</i>
Defendant,	:	
and	:	
CENTRAL BANK & TRUST,	:	Civil No. 7416
Administrator of the estate	:	
of George R. Powell,	:	
Intervenor.	:	

This matter having come on regularly for trial on the 27th day of January, 1977, before the Honorable David Sam, sitting with a jury, and the plaintiff having been present and represented by her attorney, Ray Eugene Gammon, and the defendant having been present and having been represented by her attorney, Gayle F. McKeachnie, and the intervenor having been represented by its attorney, Jackson Howard, and the matter having been tried to the jury for two days, and all of the evidence having been received, and the plaintiff having rested her case, and the parties having represented to the Court that all testimony had been received except approximately ten minutes to be presented by the defendant, and whereupon the parties reached a settlement which was stipulated into the record of the Court,

NOW THEREFORE, upon the basis of that Stipulation and upon the basis of the Court's own findings, the following findings of

fact are entered:

FINDINGS OF FACT

1. All of the parties have agreed to withdraw the matter from the jury to submit the matter to the Court.

2. All of the parties have agreed that the evidence indicates that the decedent, George R. Powell, was of unsound mind and mentality from January 1, 1973, to the date of his death, and was probably legally incompetent prior to January 1, 1973.

3. The Court finds, independent of the stipulation of the parties, that the decedent George R. Powell was 87 years of age at the time of his death and for at least 18 months prior to that date had been vulnerable to the importunings and influence of close members of his family, and those whom he believed to be close friends. He was easily influenced and susceptible to suggestions and impressions concerning the relative affections of his various children and others.

4. The Court finds, independent of the stipulation of the parties, that the decedent, George R. Powell made certain gifts to the plaintiff, LaMar P. West and to the defendant, Florence Powell during the years 1973 and 1974, and the Court further finds that all of the gifts made to the plaintiff and the defendant during that period of time were made by reason of the undue influence of both the plaintiff and the defendant upon the decedent.

5. The intervenor made a motion for judgment on the record and upon the pleadings at the close of the plaintiff's case, which motion the Court took under advisement and which motion the Court now finds meretricious, for the reasons and upon the following grounds: that the plaintiff failed to show that the decedent intended a joint tenancy in respect to the two time certificates of deposit which are the subject of this litigation, but on the contrary, the record clearly shows that the name of

the plaintiff was placed upon the time certificates of deposit as a matter of convenience to the decedent, who at that time was old, infirmed, blind and suffering from senility due to age, and could not otherwise manage his affairs without the assistance of others, especially of matters that required documentation in writing.

6. The record clearly discloses that the decedent did not intend to make a gift to the defendant Florence Powell.

7. As part of the stipulation of the parties, it was agreed that the Court could take judicial notice of Probate file No. 17,578, in this District in and for Utah County, and further that the Court could make and enter orders pertaining to that probate matter consistent with the stipulation of the parties, and the Court, therefore, finds that the will executed by the decedent George R. Powell, on or about June 4, 1974, was a product of undue influence upon the decedent, and that he did not intend the testamentary distribution therein provided and further in respect to said will, the Court finds that the will contains many errors of material fact, such as the improper designation of Florence Powell as a "daughter in law", when in fact she was a step sister-in-law; a designation of Joel Powell as his son, when in fact his only son of similar name was Juel Powell; the gift of \$1.00 to his wife, implying that there was real estate from which he could satisfy a statutory privilege when there was no such real estate and when the wife of the decedent was incompetent, and could not make an election outside of the will.

8. The Court further finds that the will was executed under circumstances of duress and undue influence by reason of the fact that the will was executed when the decedent was in the hospital suffering from his final illness, at a time when he was suffering from the effects of advance senility, at a time when he had neither the competence nor the ability to instruct a lawyer

1 concerning his disposition, which is clearly reflected in the
2 language of the will.

3 9. Because of the particular findings set forth in Findings
4 7 and 8 above, the Court finds that the will offered into probate
5 was in fact void and as admitted was a fraud upon the Court. The
6 Court, therefore, finds that the said will should be vacated and
7 the administrator with will annexed instructed to probate and
8 distribute the estate as if the decedent had died intestate with
9 the exception that each of the children of George R. Powell shall
10 receive 22 1/2% of the distributive estate and Florence Powell
11 shall receive 10% of the distributive estate.

12 10. The parties to the litigation entered into stipulation
13 the material terms of which are as follows:

14 a. Each of the parties admitted that the \$70,000.00
15 time certificates of deposit which were the subject of this
16 litigation were not intended as a joint tenancy with the plain-
17 tiff and were not intended as a gift from the decedent to either
18 the plaintiff or defendant and should be made the proper asset
19 of the estate.

20 b. The decedent never made a delivery of the said
21 certificates as a gift and that the claims of the plaintiff and
22 defendant to the said certificates could be considered claims
23 based upon undue influence of both the plaintiff and defendant
24 over the decedent.

25 c. The entire estate of the decedent may be probated
26 as if the decedent died intestate, with the exception that Flo-
27 rence Powell, the defendant in this action, shall receive 10% of
28 such distribution and the children of the decedent, LaMar Powell
29 West, Vonda Powell Edwards McCarter, Owen Powell, and Juel Ferrir
30 Powell, shall each receive 22 1/2%.

31 d. The intervenor (Administrator) shall procure from
32 all heirs who, together with the plaintiff and defendant, shall

1 each furnish the administrator of the estate with an affidavit
2 showing all transfers of assets valued in excess of one hundred
3 dollars per item, directly or indirectly, real or personal,
4 tangible or intangible from the decedent to him or her during a
5 period of three years immediately prior to his death, with the
6 exception that the defendant Florence Powell shall not be required
7 to account for, nor will the estate consider as an asset, her
8 1974 Chrysler automobile, or the microwave oven which apparently
9 came to her from the decedent. The inventory to be turned over
10 to the administrator by the parties to this litigation and by
11 other heirs of the decedent, shall include the assets described
12 and identified above but shall also include, but are not limited,
13 to the following terms which are presently known:

14 (1). A promissory note dated October 2, 1969,
15 from Owen Powell and Florence Powell to the decedent in the
16 amount of \$500.00.

17 (2). A promissory note dated October 2, 1969, from
18 Owen Powell and Florence Powell to the decedent in the amount of
19 \$365.00.

20 (3). A 1968 Chrysler automobile presently in the
21 possession of the plaintiff.

22 (4). Time certificate of deposit No. 3215 of the
23 Bank of American Fork in the amount of \$50,000.00.

24 (5). Time certificate of deposit No. 3224 of the
25 Bank of American Fork in the amount of \$20,000.00.

26 (6). A promissory note from Arnold and Mary West
27 to the decedent dated March 23, 1973, in the face amount of \$19,-
28 500.00.

29 (7). A promissory note dated July 17, 1973, from
30 Gordon Case and Claudia Case to the decedent in the face amount of
31 \$2,500.00.

32 (8). A mobile home presently titled in the name of

1 Arnold and Mary West subject to pending litigation in Civil No.
2 45,985 of this District, in and for Utah County, of the approxi-
3 mate value of \$8,000.00.

4 (9). A 1974 Sea Swirl Boat presently in the pos-
5 session of LaMar West, of an approximate value of \$4,200.00.

6 (10). A 1971 motor home, presently in the pos-
7 session of LaMar West of an approximate value of \$7,000.00.

8 (11). All joint tenancy joint bank accounts held
9 by the decedent and any other person during the period of 1973 and
10 1974.

11 (12). All time certificates of deposit owned by
12 the decedent and/or any other person during the period of 1973 and
13 1974, including the proceeds from certificates No. 114 and 109
14 of the Mountain View Bank, American Fork, Utah and certificate
15 No. 9372 of the Bank of Pleasant Grove, in the fact amount of
16 \$20,000.00, \$20,000.00 and \$5,000.00, respectively, totaling \$45,-
17 000.00.

18 (13). Savings account in the Mountain View Bank,
19 No. 8-50117-3 with an approximate value at the date of his death
20 at \$929.00.

21 (14). A mortgage receivable from Robert Ybarra
22 and Rebecca Ybarra, his wife, of the approximate value of \$13,-
23 000.00.

24 (15). Mortgage receivable from Joseph DeJesus
25 Cornejo and Maria his wife of an approximate value of \$7,600.00.

26 (16). A judgment receivable from Norman Powell in
27 the approximate value of \$9,000.00.

28 e. The plaintiff, LaMar West, shall be given credit for
29 expenditures made on behalf of her mother, as against \$45,000.00
30 in time certificates of deposits referred to in Provision d(12)
31 above, and delivered to her in trust for the benefit of her
32 mother, as follows: for actual expenses extended on behalf of

Mary Powell, \$12,545.73; for the reasonable value of the plaintiff's home which was furnished to Mary Powell, \$2,400.00; for the reasonable value of care furnished to Mary Powell by the plaintiff, \$600.00; making the total \$15,545.73 credit against the \$45,000.00 in time certificates of deposit.

f. The Intervenor (estate) shall pay to the plaintiff for the use and benefit of her attorney, the sum of \$1,500.00.

g. The Intervenor (estate) shall pay to the defendant for the use and benefit of her attorney, the sum of \$1,500.00.

h. The settlement is conditioned upon the intervenor or other litigant obtaining from the Court a determination by litigation or otherwise that Florence Eunice Powell of Montana, was and is not, the Florence Powell named as executor and heir in the will of June 4, 1974. This matter is at issue before this Court in Uintah County. In the event that Florence Powell of Montana shall establish that she is in fact an heir, this stipulation in so far as it applies to the defendant shall fail.

i. The Court finds the stipulation entered into between the parties to be reasonable and approves the same.

The Court having made and entered its findings of fact, now takes and enters its Conclusions of Law.

CONCLUSIONS OF LAW

1. The intervenor is entitled to judgment against the plaintiff and against the defendant of no cause of action on their respective complaint and counterclaim and their respective pleadings against the Intervenor.

2. The Intervenor is entitled to judgment declaring the estate to be the sole and only owner of the two certificates of deposit totaling \$70,000.00 and described as follows:

Time Certificate of deposit No. 3215 of the Bank of American Fork in the amount of \$50,000.00.

Time Certificate of deposit No. 3224 of the

1 Bank of American Fork in the amount of \$20,-
2 000.00.

3 3. The intervenor is entitled to have an order entered in
4 the probate file, in the matter of the estate of George Powell,
5 deceased, in and for Utah County, Probate No. 17,578, in accor-
6 dance with the findings of fact stated above and the stipulation
7 of the parties entered into open Court.

8 DATED at Provo, Utah, this _____ day of February, 1977.


9 BY THE COURT:

10
11 _____
12 DAVID SAM, JUDGE

13 APPROVED:

14 
15 RAY EUGENE GAMMON
16 Attorney for Plaintiff

17
18 _____
19 GAYLE F. MCKEACHNIE
20 Attorney for Defendant

21 
22 JACKSON HOWARD
23 Attorney for Intervenor

IN THE FOURTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

FARMERS BANK & TRUST COMPANY,
Incorporation,

Civil Case No. 9169

Plaintiff,

vs.

D E C I S I O NFLORENCE A. POWELL and
FLORENCE EUNICE POWELL,

Defendants.

This matter was tried to the Court on February 22, 1979,

L. Valentine, Esq., appearing as counsel for plaintiff,

Farmers Bank & Trust Company, Kathryn L. Schuler, Esq., appearing

for defendant Florence Acres Powell, and M. Dayle Jeffs, Esq.,

appearing for Florence Eunice Powell, and the assignees of her

interest in the Estate of George R. Powell. The parties stipulated

that the trial proceed in Utah County, whereupon they called their

witnesses and presented other evidence, which the Court heard, and

having taken the matter under advisement, and having consulted the

authorities cited by counsel in support of their respective positions,

the Court now enters its:

D E C I S I O N

It was established by the evidence and stipulations entered

between the parties that in May and June of 1974 the decedent,

George R. Powell engaged Gayle McKeachnie, Attorney at Law, of Vernal,

Utah to prepare a will. The will was prepared and executed by

George R. Powell in early June of 1974, and that one of the provisions

of the will was as follows:

"(c) All the rest of my estate I give, bequeath,

and devise in equal shares to my son, Owen Powell, my

daughter, Lamar Powell Nerdin, and my daughter-in-law,

Florence Powell."

It was further established by the evidence that at the time of execution of the will containing the foregoing provision there were two persons by the name of Florence Powell. One was Florence Powell, the ex-wife of decedent's son, Owen Powell. Florence had re-married after divorcing Owen, but had terminated the marriage after one year, and had not married again prior to the death of George R. Powell. It was also established that she had three children by Owen, Owen Powell, Eunice Ann Powell Jones, and Lowell Powell.

The other Florence Powell was Florence Agnes Powell, who was the daughter of George R. Powell's half brother.

After George R. Powell subsequently died, the will was admitted to probate, and upon a discovery of the fact that two Florence Powells were named in the will, the plaintiff herein filed this interpleader action to determine in this proceeding which of the two was the intended beneficiary of the will. The law in this state and what appears to be the weight of authority throughout this country is to the effect that in interpreting the meaning of a will, the intention of the testator must be ascertained from language within the four corners of the instrument. Evidence outside the four corners of the instrument will be consulted to determine the true intent of the testator only if there is a latent ambiguity appearing in the will. It is a question of law for the court to decide whether an ambiguity exists before receiving evidence to explain it. (Winegar v. Smith Investment Company, Supreme Court of Utah No. 15504, filed January 26, 1979.)

It is apparent that the language of the will identifies the Florence Powell who is the daughter-in-law of the decedent. The evidence shows that Florence Eunice Powell had that relationship to decedent upon her marriage to George R. Powell. It appears she would naturally be the beneficiary if that relationship continued. The question therefore is whether the divorce between Owen and Florence

ice and her subsequent marriage and divorce, terminate the relation-
of daughter-in-law as it once existed, so that the descriptive
rence in the will does not fit either of the named "Florence
all," thus causing a latent ambiguity to be resolved by extrinsic
ence.

There is no Utah case cited which speaks to the issue before
Court, but common law rule announced by Lord Coke is as follows:

"That the marriage must continue or issue be had
to continue the affinity." (Coke 157a).

It is said that this rule is universally recognized, and it
been repeatedly held that if the marriage has resulted in issue
all living, the relationship by affinity continues. (Stringfellow v.
61 S.W. 719; Bigelow v. Spague, 5 N.E. 144; and Jaques v.
Wealth, 10 GRAT. VA. 690.)

It would appear that this rule has not changed, and the fact
Florence Eunice Powell had three children by Owen Powell, who
in existence at the time the testator made his will, would con-
the relationship as between Florence Eunice and the testator
therefore, would clearly identify her as the intended benefi-
ry, there being no latent ambiguity.

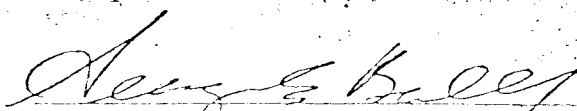
The defendant, Florence A. Powell, moved for the admission
de deposition of Gayle McKeachnie, Attorney at Law, who prepared
will in question, claiming his unavailability because of him being
er of the Utah State Legislature, which at the time of trial was
sion, and counsel for defendant, Florence Eunice Powell,
to the admission of the deposition into evidence, not from
standpoint of the unavailability of the deponent, but from the
point that his testimony was inadmissible in that the will was
oligous and no resort to such testimony should be allowed, and on
her grounds as specifically set forth on a line by line objection
the deposition's contents. The Court admitted the deposition and
owed defendant, Florence Eunice, to reserve a motion to strike

testimony, and in view of the Court's Ruling herein grants said

and.

Counsel for the defendant, Florence Eunice Powell, is directed
prepare Findings of Fact, Conclusions of Law, and Decree establish-
the right of Florence Eunice Powell to take in accordance with
foregoing provision of the decedent, George R. Powell's will.
Court further finds that the interest of Florence Eunice Powell
been transferred to her three minor children, who will qualify
distribution of her share pursuant thereto.

Dated at Provo, Utah County, Utah this 13 day of March,


GEORGE E. BALLIF, JUDGE

JOHN L. VALENTINE, for:

HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 EAST 300 NORTH STREET
P. O. Box 778
PROVO, UTAH 84601
TELEPHONE: 373-6345

Attorneys for Administrator

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

IN THE MATTER OF THE ESTATE OF:

GEORGE R. POWELL,	:	FINDINGS OF FACT
	:	AND CONCLUSIONS OF LAW
Deceased.	:	Probate No. 17,578

This matter came on duly and regularly to be heard on the 26th day of September, 1979, before the Honorable J. Robert Bullock, sitting without a jury, with Jackson Howard and John L. Valentine, appearing as counsel for the administrator of the estate, Central Bank and Trust Company; and the objector, Lamar P. West, present personally and represented by her attorney, Hugh W. Colton; and M. Dayle Jeffs, having appeared for the heirs of Florence E. Powell, Interested parties in this estate pursuant to the Utah Uniform Probate Code; and no other persons having filed an objection to or an appearance in this proceeding after having received notice of the same, and all the evidence having been received, the Court having taken the matter under advisement and having been fully advised in the premises, now makes and enters the following:

FINDINGS OF FACT

1. All required notices of this hearing have been given.
2. A trial was had with a jury on the 27th day of January, 1977, before the Honorable David Sam, sitting in the Fourth Judicial District in and for Uintah County, State of Utah, as Civil #7416.
3. Prior to the jury verdict, the parties reached a settlement and an oral stipulation was entered into the record before the court. The Court made certain Findings of Fact and Conclusions of

was based upon said stipulation and upon its own independent findings which were entered on the 3rd day of February, 1977. *Further, objector's motion to set aside said stipulation is denied.*

4. Evidence was submitted to this Court by the objector in this hearing, attempting to set aside said stipulation and said findings of Fact and Conclusions of Law, and the Judgment entered by the Court based thereupon. The Court finds that such evidence is insufficient to require an order setting aside said Stipulation, findings of Fact, and Conclusions of Law, and Judgment. *See above.*

5. The Court finds that the objector, Lamar P. West, was adequately represented, advised by competent counsel and was not under any undue influence, duress or misunderstanding regarding the Stipulation that she had entered into. The court further finds that she could have objected *she did not* to said Stipulation but failed to do so in a timely manner.

6. The Court finds that the 1971 Lifetime Eight Housecar and the Sea Swirl Boat purchased in 1973, which are presently in the possession of the objector, Lamar P. West, under Rule 67 of the Utah Rules of Procedure with the estate of George R. Powell as the beneficiary thereunder, are assets of the estate of George R. Powell.

7. The Court further finds that pursuant to said Stipulation, findings of Fact, Conclusions of Law and Judgment that that certain certificate of deposit #109 drawn originally on the Mountain View Bank of American Fork, Utah, in the principal amount of \$20,000.00, with all accrued interest thereon, is an asset of the estate of George R. Powell.

8. The court finds the protest to motion for declaratory relief filed by Lamar P. West dated the 27th day of June, 1979, is without foundation and should be dismissed. *?*

9. The Court finds that the interpretation of the various orders as proposed by the administrator as set forth in the administrator's motion is the most correct interpretation of such

orders in light of the other findings contained herein.

The Court having made and entered its Finding of Fact, now makes and enters its Conclusions of Law.

CONCLUSIONS OF LAW

1. The Findings of Fact, Conclusions of Law and Judgment entered by the Fourth Judicial District Court for Uintah County, State of Utah, as Civil #7416 are res judicata *then that was void* as to all parties who were before the court at that time including the objector, Lamar P. West.

2. The Stipulation, Findings of Fact, Conclusions of Law and Judgment are res judicata as to the action now pending in the Fourth Judicial District Court of Utah County, as Civil #42908.

3. There is an amount due and owing to the Estate of George R. Powell from the objector, Lamar P. West, after taking into account all credits set forth in that certain stipulation, findings of fact, conclusions of law and judgment, in the amount of \$9,454.27 which amount, in addition to the Sea Swirl boat and housecar described in the findings of fact, conclusions of law herein shall be paid to the estate before any distribution is made to the objector, Lamar P. West, and the administrator may apply to the court for judgment in said amount.

4. The protest to motion for declaratory relief filed by Lamar P. West herein should be dismissed.

5. The Court concludes that the estate of George R. Powell should be distributed as follows:

<u>Name</u>	<u>Percentage</u>	<u>Relationship</u>
Owen Powell	1/4 of 2/3's 1/6 of estate	Son of George R. Powell
Juel Ferrin Powell	1/4 of 2/3's 1/6 of estate	Son of George R. Powell
Vonda Powell McCarthy	1/4 of 2/3's 1/6 of estate	Daughter of George R. Powell

Lamar Powell West	1/4 of 2/3' 1/6 of estate	Daughter of George R. Powell
Eunice Ann P. Jones	1/3 of 1/3 1/9 of estate	Heir of Flo- rence E. Powell
David Juel Powell	1/3 of 1/3 1/9 of estate	Heir of Flo- rence E. Powell
Richard Owen Powell	1/3 of 1/3 1/9 of estate	Heir of Flo- rence E. Powell

6. The Court further finds that by the decision in Civil
#7416 in Uintah County, Florence A. Powell forfeits any and all
interest in the estate except as to the personal property granted
to her under that decision, and which she has received.

Dated this _____ day of _____, 1979.

BY THE COURT:

JUDGE J. ROBERT BULLOCK

MAILING CERTIFICATE

MAILED a copy of the foregoing Findings of Fact and Conclusions
of Law to M. Dayle Jeffs, Attorney for heirs of Florence Eunice
Powell, 90 North 100 East, Provo, Utah 84601, and Mr. Hugh Colton,
Attorney for Objector, Lamar P. West, 55 East Main, Vernal, Utah,
#4078, postage prepaid this 29th day of October, 1979.

J. C. Williams
Secretary

1-2-1-1

Probate No. 17578

DECISION

1. The Findings and Judgment entered by the Court on February 3, 1977 in Civil No. 7416 in the Fourth Judicial District Court in and for Uintah County, State of Utah, are res judicata.

2. The Court determines that the evidence is insufficient to require an order setting aside the Stipulation and the Findings and Judgment entered by the Court based thereon.

3. The Court determines that the ownership of the motorhome, motorboat, and residue of the Ivins Trust was determined by the Court in its Order of August 3, 1977, in Civil No. 7416, and the same is res judicata.

4. The protest to Motion for Declaratory Relief
filed herein on June 29, 1979 by Lamar Powell West is dismissed

5. The Motion for Declaratory Relief is granted.

Counsel for the Administrator is directed to prepare detailed findings and order consistent with this decision and submit them to the Court for signature within seven days.

Dated this 9th day of October, 1979.

BY THE COURT:

JUDGE

CC: Jackson Howard, Esq.
M. Dayle Jeffs, Esq.
Hugh W. Colton, Esq.

JOHN L. VALENTINE, for:

HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 EAST 300 NORTH STREET
P. O. Box 778
PROVO, UTAH 84601
TELEPHONE: 373-6345

Attorneys for Administrator

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

IN THE MATTER OF THE ESTATE OF:

GEORGE R. POWELL,	:	ORDER AND DECREE OF DISTRIBUTION
Deceased.	:	Probate No. 17,578

This matter coming on regularly to be heard on the 26th day

September, 1979, before the Honorable J. Robert Bullock,

and the Administrator of the Estate, Central Bank and Trust Company,

having been represented by its attorneys, Jackson Howard and John

Valentine, and the heirs of Florence Eunice Powell having been

represented by M. Dayle Jeffs; and Lamar P. West having been repre-

sented by her counsel, Hugh W. Colton; the Court having considered

the evidence and having entered its Findings of Fact and Conclusions,

the Court now makes the following Order:

IT IS HEREBY ORDER, ADJUDGED AND DECREED:

1. The Findings of Fact, Conclusions of Law and Judgment entered by the Fourth Judicial District Court for Uintah County, State of Utah, as Civil #7416 are res judicata, as to all parties here before the court at that time including the objector, Mr P. West.
2. There is an amount due and owing to the Estate of George Powell from the objector, Lamar P. West, after taking into account all credits set forth in that certain stipulation, findings of fact, conclusions of law and judgment, in the amount of \$9,454.27 which amount, in addition to the Sea Swirl boat and housecar described in the findings of fact, conclusions of law

herein shall be paid to the estate before any distribution is made to the objector, Lamar P. West. The administrator may apply to the court for judgment in that amount.

5. The estate of George R. Powell shall be distributed as follows:

<u>Name</u>	<u>Percentage</u>	<u>Relationship</u>
Owen Powell	1/4 of 2/3's 1/6 of estate	Son of George R. Powell
Juel Ferrin Powell	1/4 of 2/3's 1/6 of estate	Son of George R. Powell
Vonda Powell McCarthy	1/4 of 2/3's 1/6 of estate	Daughter of George R. Powell
Lamar Powell West	1/4 of 2/3' 1/6 of estate	Daughter of George R. Powell
Donice Ann P. Jones	1/3 of 1/3 1/9 of estate	Heir of Florence E. Powell
David Juel Powell	1/3 of 1/3 1/9 of estate	Heir of Florence E. Powell
Richard Owen Powell	1/3 of 1/3 1/9 of estate	Heir of Florence E. Powell

6. By the decision of Civil #7416 in Uintah County, Florence A. Powell forfeits any and all interest in the estate except as to the personal property granted to her under that decision which she has already received.

Dated this _____ day of _____, 1979.

BY THE COURT:

JUDGE J. ROBERT BULLOCK

MAILING CERTIFICATE

MAILED a copy of the foregoing Order and Decree to M. Dayle
Attorney for heirs of Florence Eunice Powell, 90 North
West, Provo, Utah 84601, and Mr. Hugh Colton, attorney for
Lamar P. West, 55 East Main, Vernal, Utah 84078, postage
paid this 29th day of October, 1979

J. William
Secretary