

1982

# Lois Jean Osborn et al v. Carol Smith et al : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

David E. Bean; Attorney for Appellants;

H. Ralph Klemm; Kent H. Murdock; Sumner J. Hatch; David B. Boyce; Richard Ruckenbroad;  
Attorneys for Respondents;

---

## Recommended Citation

Brief of Appellant, *Osborn v. Smith*, No. 18159 (Utah Supreme Court, 1982).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/2796](https://digitalcommons.law.byu.edu/uofu_sc2/2796)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE STATE OF UTAH

-----

In the Matter of the Estate of	:	
	:	
GRACE M. ANDERSON,	:	Case No. 18159
	:	
Deceased.	:	
	:	
CAROL SMITH and ELLA A. JOHNSON,	:	
	:	
Appellants.	:	

-----

APPELLANTS' BRIEF

-----

DAVID E. BEAN  
Attorney for Appellants,  
Carol Smith and Ella Johnson  
190 South Fort Lane, Suite 2  
Layton, Utah 84041

H. RALPH KLEMM  
Attorney for First Security  
Bank, Conservator  
175 South West Temple #500  
Salt Lake City, Utah 84101

DAVID B. BOYCE  
Attorney for Respondent,  
Lois Jean Osborn  
61 South Main #500  
Salt Lake City, Utah 84111

KENT H. MURDOCK  
Attorney for Respondent,  
Lois Jean Osborn  
400 Deseret Building  
Salt Lake City, Utah 84111

RICHARD RUCKENBROAD  
Attorney for Respondent,  
Nina O. Scalley  
36 South State #2000  
Salt Lake City, Utah 84111

SUMNER J. HATCH  
Attorney for Respondent,  
Nina O. Scalley  
72 East 400 South #330  
Salt Lake City, Utah 84111

FILED

FEB - 8 1982

-----  
Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

-----

In the Matter of the Estate of	:	
	:	
GRACE M. ANDERSON,	:	Case No. 18159
	:	
Deceased.	:	
	:	
CAROL SMITH and ELLA A. JOHNSON,	:	
	:	
Appellants.	:	

-----

APPELLANTS' BRIEF

-----

DAVID E. BEAN  
Attorney for Appellants,  
Carol Smith and Ella Johnson  
190 South Fort Lane, Suite 2  
Layton, Utah 84041

H. RALPH KLEMM  
Attorney for First Security  
Bank, Conservator  
175 South West Temple #500  
Salt Lake City, Utah 84101

DAVID B. BOYCE  
Attorney for Respondent,  
Lois Jean Osborn  
61 South Main #500  
Salt Lake City, Utah 84111

KENT H. MURDOCK  
Attorney for Respondent,  
Lois Jean Osborn  
400 Deseret Building  
Salt Lake City, Utah 84111

RICHARD RUCKENBROAD  
Attorney for Respondent,  
Nina O. Scalley  
36 South State #2000  
Salt Lake City, Utah 84111

SUMNER J. HATCH  
Attorney for Respondent,  
Nina O. Scalley  
72 East 400 South #330  
Salt Lake City, Utah 84111

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES . . . . .	i
STATEMENT OF THE KIND OF CASE. . . . .	1
DISPOSITION IN LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL. . . . .	2
STATEMENT OF FACTS . . . . .	2
ARGUMENT . . . . .	7
POINT I	
IS THE COURT ORDER VOIDING THE WILL AND THE DEEDS EXECUTED BY GRACE M. ANDERSON THE 28TH DAY OF NOVEMBER, 1977 A VALID ORDER? . . . . .	7
POINT II	
THE STIPULATION EXECUTED BY THE PARTIES EMPOWERED THE COURT TO MAKE THE ORDER VOIDING THE WILL AND DEEDS MADE WITHOUT COURT APPROVAL. . . . .	9
POINT III	
MAY THE DISTRICT COURT IN A SUBSEQUENT PROCEEDING VOID AN ORDER OR RULING OF A DIFFERENT DIVISION OF THE SAME DISTRICT COURT PREVIOUSLY MADE FROM WHICH NO APPEAL WAS RESERVED OR TAKEN? . . . . .	14
CONCLUSION . . . . .	15

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES CITED</u>	
<u>Estate of Powell v. West,</u> 626 P.2d 430 (Utah 1981) . . . . .	11
<u>Harward v. Harward,</u> 526 P.2d 1183 (Utah 1974) . . . . .	14
<u>In re Estate of Mecham,</u> 537 P.2d 312 (Utah 1975) . . . . .	14
<u>Johnson v. Johnson,</u> 560 P.2d 1132 (Utah 1977) . . . . .	14
<u>Moon v. Platte Valley Bank,</u> 634 P.2d 1036 (Colo.App. 1981) . . . . .	7
<u>Parkland Hosiery Company, Inc. v. Shore,</u> 439 U.S. 322, 58 L.ed. 2d 552, 99 S.Ct. 645 (1979) . . . . .	11
<u>Peterson v. Peterson,</u> 530 P.2d 821 (Utah 1974) . . . . .	14
<u>Richardson v. Grand Central Corporation,</u> 572 P.2d 395 (Utah 1977) . . . . .	14
<u>Searle Bros. v. Searle,</u> 588 P.2d 689 (Utah 1978) . . . . .	12
<u>State v. Morgan,</u> 527 P.2d 225 (Utah 1974) . . . . .	14
<u>STATUTES AND CODES</u>	
Utah Rules of Civil Procedure, Rule 72 . . . . .	14
Utah Uniform Probate Code, 75-5-422. . . . .	10

IN THE SUPREME COURT OF THE STATE OF UTAH

-----

In the Matter of the Estate of	:	
	:	
GRACE M. ANDERSON,	:	Case No. 18159
	:	
Deceased.	:	
	:	
CAROL SMITH and ELLA A. JOHNSON,	:	
	:	
Appellants.	:	

-----

APPELLANTS' BRIEF

-----

STATEMENT OF THE KIND OF CASE

Appellants moved the court for a dismissal of the petition for probate of the Last Will and Testament of Grace M. Anderson on the ground that a prior order of the Court had voided the will, and deeds made concurrently, after stipulation and court order that the guardian and conservator would not allow the ward to make any testamentary dispositions without first obtaining an order of the Court and notice to appellants.

DISPOSITION IN LOWER COURT

The motion was heard in the Second Judicial District Court of Davis County, the Honorable J. Duffy Palmer,

District Judge and after denial of the motion and subsequent trial, the Court entered an order admitting the will to probate and from the entry of said order and the Findings of Fact and Conclusions of Law, this appeal was timely filed.

RELIEF SOUGHT ON APPEAL

Appellants as objectors of the probate of the will seek reversal of the order admitting the will to probate and confirmation of the Court's prior ruling that said will and concurrent deeds are null and void.

STATEMENT OF FACTS

Two files were consolidated for trial, a guardianship file #3347 (G) and an estate file #2827 (R).

On the 1st day of July, 1976, Charles H. Anderson and Grace M. Anderson, executed a joint will wherein they made 23 specific devises to neighbors, friends, and relatives and then named his sister, Ella A. Johnson and his nephew, K. O. Smith, as equal residual beneficiaries. Charles H. Anderson died on September 17, 1976 at the age of 83 and Grace M. Anderson was then 85 years old.

On the 26th day of September, 1976, Nina O. Scalley, a former business associate and friend of Grace M. Anderson, signed a Petition for Letters of Guardianship also signed by Grace M. Anderson naming said petitioner as guardian and

alleging inter alia that Grace M. Anderson was in "impaired health" and therefore "likely to be deceived or imposed upon by artful or designing persons." (G-P.1) Notice of the proceedings was given to no one else. (G-P.1-2)

On the same date, Grace Anderson executed another will substantially at variance with the will she executed with her husband, and naming Nina O. Scalley and Lois Jean Osborn as residual beneficiaries, one-fourth to each. (R-P.18)

On the same date, September 26, 1976, Grace M. Anderson as trustor and Nina O. Scalley, as trustee, executed a trust agreement describing real property then a part of Grace M. Anderson's estate. (R-P.18)

On the 14th day of November, 1976, Grace M. Anderson executed a Codicil to her will of September 26, 1976, again making substantial changes in the specific bequests, and naming Lois Jean Osborn as a residual beneficiary to three-fifths of her estate and Nina O. Scalley as a residual beneficiary to two-fifths of her estate. (R-P.18)

The nephew, K. O. Smith, and the sister-in-law, Ella A. Johnson, then became aware of the guardianship proceedings and Grace M. Anderson then signed a Petition to relieve Nina O. Scalley as guardian and appoint K. O. Smith as her guardian filed in the District Court of Davis County. (G-P.5-8)

After hearings, Nina O. Scalley stipulated that she



could be relieved as guardian for Grace M. Anderson (G-P.13) and K. O. Smith was appointed guardian and attempted to obtain copies of the testamentary documents from counsel then representing Nina O. Scalley and Lois Jean Osborn, David W. Boyce. (G-P.37)

When K. O. Smith was appointed guardian in the Spring of 1977, Lois Jean Osborn, second cousin to Grace M. Anderson, forthwith petitioned the court to relieve K. O. Smith as guardian and appoint herself as guardian and shortly thereafter moved in with Grace M. Anderson. (G-P.30)

At a hearing held the 28th day of June, 1977 in the District Court of Davis County, K. O. Smith and Lois Jean Osborn stipulated in open court that K. O. Smith would be relieved as guardian and Lois Jean Osborn would be appointed guardian on certain terms and conditions, including the representation of Lois Jean Osborn that she would not permit Grace M. Anderson to make any further testamentary dispositions or execute deeds without first obtaining approval from the court. The stipulation was reduced to writing, signed by the parties, (G-P.50) and filed with the court and a court order embodying the terms of the stipulation was signed and filed on the 11th day of August, 1977 and thereafter Letters were issued to Lois Jean Osborn who served in the capacity of a guardian and conservator. (G-P.62)

Nevertheless, on the 28th day of November, 1977, Lois Jean Osborn and her attorney, David W. Boyce, permitted Grace M. Anderson to execute a will, again changing the testamentary disposition of her estate. On the same date Grace M. Anderson executed two Warranty Deeds, naming Lois Jean Osborn as a joint tenant with her, with full right of survivorship and said deeds were recorded in the office of the Davis County Recorder. (G-P.67-68)

K. O. Smith then filed a Petition in the District Court of Davis County challenging the validity of the deeds, requesting that a conservator be appointed for the estate of Grace M. Anderson other than Lois Jean Osborn, and requesting that all testamentary dispositions made by Grace M. Anderson after the death of her husband, Charles H. Anderson, be declared null and void, now designated as Probate Number 3347. (G-P.65) The competency of Grace M. Anderson was then in question and specifically addressed by the Court. (G-P.73)

The Court accepted the stipulation appointing First Security Bank as conservator and mental examination of the ward, but upon objections filed by the guardian, (G-P.78) the order was vacated and a Petition was then filed with the court alleging that Grace M. Anderson was competent and did not need a conservator. (G-P.81) The parties

stipulated that Jack H. Tedrow, M.D. could be appointed to examine Grace M. Anderson and that his report could be admitted and filed with the court and the Court so ordered. (G-P.83 and P.100)

The Court also ordered that the deeds and the will dated November 28, 1977 were null and void. (G-P.100)

The cause was then set for trial but Grace M. Anderson died on the 7th day of March, 1980.

Nina O. Scalley and Lois Jean Osborn then filed a Petition for Probate of the will of November 28, 1977, (R-P.2) and alternatively for probate of the will of September 26, 1976 and the Codicil of November 14, 1976 and appellants Ella A. Johnson and K. O. Smith filed objections. K. O. Smith subsequently died and Carol Smith was substituted in his stead without objections, Probate Number 2827.

The trial of the cause was held before the Honorable J. Duffy Palmer, District Judge on the 28th and 29th of September, 1981. One of the issues framed at the Pre-Trial was the validity of Judge Swan's order voiding the November 28, 1977 will. Counsel discussed the matter with the Court in chambers prior to trial and appellant made a motion for the record prior to the commencement of the trial and the motion was denied and it is from the denial of that motion that this appeal is brought.

ARGUMENT

POINT I

IS THE COURT ORDER VOIDING THE WILL AND THE DEEDS EXECUTED BY GRACE M. ANDERSON THE 28TH DAY OF NOVEMBER, 1977 A VALID ORDER?

The Court found that the order entered by Judge Swan voiding the will and the deeds was the result of the stipulation entered into by the parties with the understanding that a hearing would eventually be held to determine the competency of Grace M. Anderson to execute the deeds and will. No such understanding is reflected in the record, and no such understanding is reflected in any stipulation signed by the parties or their counsel. Although a second Judge is prohibited from making factual determinations as to a first Judge's intent when he interprets an order issued by the first Judge, he is allowed to make determinations regarding matters of law as to unresolved issues. Moon v. Platte Valley Bank, 634 P.2d 1036 (Colo.App. 1981). Judge Swan voided the will and the deeds because Lois Jean Osborn and her attorney willfully violated the stipulation and the court order and Dr. Tedrow's report opined that Grace Anderson was incompetent at the time she executed the will and deeds. The order states:

8. All deeds and instruments of conveyance executed by Grace M. Anderson from and after the 30th day of July, 1977, are hereby declared to be null and void, and specifically, the warranty deed showing Grace M. Anderson as a grantor and Grace M. Anderson and Lois Jean Osborn as grantees dated the

28th day of November, 1977, and recorded in Book 680, Pages 41 and 42 in the Office of the Davis County Recorder are void and of no effect.

9. All wills, codicils and trust instruments executed by the said Grace M. Anderson from and after the 30th day of July, 1977, are hereby declared to be null and void and of no effect upon the demise of the said Grace M. Anderson (G-P.100)

The record adequately reflects that the Court was not sympathetic with the legal position of Lois Jean Osborn and her attorney, David W. Boyce and entered an order to which they both agreed voiding the instruments. The position of the proponents at that time was that they had a Dr. Peterson who knew and had examined Grace M. Anderson who would testify that she was competent and did not need a guardian and that she could then make any kind of a will or execute any deed she wanted without court approval. (G-P.130) The continuation of that action was to determine the competency of Grace Anderson to act for herself without a conservator. The findings of the trial Court effectively bastardized the prior court record. How do you void the deeds and the will by stipulation of the parties while Grace M. Anderson is alive and then resurrect the will when she's dead?



POINT II

THE STIPULATION EXECUTED BY THE PARTIES  
EMPOWERED THE COURT TO MAKE THE ORDER  
VOIDING THE WILL AND DEEDS MADE WITHOUT  
COURT APPROVAL.

The provisions of the stipulation were conditions precedent to the change of guardianship to which the parties agreed. The Court's finding II(g) states:

That the actual purpose of the stipulation and court order referred to in paragraphs (d) and (e) above, was to satisfy Kenneth O. Smith's desire to receive notice of any subsequent wills or deeds of Grace M. Anderson, rather than to raise any question regarding the competency of Grace M. Anderson to execute such documents.

The entire record to that date reflects a genuine concern about the competency of Grace M. Anderson and the influence then being exercised upon her.

Lois Jean Osborn had moved in to the home (G-P.30) and the very reason for such notice is to evaluate competency at the time such instruments are executed; otherwise, the notice provisions serve no purpose and have no meaning. This concern is reflected in the first Petition filed by Appellants in the Guardianship proceeding. (G-P.63-66) With respondent then living with the ward, how else could Appellant determine if undue influence was exercised upon the ward who "would be likely to be deceived or imposed upon by artful or designing persons," and whose "emotional condition" justified a "hearing in the shortest possible time." (G-P.2)

The applicable section of the Stipulation reads as follows:

7. That Lois Jean Osborn agrees that the Court may order that before any trusts or any testamentary devises are executed by Grace M. Anderson, or by Lois Jean Osborn for Grace M. Anderson, that she will petition and obtain approval from the Court, giving notice of the same to Kenneth O. Smith. (G-P.51)

This provision of the Stipulation was made a part of the Court Order dated August 11, 1977 as follows:

6. Lois Jean Osborn shall not sign any trusts or any testamentary devises for Grace M. Anderson, nor shall Grace M. Anderson sign any such documents for herself without first petitioning and obtaining approval of this Court. (G-P.55)

It was ten months after that time that a psychiatric evaluation could be arranged and when arranged, incompetency at the time said documents were executed was highly probable.

The Court found that on or about August 11, 1977, Lois Jean Osborn was appointed conservator for Grace M. Anderson, an aged person - Finding II(f). A fiduciary relationship then existed under the provisions of the Utah Uniform Probate Code effective July 1, 1977 and 75-5-422 provides:

...Any sale or encumbrance to a conservator, his spouse, agent, or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest, is voidable unless the transaction is approved by the Court after notice to interested persons and others as directed by the Court.

The trial court therefore had jurisdiction and power to void the will and deeds regardless of any stipulation

between the parties. But in Estate of Powell v. West, 626 P.2d 430 (Utah 1981) the Court said at page 436, 437:

However, our decision on that issue does not apply to other rulings made in 7416 in the stipulated settlement of issues by the parties that were properly before the Court. Thus, the ruling made pursuant to the stipulation that the time certificates of deposit and other property were assets of the estate is binding upon the parties to that stipulation.

The Court ruled in that case that the trial court's order declaring the will void was beyond the jurisdiction of the court because objections to probate were not brought within the statutory six-month limitation period and because the pleadings were void of any such issue but such is not the case here. The statute permits the court to void the documents where a fiduciary is involved, the parties stipulated that no such documents would be executed, and the issues were squarely before the court by pleading and by stipulation when Judge Swan ruled the documents were void and that ruling is res judicata.

In Parkland Hosiery Company, Inc. v. Shore, 439 U.S. 322, 58 L.ed. 2d 552, 99 S.Ct. 645 (1979) the Court through Mr. Justice Stewart said at page 649:

Collateral estoppel like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.



The Court then went on to distinguish between the use of collateral estoppel offensively (where a plaintiff not a party to the prior action alleges that defendant was a party and bound by the previous judgment or ruling) and the use of collateral estoppel defensively-where a plaintiff is estopped from asserting a claim that the plaintiff had previously litigated and lost against another defendant.

In the case at bar, Nina O. Scalley was not a party at the time the stipulations were entered into and did not participate in the proceedings that culminated in the Court's order voiding the deeds and the will dated November 28, 1977. However, the interests of Nina O. Scalley were identical to her co-petitioner, Lois Jean Osborn, and she is therefore bound by that order.

In Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978), the Court said at page 690:

In general, a Divorce Decree like other final judgments, is conclusive as to parties and their privies and operates as a bar to any subsequent action. In order for res judicata to apply, both suits must involve the same parties or their privies and also the same cause of action; and this precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action. If the subsequent suit involves different parties, those parties cannot be bound by the prior judgment.

Collateral estoppel, on the other hand, arises from a different cause of action and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first

suit. This means that the plea of collateral estoppel can be asserted only against the party in the subsequent suit who was also a party or in privity with the party in the prior suit.

The Court then discussed the four basic essentials for application of collateral estoppel as follows:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?

2. Was the final judgment on the merits?

3. Was the party against whom the plea is asserted a party in privity with the party to the prior adjudication?

4. Was the issue in the first case competently, fully, and fairly litigated?

The Court then proceeded to define privity in the following language at page 691:-

The legal definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal right. This includes a mutual or successive relationship to rights in property. Our Court has said that as applied to judgments or decrees of court, privity means "one whose interest has been legally represented at the time."

In the case at bar, the interest of Nina O. Scalley is exactly identical to the interest of Lois Jean Osborne. Therefore the doctrine of res judicata and collateral estoppel, along with the stipulation conceded by respondents as to the will and the deeds of November 28, 1977 give final validity to the order of Judge Swan voiding said deeds and will and precludes further litigation and the admission of

said will to probate.

POINT III

MAY THE DISTRICT COURT IN A SUBSEQUENT PROCEEDING VOID AN ORDER OR RULING OF A DIFFERENT DIVISION OF THE SAME DISTRICT COURT PREVIOUSLY MADE FROM WHICH NO APPEAL WAS RESERVED OR TAKEN?

There was no appeal from Judge Swan's order nor was any reservation made pursuant to Rule 72 U.R.C.P. No question was raised at that time as to Judge Swan's jurisdiction or power to make the order and all parties understood and stipulated that the order could be made.

The general rule is that a Judge of one division of the same court cannot act as an Appellate Court and overrule orders, judgments, or decrees of another Judge. In re Estate of Mecham, 537 P.2d 312 (Utah 1975); Peterson v. Peterson, 530 P.2d 821 (Utah 1974); Johnson v. Johnson, 560 P.2d 1132 (Utah 1977); State v. Morgan, 527 P.2d 225 (Utah 1974); Richardson v. Grand Central Corporation, 572 P.2d 395 (Utah 1977); Harward v. Harward, 526 P.2d 1183 (Utah 1974) where the Court said at page 1184:

We take judicial notice of the fact that Allen L. Hodson, is a lawyer admitted to practice in the courts of this state, and when he took his oath as a Judge pro tempore, he became the equal in every respect to the regularly elected or appointed Judges in so far as handling of the instant matter is concerned. The orders he made are binding upon the parties unless and until they are reversed upon appeal to the court. A fellow Judge cannot set them aside.

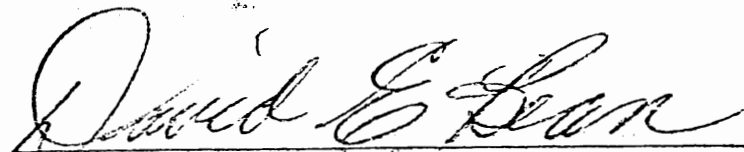
CONCLUSION

If during the lifetime of the ward, testamentary disposition can be prevented or voided, the facts of this case justify the order entered by Judge Swan. If the order voiding the will is valid, the will cannot be resurrected by another Judge of the same court interpreting the intent of Judge Swan in making his order and Respondent admits that the order was made as the result of a Stipulation. The order is res judicata to these Respondents and in any event the doctrine of collateral estoppel is applicable.

Appellants' motion to dismiss the Petition as to the will of November 28, 1977 should have been granted by the Court and the trial Court order admitting the will to probate should be reversed.

Respectfully submitted this 8<sup>th</sup> day of February, 1982.

BEAN & SMEDLEY



DAVID E. BEAN

Attorney for Appellants

Carol Smith and Ella A. Johnson

CERTIFICATE OF MAILING

I certify that on this 8<sup>th</sup> day of February, I mailed  
two copies of Appellants' Brief to:

H. RALPH KLEMM  
Attorney for First Security Bank,  
Conservator  
175 South West Temple #500  
Salt Lake City, Utah 84101

KENT H. MURDOCK  
Attorney for Respondent,  
Lois Jean Osborn  
400 Deseret Building  
Salt Lake City, Utah 84111

SUMNER J. HATCH  
Attorney for Respondent,  
Nina O. Scalley  
72 East 400 South #330  
Salt Lake City, Utah 84111

DAVID B. BOYCE  
Attorney for Respondent,  
Lois Jean Osborn  
61 South Main #500  
Salt Lake City, Utah 84111

RICHARD RUCKENBROAD  
Attorney for Respondent,  
Nina O. Scalley  
36 South State #2000  
Salt Lake City, Utah 84111

all postage prepaid.

