1982

In the matter of the estate of Louis A. Grossen : Brief of Respondent Earl Louis Grossen

Utah Supreme Court

Clark R. Nielsen; Attorneys for Appellants;
William L. Crawford; Parsons, Behle & Latimer; Attorneys for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of LOUIS A. GROSSEN, a/k/a LOUIS GROSSEN, MILTON GROSSEN, L.E. GROSSEN, LARRY GROSSEN and EDWARD GROSSEN, Deceased.	)	No. 18075

BRIEF OF RESPONDENT EARL LOUIS GROSSEN

Appeal from an Order of the Third Judicial District Court of Salt Lake County, State of Utah, Honorable Kenneth Rigtrup, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF RESPONDENT EARL LOUIS GROSSEN

NATURE OF THE CASE

This is an action to determine the testacy or intestacy of Louis A. Grossen, deceased, and to determine the validity or invalidity of the decedent's Last Will and Testament, dated July 10, 1974.

Appellants allege that the will is invalid because one witness was under the age of 18 when the will was executed. Respondents claim that at the time the will was witnessed, there was no legal age requirement for witnesses.

DISPOSITION IN LOWER COURT

An evidentuary hearing was held on September 21, 1981, before the Honorable Kenneth Rigtrup, District Judge. Judge Rigtrup found that the will had been validly executed and witnessed, and admitted it to probate. Judge Rigtrup further denied the Appellants' petition for appointment of personal representative and appointed Respondent personal representative.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the disposition of the court below.

STATEMENT OF FACTS

The matters set forth in the first two paragraphs of Appellants' statement of facts are correct except that the record does not conclusively show that the decedent did not remarry his second wife after their divorce in 1943 (R. 20, 73-74).

The matters set forth in the third paragraph of Appellants' statement of facts are not properly facts before this Court. As Appellants concede, their proffer of testimony regarding statements allegedly made before the decedent's death was ruled inadmissible by the trial court (R. 71-72). Appellants have not challenged the validity of that ruling.

The court below found that the decedent executed the Last Will and Testament in dispute in this case and that it was properly witnessed (R. 81-82). It is irrelevant that Respondent did not file the will for probate until after Appellants filed their petition.

The court below did specifically find that, on the date that Mr. Grossen's Last Will and Testament was executed and witnessed, Scott Hill was only 16 years old (R. 33). The court also found that "the execution of the will by the decedent was made in the presence of Richard B. Hill and Scott Hill

as attesting witnesses, the decedent at the time of the execution of the will indicated to the subscribing witnesses that it was his will and requested them to execute the same, and the two attesting witnesses signed their names at the end of the will at the testator's request, in his presence, and in the presence of each other (R. 33, 81-82). Appellants have not challenged the sufficiency of the evidence upon which such findings were made. The testimony of Richard B. Hill and Scott Hill referred to in Appellants' brief, to the effect that their recollections of exactly what took place are poor, is therefore irrelevant to the issues on appeal herein.

Upon hearing the evidence presented at the hearing, the court below ruled that Mr. Grossen's Last Will and Testament was valid and properly executed and witnessed, and admitted that will to probate (R. 33-34, 81-82). Respondent was appointed personal representative (R. 37, 82). In admitting the will to probate, the court found that the will was validly executed and witnessed according to the law of the State of Utah at the time the will was executed, and that, at that time, such law did not include an age requirement for witnesses to a will (R. 80-81).

The matters set forth in the final paragraph of appellants' statement of facts are correct.

QUESTIONS PRESENTED

The only issue properly before this Court on appeal is the following:

Whether a will which was validly executed and witnessed in 1974 by two witnesses, one of whom was under age 18, and which was never revoked, remains valid under the Utah Uniform Probate Code as adopted in 1975, which requires that the witnesses to wills be over the age of 18 years.

Appellants argue in both Points I and II of their brief that the decedent's will was invalid because one of the witnesses did not meet the age requirement set forth in Utah Code Ann. § 75-2-505 (1953, as amended, 1975). Both points present that single issue, an no other. Appellants nowhere argue that, prior to adoption of the Uniform Probate Code in Utah in 1976, Utah law imposed any specific age requirement on witnesses to a will and the court below found that no such age requirement existed before adoption of the Utah Uniform Probate Code (R. 81). Nevertheless, Respondent will complete his argument by discussing in Respondent's Point II the absence of such an age requirement before 1977.

The court below made no finding of fact as to whether the decedent was married on the date of his death (R. 73). Given the disposition of the case below, such a finding was not necessary. In their Point III, Appellants assume it to be an established fact that the decedent was not, in fact, married at the date of his death. Such supposed fact is not conclusively

established in the record. Furthermore, the court below neither received evidence nor made any rulings as to the fitness of either candidate for appointment as personal representative, other than respondent. Point III of Appellants' argument is therefore not properly at issue on this appeal. If this Court should rule that Mr. Grossen's will should not have been admitted to probate, this case should be returned to the court below for further hearing and determination.

SUMMARY OF ARGUMENT

1. A will which was validly executed and witnessed in 1974 and was never revoked remains valid under the Utah Uniform Probate Code.

2. The will in question was validly executed and witnessed according to Utah law in 1974.

3. If the court should rule adversely to respondent on this appeal, the case should be remanded to the trial court for further hearing to receive additional evidence and determine the most suitable personal representative.

ARGUMENT

I

A WILL WHICH WAS VALIDLY EXECUTED AND WITNESSED IN 1974 AND WAS NEVER REVOKED REMAINS VALID UNDER THE UTAH UNIFORM PROBATE CODE.

As Appellants note, there is no question that the Utah Uniform Probate Code "applies to any wills of decedents dying"

after July 1, 1977. Utah Code Ann. § 75-8-101 (2)(a) (1953, as amended 1975). Respondent does not argue, and the court below did not rule, that the Uniform Probate Code does not apply. Appellants' argument that the code applies, and indeed that it controls the validity of a will of any person dying after July 1, 1977, is entirely beside the point.

In fact, because it was validly executed and witnessed under Utah law in 1974, (as discussed in Point II, below), that will is valid according to the express terms of § 75-2-506 (1953, as amended 1975):

> A written will is valid if executed in compliance with § 75-2-502 or 75-2-503 or if its execution complies with the law at the time of execution of the place where the will is executed. (Emphasis added)

In finding that the will at issue in this case is valid, the trial court did nothing more than apply the literal and unambiguous language of that section. As a general rule, the courts should not substitute their own interpretations for the clear, literal meaning of a statute. Gord v. Salt Lake City, 20 Utah 2d 138, 434 P.2d 449 (1967). See, also, the language from In re Alexander's Estate, 104 Utah 286, 139 P.2d 432, 434 (1943), quoted in Brief for Appellants at 9.

Any ruling other than that adopted by the court below would have contravened not only the language but also the policies underlying the Utah Uniform Probate Code. Given the clear language of § 75-2-506, the policy noted by Appellants

favoring "deference to the State Legislature in its determination of State probate procedures" (Brief for Appellants at 6), supports respondent's position. In this regard, it is worth noting that In re Estate of Lane, 99 Ida. 850, 590 P.2d 577 (1979), upon which Appellants rely extensively, is neither "factually identical" nor "directly applicable" to the case on appeal herein. In Lane, the Idaho court merely applied the witness age requirement to a will which was executed after the age requirement had taken effect. The Idaho court had no reason not to apply that age requirement strictly and literally, because nothing in the Idaho statutes directed it to do otherwise. In contrast, in the case on appeal herein, Respondent readily concedes that, with respect to wills to which § 75-2-506 does not apply, the provisions of § 75-2-505, requiring witnesses to be over age 18, deserve strict application. It is, however, just as important to apply the terms of § 75-2-506 strictly and literally, in deference to the judgment of the Utah Legislature.

Likewise pertinent are the policies expressly articulated in the Utah Uniform Probate Code itself. Utah Code Ann. § 75-1-102 provides:

> (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: . . . (b) to discover and make effective the intent of a decedent in distribution of his property; . . . and

> . . . (e) to make uniform the law among the various jurisdictions.

(Emphasis added).

The trial court expressly found that the decedent executed his Last Will and Testament "of his own free will and choice" and not "as the result of fraud, duress, undue influence, mistake, or any other condition that would cause the will not to be valid" (R. 33). Thus, the intent of the decedent is not in doubt, and any attempt to ignore the clear language of § 75-2-506 would result in the defeat of that clearly expressed intent. (The circumstances and intention of the Testator at the time of execution of the will are, of course, controlling ones. Wright v. Wright, 520 P.2d 563 (Utah, 1974)). As a corollary to the policy which favors discovering and giving effect to the intent of a decedent, Utah law recognizes a presumption against intestacy. In re Estate of Gardner, 615 P.2d 1215 (Utah, 1980). Of course, these principles are ordinarily applied in interpreting a will itself, but there is no reason why this Court should not consider them in the course of statutory construction as well. Absent important policy considerations to the contrary, then, this court should not adopt a reading of § 75-2-506 which both ignores the clear language of that section and would result in the intestacy of the decendent and the defeat of his clearly expressed intent. In addition, to place any such construction on the statute could cause numerous wills to be invalidated; surely the Legislature would not have intended such a result.

Appellants neither cite nor refer to § 75-2-506 in their brief, so it is difficult to determine their position regarding its application. Appellants may have intended to argue that this Court should only apply that section to wills executed in states other than Utah. Aside from the fact that it would ignore the clear, unambiguous language of the section and the equally clear intent of the decedent, such a ruling would contravene the second expressed policy of the Utah Uniform Probate Code noted above, that favors uniformity of law. If the words "at the time of execution" are not to be ignored, such a limitation on the scope of the section would mean that, hypothetically, if the execution and witnessing of Mr. Grossen's will had taken place in Idaho before that State's adoption of a witness age requirement, and if that will were submitted for probate in Utah, the Utah court would admit that will, whereas an Idaho court would not, despite the fact that the will was valid in Idaho at the time it was executed. Likewise, an Idaho court would, by virtue of § 75-2-506, admit Mr. Grossen's will as actually executed and witnessed in Utah, although the will would not be admitted in Utah. Such a result does violence to the policy in favor of uniformity of law.

In addition, the results described above, which would necessarily follow from limiting the application of § 75-2-506 to wills executed in states other than Utah, would make little sense. A statute is not to be interpreted so as to produce

absurd and senseless results. Curtis v. Harmon Electronics, Inc., 575 P.2d 1044 (Utah, 1978).

Such a limitation of § 75-2-506 might be defensible if that section declared valid in Utah only those wills which are now valid in the states in which they were executed. Wills would then, under § 75-2-506, be universally either valid or invalid. That is, however, not what the section says. Rather, § 75-2-506 validates wills which were validly executed "at the time of execution [in] the place where. . . executed." It is a universal principal of statutory construction that statutes are to be interpreted so as to give effect to all of their parts. Millet v. Clark Clinic Corp., 609 P.2d 934 (Utah, 1980); Grant v. Utah State Land Board, 26 Utah 2d 100, 485 P.2d 1035 (1971).

II

THE WILL IN QUESTION WAS VALIDLY EXECUTED AND WITNESSED ACCORDING TO UTAH LAW IN 1974.

Prior to the enactment of Utah Code Ann. § 75-2-505 in 1975, Utah law contained no age limitations for witnesses to a will. Absent such a provision in the Probate Code, general provisions governed the competence of the witnesses to a will. 79 Am. Jur. 2d Wills § 284 (1975). Under those general provisions, which were controlling in 1974, a sixteen-year-old was perfectly competent to act as a witness, absent some indication of mental incompetence or inability to understand or remember the subject of testimony. Utah Code Ann. § 78-24-1 (1953);

State v. Middelstadt, 579 P.2d 908 (Utah, 1978); State v. Smith, 16 Utah 2d 374, 401 P.2d 445 (1965). The court below found that the witnesses to the decedent's will were competent under the general rules with respect to witnesses in Utah. They therefore met the requirements of Utah law in effect at the time the will of decedent was executed.

III

IF THE COURT SHOULD RULE ADVERSELY TO RESPONDENT ON THIS APPEAL, THE CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR FURTHER HEARING TO RECEIVE ADDITIONAL EVIDENCE AND DETERMINE THE MOST SUITABLE PERSONAL REPRESENTATIVE

In appointing respondent personal representative, the court below followed the provisions of Utah Code Ann. § 75-3-203 (1953, as amended 1975), which sets forth the priority among persons seeking appointment as personal representative. Because the will names respondent as personal representative, the court so ordered. (R. 36-37). The court therefore had no occasion to determine whether the decedent was married at the time of death, and if not, who would be most fit to act as personal representative.

Appellants request an order from this Court naming appellant Mrs. Vincent as personal representative, claiming that, "any allegation that Vivian Grossen has priority for appointment as personal representative under § 75-3-203(d), as surviving spouse of Louis Grossen, is defeated by the fact that at the time of Louis Grossen's death, Vivian was not, in fact, married to Mr. Grossen." (Appellants' Brief at 10). This

assertion is not conclusively supported by the record. While counsel for respondent did not attempt to present evidence on this point, the record does contain evidence from which the court could have inferred that the decedent was, in fact, married at his death, including the references in the will to "my wife, Vivian H. Grossen," (R. 20), and the certificate executed after the divorce of the decedent, sealing his marriage to Vivian H. Grossen, (R. 73-74). Furthermore, even if the decedent was not married at his death, the record herein is insufficient for this Court to reach an informed conclusion as to the relative fitness of either respondent or Mrs. Vincent, both of whom are children of the decedent, to act as personal representative. If this Court should find that the will is not valid under Utah law, then it should remand this case to the court below, whose province it is to make findings of fact in probate disputes. In re Estate of Astill, 14 Utah 2d 217, 381 P.2d 95 (1963); In re Alexander's Estate, 104 Utah 286, 130 P.2d 432 (1943).

CONCLUSION

The Last Will and Testament of Louis A. Grossen was validly executed and witnessed under Utah law in effect on the date of execution. Under the Utah Uniform Probate Code, which expressly validates wills executed in accordance with the law in effect at the time and place of execution, the will is therefore valid.

Should the Court rule in appellants' favor, however, this case should be remanded to the court below for further consideration of the issues which would then arise regarding appointment of a personal representative.

RESPECTFULLY SUBMITTED this 29 day of March, 1982.

William L. Crawford

WILLIAM L. CRAWFORD

T. Patrick Casey

T. PATRICK CASEY

of and for
PARSONS, BEHLE & LATIMER
Attorneys for Respondent
79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84147

CERTIFICATE OF MAILING

I hereby certify that on the 1st day of April, 1982, I caused to be mailed two copies of the foregoing BRIEF OF RESPONDENT, postage prepaid, to Clark R. Nielsen, NIELSEN & SENIOR, Attorneys for Appellants, 1100 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah, 84111.

T. Patrick Casey

Last Will and Testament

OF

LOUIS GROSSEN

I, LOUIS GROSSEN, a resident of Salt Lake City, County of Salt Lake, State of Utah, being of sound mind and disposing memory and not acting under duress, menace, fraud or the undue influence of any person whomsoever, do make, publish and declare this to be my Last Will and Testament and do hereby expressly revoke all former Wills and testamentary dispositions heretofore made by me.

I.

MY HEIRS. My wife, VIVIAN E. GROSSEN---(hereinafter sometimes designated "my wife"), and ~~our~~ my three (3)-- children whose names are EARL LOUIS GROSSEN, LUCILLE TAYLOR, MAE ELEANOR VINCENT---- are living at the time of the execution of this Will. I have no other children. The terms "child," "children" and "issue" as used herein shall include legally adopted and hereafter born child, children and issue.

II.

DEBTS AND FUNERAL EXPENSES. I direct that my debts, last illness, funeral and burial expenses be paid as soon after my death as may be reasonably convenient, and I hereby authorize my Executor as hereinafter appointed, to settle and discharge any claims against my estate in total absolute discretion

III.

SCOPE OF THIS WILL. It is my intention in this Will to devise, bequeath and dispose of my entire estate consisting of all of my real, personal and mixed properties of every kind and description, wheresoever the same may be situated, and to exercise any power of appointment which I may own at the time of my death.

IV.

HOUSEHOLD FURNISHINGS. I declare that as of this date all household furniture and furnishings, appliances and equipment, carpets, silverware, books, pictures, paintings, works of art, and similar household items in any residential dwelling or home occupied by myself and my wife at the time of my death, are the sole and separate property of my said wife, having been given to her by me during my lifetime or having been acquired by her from her separate funds.

V.

DISPOSITION OF ESTATE. If my wife, VIVIAN H. GROSSEN---- survives me, then I give, devise and bequeath to my said wife my entire estate consisting of all of my real, personal and mixed properties, wheresoever the same may be situated, outright and free of trust.

EXHIBIT A

Louis Grossen 20

VI.

ALTERNATE DISPOSITION OF ESTATE. If my wife, VIVIAN H. GROSSEN ------, does not survive me, then I give, devise and bequeath my entire estate consisting of all of my real, personal and mixed properties, wheresoever the same may be situated, in equal shares, one such equal share to each of my children. If any of my children shall predecease me, then the share of my estate that said deceased child would have received if he or she had survived me shall be distributed to his or her surviving issue, per stirpes, upon the principle of representation. If said deceased child has no surviving issue, then the share of my estate which said deceased child would have received if he or she had survived me, shall be distributed equally to my surviving children, or if any of them be deceased leaving issue, to his or her surviving issue, per stirpes, on the principle of representation.

Item VII. is not applicable.

APPOINTMENT OF GUARDIAN. In the event both my wife and I die leaving a child or children under the age of majority, I appoint to serve as Guardian of the person and property of such minor child or children. In the event should decline or for any reason fail to serve as such Guardian, I appoint to serve as Guardian of such minor child or children.

VIII. This is item VII.

PRESUMPTION OF SURVIVAL. In the event that my wife and I die under circumstances where it is difficult to ascertain or determine which of us died first, I direct that it shall be presumed for purposes of my Will that I survived her.

IX. This is item VIII.

PROVISION FOR CHILDREN. I have intentionally made no provision for my children who are now living or for any children who may be born hereafter, or legally adopted, other than as expressly provided in this Will, because I have confidence that my wife will provide for said children if she survives me. If my wife does not survive me, then I have made provision for said children hereunder. (Refer to section six (VI) above). In addition, I, Louis Grossen, will to each of my three children the total sum of $000.00 each if my wife survives me.

X. This is item IX.

APPOINTMENT OF EXECUTOR. I hereby nominate and appoint EARL LOUIS GROSSEN to serve as Executor of my Will without bond or other security being required of him. I hereby authorize my Executor to sell, lease or encumber any portion of my estate without authority of any court and with or without notice. I further direct that my Executor may, in total discretion, continue to hold, manage or operate any property or business interest that I may hold or own at the time of my death, the profits or losses, if any therefrom, to inure to and be chargeable to my estate as a whole and not to my Executor. In the event not applicable should decline or for any reason fail to serve hereunder, I hereby nominate and appoint not applicable ----------, or its successors, to serve as

Louis Grossen

Executor of my Will, with the same powers and discretions as are herein vested in my Execut—.—[In the event Not applicable--------- should decline or for any reason fail to serve hereunder, I hereby nominate and appoint Not applicable------- to serve as Execut N/A of my Will, without bond or other security being required of N/A and with the same powers and discretions as are herein vested in my Execut N/A]. Note: The last three sentences on page two of my will, beginning "In the event.....through the last sentence in the above section, page 3, ending "vested in my Execut.....are not applicable in this will of LOUIS GROSSEN.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of July , 1974. (Ten July 1974)

Louis Grossen

This instrument, consisting of three...(3).typewritten pages (including the attestation clause and signatures of witnesses), was subscribed by LOUIS GROSSEN---------- on the day and year last above written in the presence of us, and at the time said Will was so subscribed LOUIS GROSSEN--------declared to us that this instrument is his Will, and thereupon, we, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as attesting witnesses the day and year last above written.

NAME	RESIDENCE
Richard D. Hill	737 E. 4TH So. S.L.C. Ut.
Scott Hill	737 E. 4TH So. S.L.C. Ut.

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IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

* * * * * * *

IN THE MATTER OF THE ESTATE OF LOUIS A. GROSSEN, Deceased	FINDINGS OF FACT AND CONCLUSIONS OF LAW Probate No. P81-671

* * * * * * *

The Petition of Mae Eleanor Grossen Vincent and Lucille M. Grossen Taylor for Appointment of Personal Representative and Determination of Intestacy and the petition of Earl L. Grossen for Formal Probate of Will and Formal Appointment of Personal Representative, and the Objections to said Petitions on file herein, came on for hearing before the Honorable Kenneth Rigtrup, Judge of the above-entitled Court, sitting without a jury, on the 21st day of September, 1981. Petitioner Earl L. Grossen was represented by his counsel, William L. Crawford, of and for Parsons, Behle & Latimer. Petitioners Mae Eleanor Grossen Vincent and Lucille M. Grossen Taylor were represented by their counsel Clark R. Nielsen, of Nielsen and Senior. Richard B. Hill and Scott Hill, as subscribing witnesses to the Last Will and Testament of Louis Grossen, testified as to the circumstances surrounding the execution of the Will. The Court having heard testimony introduced by the parties and the Court being fully advised in the premises, now makes and enters the following:

FINDINGS OF FACT

1. The document filed with this Court under Probate No. P81-671 captioned "Last Will and Testament of Louis Grossen" and dated July 10, 1974, is the Last Will and Testament of Louis Grossen, deceased.

2. Said Last Will and Testament was executed at the end thereof by Louis Grossen who wa then over the age of 18 years, the execution of the Will by the decedent was made in the presence of Richard B. Hill and Scott Hill as attesting witnesses, the decedent at the time of execution of the Will indicated to the subscribing witnesses that it was his will and requested them to execute the same, and the two attesting witnesses signed their names at the end of the Will at the testator's request, in his presence, and in the presence of each other.

3. At the date of the execution of the Will, one of the witnesses, Scott Hill, was only 16 years of age.

4. At the time of the execution of the Will the decedent was acting of his own free will and choice and did not execute his Will as the result of fraud, duress, undue influence, mistake, or any other condition that would cause the Will not to be valid.

5. The decedent at the time of the execution of his Will had the capacity to dispose of his property by will.

Based upon the foregoing Findings of Fact the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The Last Will and Testament of Louis Grossen dated July 10, 1974, which Will has been filed with this Court,

is valid and is entitled to be admitted to probate as the Last Will and Testament of Earl Grossen, deceased.

DATED this 30th day of September, 1981.

BY THE COURT:

Kenneth Rigtrup

The Honorable Kenneth Rigtrup,
District Judge

ATTEST
W. STERLING EVANS
Clerk

By _____
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

* * * * * * *

IN THE MATTER OF THE ESTATE OF LOUIS A. GROSSEN, Deceased	)	FORMAL PROBATE OF WILL AND APPOINTMENT OF PERSONAL REPRESENTATIVE
	)	Probate No. P81-671

* * * * * * *

Upon consideration of the Petition of Earl L. Grossen for Formal Probate of the Decedent's Will dated July 10, 1974, and for Formal Appointment of Earl L. Grossen as Personal Representative of the decedent, filed with the Court by Earl L. Grossen on September 7, 1981, and the Court having entered its Findings of Facts and Conclusions of Law in this matter, the Court further finds that:

1. The required notice has been given or waived.

2. The proceeding was commenced within the time provided by law.

3. The decedent died on April 17, 1981, in Salt Lake County, State of Utah.

4. Venue is proper.

5. The testamentary instrument to which the petition relates is the decedent's Last Will.

6. Earl L. Grossen is entitled to appointment as the decedent's Personal Representative to act without bond.

7. The heirs of the decedent are as follows:

Name	Relationship
Vivian H. Anderson Grossen	Spouse
Mae Eleanor Grossen Vincent	Daughter
Lucille M. Grossen Taylor	Daughter
Earl Louis Grossen	Son

THEREFORE:

1. The Will of the decendent dated July 10, 1974, is hereby formally probated.

2. Earl L. Grossen is hereby formally appointed as the Personal Representative of the decedent to act without bond.

3. Upon qualification and acceptance, Letter Testamentary shall be issued to the said personal representative.

DATED this 30th day of September, 1981.

BY THE COURT:

The Honorable Kenneth Rigtrup
District Judge

ATTEST
W. STERLING EVANS
Clerk
By _____
Deputy Clerk

THE COURT: May this witness be excused?

MR. NIELSEN: Yes, your Honor, he may. I would call then Mrs. Vincent to the stand.

THE COURT: For what purpose?

MR. NIELSEN: For the purpose of testifying that in 1976, your Honor, and in 1978 she had conversations with the decedent wherein the decedant stated to her that he did not have a Will, and that it's about time he made a Will.

MR. CRAWFORD: That's moot, your Honor. The statute is clear that if you have a Will and you want to destroy that Will there are certain procedures and manners in which you can destroy your Will, by burning it, tearing it, mutilating it, and such things as that, and I don't think he can revoke a Will by telling somebody else that you don't think you have a Will. I think any testimony that she could give concerning what he told her would be, number one, hearsay; and number two, irrelevant.

MR. NIELSEN: First of all, your Honor, the issue isn't whether or not he revoked this document. The issue is whether or not this document is his Will. And therefore, I'm not suggesting that the testimony is that he merely revoked this document.

Second of all, as to its being hearsay, it clearly comes within the exception of his state of mind and his belief at the time that he did not have a Will and that is

certainly relevant as to whether or not he had a Will.

THE COURT: I'm going to sustain the objection.

MR. NIELSEN: May I proffer that testimony, then, for the record?

THE COURT: You may.

MR. NIELSEN: May I then call Mrs. Taylor to the stand for the same purpose?

THE COURT: I will sustain the objection on that. You may make a proffer of what that testimony would be.

MR. NIELSEN: My proffer as to her testimony would be that in 1980, in the fall of 1980, she had conversation with her father in which her father asked her if she knew of an attorney so he could make a Will, because he did not have one and wished to make one and it was high time that he did so.

THE COURT: Do you have anything else to offer?

MR. NIELSEN: Yes, your Honor. I would offer into evidence the certified copy of the divorce decree signed in 1941 in which the purported surviving spouse of this decedent was granted a decree of divorce from Mr. Louis Grossen.

MR. CRAWFORD: I object to that, too, your Honor. I think the Will leaves all the property to a named person. He identifies her in the Will as his wife, but I think it's immaterial whether she was in fact his wife, as long as she's

named as a beneficiary of his Will.

MR. NIELSEN: Certainly for the purpose of interpreting the Will, that may be fine, your Honor. But insofar as whether or not he would refer to her as his wife, when he knew that they were not married and she was not his wife, then I submit that it's relevant for the purpose of showing whether or not this purported Will is really his Will.

THE COURT: I don't see what bearing the marital status has, necessarily, in this day and age.

MR. NIELSEN: For the purpose of if it's not his wife, then he wouldn't have referred to her as his wife. And I further proffer that Mrs. Vincent would so testify, that she stated that she was not his wife and she had no claim to him.

THE COURT: Is that an appropriate basis for invalidating a Will?

MR. NIELSEN: I think it goes, your Honor, to further testimony and further evidence that he never intended this to be his Will and this is not his Will.

THE COURT: I'll receive the exhibit.

MR. NIELSEN: May I have just a moment, your Honor?

THE COURT: You may.

MR. NIELSEN: I have nothing further in the way of testimony or evidence, your Honor, but I would coninue my

objection that this is not the Last Will and Testament of the decedent, and further, that the document was not properly executed in accordance with the governing laws of the State of Utah, and that, I suppose, goes to the argument which I'm sure we're going to come to, which is which law applies in this case.

MR. CRAWFORD: Well, your Honor, Counsel has submitted an exhibit and I have an exhibit of my own. Unfortunately, the people that have signed this exhibit, I don't know where they are or who they are, but this is a marriage certificate evidencing a sealing of this prior marriage of Mr. Grossen and Mrs. Grossen, and it's dated 1957, which is some 16 years after that divorce decree.

I submit that this document goes more to showing his state of mind as far as what he thought about his marital relationship than that divorce certificate. I show this to Counsel and I hope that Counsel would not object to its admission into evidence because I don't have anybody here that can testify as to it.

MR. NIELSEN: I'll certainly object to it on that basis, your Honor, and he knew I was going to object to it. In any event, it shows -- the document states on its face that they were previously married on a previous day.

THE COURT: I'm going to admit it, feeling it's about as admissible as the one I already received.

invalidating a lot of Wills, wouldn't it? Do you really think that's the law?

MR. NIELSEN: I don't think it would, your Honor, and that is a requirement that the Legislature put on the Will and shows a specific public policy.

THE COURT: Even if the Legislature did that, would it be constitutional for them to do that?

MR. NIELSEN: Yes, I think it would. If the Will speaks upon the death of the testator, then we're not talking about enacting a law which devises something which has already come into being. The Will speaks upon the death, not upon its execution. It means nothing as a document until the death of the testator.

THE COURT: His signing and executing it is an exercise of a private property right that one possesses to dispose of his property, isn't it?

MR. NIELSEN: Yes, but it does not become effective until his death.

(Whereupon, further argument was presented to the Court.)

THE COURT: The law is clearcut in the new code and it is the mission of the courts, I think, to carry out the wishes of the decedent and to uphold the validity of a Will where possible, rather than invalidate them for any reason. There was no provision prior to the adoption of the Uniform

Probate Code prohibiting a witness from executing a Will if he were below the age of 18, 21, or any other particular age. There was no reference to age. I don't think it's my purpose to write in requirements in the law about what a witness is or isn't. There is no definition defining who can act as a witness, and as long as that witness has the capacity and is capable of reporting what he or she observes, I would conclude that under prior law that was sufficient.

The Court finds that on July 10, 1974, Louis Grossen requested Richard B. Hill and Scott Hill to witness the execution of his Will, that he signed the document which has been offered as his Last Will and Testament in the presence of Richard Hill and Scott Hill and they, while in his presence, executed it as well. They both have dim memories, and I'd be confronted with the same problem you have. I've executed a lot of Wills and if you were to ask me I couldn't tell you one that I've executed. Short of seeing the document, examining my signature, I couldn't record any recollection at all of having witnessed a Will.

MR. NIELSEN: Well, I suppose I haven't lived long enough to encounter that problem yet. I suppose I will as I get older.

THE COURT: I think you'll find that my memory is very alert and accurate and I'm not yet that far gone that you're not going to be where I am in quick order.

MR. CRAWFORD: May the findings also recite that he declared it to be his Last Will and Testament, sufficient to meet the requirements of the statute?

THE COURT: Yes. I think the finding is that he simply requested the two of them to execute his Will. I don't think more is required by the law than that. At least Mr. Hill, Sr., I think, understood it to be his Will. It was executed for those purposes. There's nothing in this record to indicate any duress, undue influence, fraud, mistake and the Court finds that at the time he made the request of the Hills that he appeared to the Hills to have capacity to dispose of his property by Will.

The Court concludes it is a binding, valid Will and Testament and shall be admitted to probate. Anything else?

MR. CRAWFORD: Yes. I take it that Mr. Earl Grossen may be appointed the executor of this estate pursuant to the Will?

THE COURT: He is appointed the executor of the Will or personal representative to act without bond as provided by the Will.

MR. CRAWFORD: Thank you.

THE COURT: This court will be in recess.

(Whereupon, at 11:00 a.m. court was in recess.)

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