

1990

Marie S. Facer, the surviving spouse of William
Henry Facer v. Reed H. Facer and Martha F. Proctor
Individually and as Executors of the Estate of
William Henry Facer : Brief of Appellant

Utah Court of Appeals

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Marie S. Facer, pro se appellant.

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UTAH COURT OF APPEALS
BRIEF

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AND
DOCKET NO.

900488-CA

IN THE UTAH SUPREME COURT

Case No. 900297 - Sup. Ct.

Argument Priority Classification 14b

MARIE S. FACER, THE SURVIVING SPOUSE OF
WILLIAM HENRY FACER

PLAINTIFF AND APPELLANT

vs.

90-0488-CA

REED H. FACER AND MARTHA F. PROCTOR
INDIVIDUALLY AND AS EXECUTORS OF THE
ESTATE OF WILLIAM HENRY FACER

DEFENDANTS AND RESPONDENTS

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
STATE OF UTAH, COUNTY OF UTAH
HONORABLE GEORGE E. BALLIF, JUDGE

APPELLANT'S BRIEF

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FILED

SEP 21 1990

COURT OF APPEALS

TABLE OF CONTENTS

	<u>Page No.</u>
Table of Authoritiesiii, iv
Nature of the Proceedings and the Jurisdiction of the Court.	1, 2
Statement of the Case:	
A. Nature of the Action.2
B. Course of Proceedings and Disposition Below	3, 4, 5
C. Relevant Facts with Citations to the Record	5, 6, 7, 8, 9, 10, 11, 13
Statement of the Issues Presented for Review:	
Issue I	13
Issue II.	13
Issue III	13
Determinative Provisions Set Out in the Appendix:	
A. U.S. Constitution 14th Amendment.	13
B. Utah Constitution Art. XXII Sec. 2.	13
C. Utah Constitution Art. I Sec. 11.	13
D. State of Utah Statutes:	
Utah Uniform Probate Code Section No. 75-2-102.	13
Utah Uniform Probate Code Section No. 75-2-502.	14
Utah Judicial Code Section No. 78-2-2(3)(b)(5).	14
E. State of Utah Rules of Civil Procedure:	
Utah Rules of Civil Procedure Rule No. 5(a)	14
Utah Rules of Civil Procedure Rule No. 30(b)(2)	14
Utah Rules of Civil Procedure Rule No. 32	14
Utah Rules of Civil Procedure Rule No. 37	14
Utah Rules of Civil Procedure Rule No. 43	14
Utah Rules of Civil Procedure Rule No. 56(e).	14
Utah Rules of Civil Procedure Rule No. 58A(d)	14
F. Utah Code of Judicial Administration	
Rule Nos. 4-501(5),(9)	14

	<u>Page No.</u>
Summary of the Arguments	14
Detail of the Arguments:	
Issue I	14, 15, 16, 17, 18
Issue II.	18, 19, 20
Issue III	20, 21
Conclusion	21, 22

TABLE OF AUTHORITIES

	<u>Page No.</u>
<u>Arnstein v. Porter</u> , 154 F.2d 464, 469, 470 (C.CA 2nd Cir. 1946).	17
<u>Broadcast Music, Inc., et al. v. Havana Madrid Restaurant</u> , 175 F.2d 80 (U.S. CA 8th Cir. 1949)	18
<u>Carman v. Slavens</u> , 546 P.2d 603 (Utah 1976).	11, 15
<u>Celebrity Club, Inc., v. Utah Liquor Control Com'n</u> , 657 P.2d 1293, 1296, 1297 (Utah 1982)	16
<u>Graham v. Sawaya</u> , 632 P.2d 853 (Utah 1981)	11, 18, 19
<u>Nelson v. Jacobsen</u> , 669 P.2d 1211, 1212 (Utah 1983).	18
<u>Roberts v. Norden Division, United Aircraft Corp.</u> , 76 F.R.D. 80 (U.S. DC E.D. New York 1977).	16
<u>Robertson v. Campbell</u> , 674 P.2d 1232, 1233 (Utah 1983)	20
<u>Scott on Trusts</u> , § 53 Page No. 4	20
<u>U.S. Constitution</u> 14th Amendment, Section 1.	13, 15, 20, 22
<u>Utah Code of Judicial Administration</u> Rule No. 4-501(5),(9)	14, 21
<u>Utah Constitution</u> Art. I Sec. 11	2, 13
<u>Utah Constitution</u> Art. XXII Sec. 2	13
<u>Utah Judicial Code</u> No. 78-2-2(3)(b)(5)	2
<u>Utah Rules of Civil Procedure</u> Rule No. 5(a).	1, 3, 4, 11, 13, 14, 18, 19
<u>Utah Rules of Civil Procedure</u> Rule No. 30(b)(2).	8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 20, 22
<u>Utah Rules of Civil Procedure</u> Rule No. 32.	14, 17
<u>Utah Rules of Civil Procedure</u> Rule No. 37.	9, 10, 13, 14, 15, 18, 20, 21

	<u>Page No.</u>
<u>Utah Rules of Civil Procedure</u> Rule No. 43.	14, 17
<u>Utah Rules of Civil Procedure</u> Rule No. 56(e)	14, 21
<u>Utah Rules of Civil Procedure</u> Rule No. 58A(d).	1, 3, 4, 11 13, 14, 18, 19
<u>Utah Uniform Probate Code</u> No. 75-2-102	13, 20
<u>Utah Uniform Probate Code</u> Section No. 75-2-502	14, 20
<u>Wilson v. Manning</u> , 645 P.2d 655 (Utah 1982).	19
Wright and Miller, <u>Federal Rules of Civil Procedure</u> § 2142 Pages 449 through 453	17

APPELLANT'S BRIEF

NATURE OF THE PROCEEDINGS AND THE JURISDICTION OF THIS COURT

This appeal by the Plaintiff-Appellant is from an Order of the Fourth Judicial District Court, State of Utah, County of Utah, the Honorable George E. Ballif, Judge, denying the Plaintiff-Appellant's Motion for a Summary Judgment, entered on December 11, 1989, (R at 237, 238) a true and exact copy is attached hereto in the Appendix (App-1), and the Plaintiff-Appellant's subsequent Motions in trying to determine the issues of material fact asserted by the Trial Court were also denied in a Ruling dated February 21, 1990, (R at 275, 276). A true and exact copy is attached hereto in the Appendix (App-2). The Plaintiff-Appellant's Motion for a New Trial was also denied in a final Order dated May 16, 1990, (R at 304, 305, 306), yet never served on the Plaintiff-Appellant after the court signing, pursuant to the U.R.C.P. 5(a); 58A(d). A true and exact copy is attached hereto in the Appendix (App-3). The record on appeal is the Trial Court's supplied Index with page numbers assigned to each document page, herein after referred to as (R at Page Number). The previously identified court rulings utilized this indexing scheme. Also included in the Brief is the set-out of specific exhibits under the notation Appendix (App-page No.).

The Appellant filed the Appeal on May 23, 1990, in the Utah Court of Appeals (R at 307 through 315). Then, the Appellant filed

the Appeal on June 11, 1990, in the Utah Supreme Court (R at 316 through 326). The Utah Court of Appeals' Court Order allowing the transfer is (R at 336). A true and exact copy is attached hereto in the Appendix (App-4). The Utah Supreme Court's acknowledgment of this Appeal is designated as dated July 3, 1990, (R at 337), and July 30, 1990 (R at 338). A true and exact copy is attached hereto in the Appendix (App-5 and 6). The Appellant is seeking reversal of the Trial Court's Order and Ruling dated December 11, 1989, February 21, 1990, and May 16, 1990, which is the subject of review--requiring the Trial Court to establish an issue of material fact and set for trial, or in the alternative grant the Plaintiff's Motion for a Summary Judgment dated September 8, 1989, and January 8, 1990. The Utah Supreme Court has jurisdiction under Utah Judicial Code 78-2-2(3)(b)(5) (App-26) and the Constitution of Utah, Art I Sec. 11, (App-15).

STATEMENT OF THE CASE

A. Nature of the Action.

This action involves various claims made by the Plaintiff-Appellant against the Defendants-Respondents when the deceased, William Henry Facer, died on November 21, 1988, without providing any support for his surviving spouse since October 14, 1987, (except for \$150 paid February 25, 1988) when abandoning his spouse to voluntarily live with his children. His children have subsequently failed and refused to pay the required statutory share to his surviving spouse, but have conjured a purported Trust and a purported Trust Amendment, leaving the deceased's estate to his children, stripping his surviving spouse of her statutory rights, whereby long-term survival is at risk for the Appellant.

B. Course of Proceedings and Disposition Below.

The Trial Court (Honorable George E. Ballif) denied the Plaintiff's Motion for a Summary Judgment in a Ruling and Order dated December 11, 1989, (R at 237 and 238) (App-1) without providing the issue of material fact, but asserting plaintiff to appear for deposition of plaintiff as shall be noticed by plaintiff, threatening sanctions under Rule No. 37, including dismissal of the above entitled action. The actual Order reflecting this Ruling was entered by the court on December 11, 1989.

The Plaintiff filed several motions with the Trial Court commencing December 15, 1989, (R at 239, 240) and (R at 244, 245, and 246). The Defendant correspondingly filed on December 18, 1989, a Notice of Taking Deposition (R at 241, 242, and 243), a proposed Court Order (R at 247, 248, and 249), and Objection to the Plaintiff's Motion (R at 250, 251, and 252). Apparently the Court signed the Defendant's proposed Court Order on December 27, 1989, without serving the Plaintiff the signed Court Order pursuant to U.R.C.P. Rule Nos. 5(a), 58A(d), while the Plaintiff was out of this state for the holidays. A true and exact copy is attached hereto in the Appendix (App-7). The Defendant moves the Court in Motion for Order Striking Pleadings and For Sanctions dated January 4, 1990, asserting enforcement of their signed Court Order--unserved, (R at 261 through 272). The Plaintiff filed appropriate Objections January 8, 1990, (R at 253 through 260). The Trial Court's Ruling on this exchange of motions was entered on February 21, 1990. (R at 275 and 276). A true and exact copy is attached

hereto in the Appendix (App-2). The Plaintiff immediately filed a Motion for a New Trial on February 26, 1990, (R at 277 through 282). The Defendants, responding to the February 21, 1990 Ruling, prepared a proposed Court Order (R at 283, 284). The Plaintiff appropriately objected March 12, 1990, (R at 285, 286, and 287). The Defendants objected in a Motion dated March 23, 1990, (R at 288, 289, and 290). The Defendants finally objected to the Plaintiff's Motion for a New Trial March 21, 1990, (R at 291, 292, and 293). The Trial Court sent out on April 30, 1990, an unsigned, undated directive under the color of a Minute Entry (R at 296). A true and exact copy is attached hereto in the Appendix (App-8). The Defendant responding to the unsigned, undated directive proposed an Order (R at 304, 305, and 306). The Plaintiff immediately filed objection (R at 298 through 303). The Trial Court apparently signed the Defendant's proposed Court Order (R at 304, 305, and 306) on May 16, 1990, without serving the Plaintiff the signed Court Order, pursuant to U.R.C.P. Rule Nos. 5(a), (App-16), 58A(d), (App-22). A true and exact copy is attached hereto in the Appendix (App-3). The subsequent appeal is discussed above, whereby the Plaintiff-Appellant appropriately filed the Docketing Statement and a Motion for Summary Disposition on July 19, 1990. The Defendant-Respondent mailed Objection to the Plaintiff-Appellant's Summary Disposition on July 23, 1990. The Plaintiff-Appellant mailed a Reply dated July 27, 1990. On August 2, 1990, the Office of the Clerk, Utah Supreme Court set the matter for argument in this Court for Monday August 13, 1990. A true and exact copy of this Order is attached hereto in the Appendix (App-9). On August 7, 1990, the Office of the Clerk, Utah Supreme Court

issued an Order requiring the briefing of this case instead of the argument. A true and exact copy of the Order is attached hereto in the Appendix (App-10). The Office of the Clerk, Utah Supreme Court issued an Order on August 24, 1990, requiring the Appellant's Brief due October 3, 1990. A true and exact copy of the Order is attached hereto in the Appendix (App-11).

C. Relevant Facts with Citations to the Record

The Appellant, Marie S. Facer (Facer), is an individual who at all times material hereto is a resident of Utah County, State of Utah (Admits R at 29). The Respondents, Mr. Reed H. Facer and Mrs. Martha F. Proctor, individually and as Executors of the Estate of William Henry Facer, who at all times material hereto are residents of Utah County, State of Utah (Admits R at 29). The deceased William Henry Facer, at age 86 and the Appellant, Marie S. Facer, at age 53 were married in the Provo Temple on December 10, 1977, (Admits R at 30). The Appellant, Marie S. Facer, was legally and lawfully married to the deceased, William Henry Facer, on the date of his death, November 21, 1988. (Affidavit, of Marie S. Facer, par No. 2, R at 177). William Henry Facer abandoned and deserted his spouse during the marriage, subsequent to January 11, 1988, voluntarily living with his children, (Affidavit of Marie S. Facer par. Nos. 6, 7, 8, and 9, R at 178, 179). The total cash estate of William Henry Facer computed at the January 1988 analysis was \$68,653.33 (Admits R at 62 No. 17; 63). The Appellant's only amount of financial support since October 1987 from her spouse is the amount of \$150, (Affidavit of Marie S. Facer par. No. 3, R at 177).

1. The Appellant filed on March 8, 1989, her Cause of Action

in the Fourth Judicial District Court, State of Utah, County of Utah, Provo, Utah after visiting with the Defendants and exchanging correspondence with their legal council--asserting her surviving spouse statutory claims, subsequent to her spouse's death November 21, 1988, (R at 97, 98), (R at 194 through 197) and (R at 1 through 24).

2. The Appellant served the Defendants on April 4, 1989, with the appropriate and timely Request for Admissions, Interrogatories, and a Request for Production of Documents, which required a written response within thirty (30) days, and would be due by May 4, 1989, (R at 41).

3. The Respondents requested a Notice of Taking Deposition--received April 8, 1989--in attempting to answer the Appellant's timely written requests for discovery; thereby, instituting the taking of the Appellant's deposition to commence on May 1, 1989, at 9:30 a.m., (R at 42, 43).

4. The Appellant filed a timely Motion for a Protective Order on April 10, 1989, (R at 36 through 41).

5. The Respondent filed a dilatory opposition to the Motion for a Protective Order on April 21, 1989, (R at 46, 47).

6. The Appellant filed a timely Reply Motion on April 25, 1989, (R at 48, 49).

7. The Respondents mailed the requested Discovery on **May 1, 1989**, but failed and refused to admit or provide all of the vital production of documents as requested by the Appellant, (R at 50, 51, and 52).

8. The Appellant filed a Motion for Order **Compelling Discovery** on May 5, 1989, in attempting to obtain the failed and

refused discovery that was timely and appropriately requested, (R at 54 through 63).

9. The Trial Court mailed on **May 8, 1989**, (App-27), a Court Order dated May 5, 1989, denying the Appellant's Motion for a Protective Order, further ordering the Plaintiff to appear for her deposition as noticed by Defendant, (R at 53).

10. The Respondent immediately filed on May 9, 1989, Amended Notice of Taking Deposition for May 18, 1989, at 10 a.m., (R at 64, 65).

11. The Appellant, upon receipt of the Amended Notice of Taking Deposition on May 10, 1989, filed with the Trial Court on May 11, 1989, Motion For Reconsideration of a Protective Order, (R at 66, 67).

12. The Respondent filed on May 15, 1989, an Opposition to Motion for Reconsideration of a Protective Order, and a Proposed Order denying Plaintiff's Motion for a Protective Order, (R at 73 through 78).

13. The Appellant filed on May 17, 1989, a Reply Motion for Reconsideration of a Protective Order, (R at 80, 81, and 82).

14. The Trial Court mailed on May 17, 1989, (App-27), an Order denying the Plaintiff's Motion for Reconsideration--**received by the Appellant after the scheduled deposition time of May 18, 1989**, (R at 79).

15. The Respondent filed on May 18, 1989, a Reply Motion for Reconsideration of a Protective Order, (R at 83 through 87).

16. The Respondent mailed an Amended Notice of Taking Deposition on May 19, 1989, and mailed a proposed Order denying Plaintiff's Motion to Reconsider on May 19, 1989, and also mailed

Subpoena Duces Tecum on May 19, 1989, (R at 101 through 106).

17. The Appellant filed on May 22, 1989, a Reply Motion to Defendants response for Reconsideration of a Protective Order received on May 19, 1989, (R at 68, 69).

18. The Appellant filed on May 23, 1989, a Motion to Quash Subpoena Duces Tecum, citing specifically Utah Rules of Civil Procedure Rule Nos. 45(b)(1), 30(b)(2) (App-17) and 26(b), (R at 91 through 100).

19. Finally, after the Appellant filed twice a Notice to Submit, dated August 18, 1989, (R at 109, 110) and August 25, 1989, (R at 111, 112), the Trial Court disregarded and ignored the Utah Rules of Civil Procedure Rule No. 30(b)(2) (App-17), and required the Plaintiff to appear for deposition as noticed by Defendants in a Court Order dated and mailed August 25, 1989, (R at 113).

20. The Trial Court failing and refusing to rule on U.R.C.P. Rule No. 30(b)(2) (App-17), caused the Appellant to file the third Notice to Submit dated August 31, 1989, (R at 114, 115).

21. The Appellant, in attempting to force the material issues of fact to the forefront--since the Trial Court would not rule on the Motion for Compelling Discovery, nor upon U.R.C.P. Rule No. 30(b)(2) (App-17)--filed the appropriate Motion for Summary Judgment dated September 8, 1989, (R at 116 through 189).

22. The Respondent mailed once again Notice of taking Deposition on September 7, 1989--received after the appropriate Summary Judgment Motion was filed--to take place on September 19, 1989, at 1:30 p.m.,(R at 205, 206). The Respondent also mailed a proposed Court Order Denying Motion for Reconsideration on September 7, 1989--not found in the Court Record. A true and exact

copy is attached hereto in the Appendix (App-12).

23. The Appellant immediately filed Objection to Respondent's Notice of Taking Deposition on September 11, 1989, specifically, citing U.R.C.P Rule No. 30(b)(2) (App-17), also filing Notice to Submit, (R at 190 through 204).

24. The Respondent immediately filed Objections to Appellant's Objection to Notice of Taking Deposition, but does not mention or controvert U.R.C.P Rule No. 30(b)(2) (App-17), but motions the court for sanctions under U.R.C.P Rule No. 37, (App-19), mailed September 12, 1989, (R at 219, 220, and 221).

25. The Respondent also mailed a Motion to Strike and a Proposed Order for Sanctions on September 12, 1989, (R at 217, 218).

26. The Respondent also mailed on September 12, 1989, Amended Notice of Taking Deposition to commence on September 19, 1989, at 1:30 p.m., (R at 215, 216).

27. The Appellant reaffirmed the position pursuant to U.R.C.P. Rule No. 30(b)(2) (App-17), in reply to Respondent's Memorandum in Opposition to Plaintiff's Objection to Defendant's Notice of Taking Deposition, and Memorandum in Support of Motion to Strike and Impose Sanctions, filed September 14, 1989, (R at 207, 208, and 209).

28. The Appellant filed on September 14, 1989, Objections to Motion to Strike and Order for Sanction, commingled with a Notice to Submit, (R at 210 through 214).

29. The Respondent filed on September 21, 1989, Motion to Strike, and Request For Ruling, also Memorandum in Opposition to Plaintiff's Motion For Summary Judgment, (R at 222 through 228).

30. The Appellant filed on September 22, 1989, Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Objection to Motion to Strike and Notice to Submit, (R at 232, 233, 234; 229, 230, 231; 235, 236).

31. The Trial Court submitted a ruling and order dated December 11, 1989, failing and refusing to rule specifically on U.R.C.P. Rule No. (30(b)(2) (App-17), or state the issue of material fact it relied upon in denying the Appellant's Motion for a Summary Judgment. Furthermore, the Trial Court ordered "plaintiff, Marie S. Facer, to appear for deposition of the plaintiff, as shall be noticed by plaintiff in the above entitled action," stating, "if plaintiff fails to appear, she shall be subject to Sanctions under Rule 37 of the Utah Rules of Civil Procedure including dismissal of the above entitled action." (R at 237, 238), (App-1).

32. The Appellant immediately objected, file dated December 15, 1989, to the court Ruling and Order dated December 11, 1989, in a motion for the court's written statement of grounds for its decision Summary-Judgment-denial, (R at 239, 240).

33. The Respondent immediately filed on December 18, 1989, Notice of Taking Deposition, Subpoena Duces Tecum, and a proposed Order stating in par. 4, "The plaintiff, Marie S. Facer, is hereby ordered to appear for her deposition as shall be noticed by the defendants in the above-entitled action. If plaintiff, Marie S. Facer, fails to appear for her deposition as noticed by defendant, she shall be subject to sanctions under Rule 37 of the Utah Rules of Civil Procedure including dismissal of the above-entitled action." (R at 241, 242, and 243).

34. The Appellant immediately filed Motion to Quash Subpoena Duces Tecum, on December 21, 1989, (the same date as Appellant was leaving the State of Utah for the holidays) declaring forthwith, the non-represented protection established in U.R.C.P. Rule No. 30(b)(2) (App-17), and her U.S. Constitutional rights to open court set forth in Carman v. Slavens, 546 P.2d 603 (Utah 1976), (R at 244, 245, and 246).

35. The Respondent filed on January 8, 1990--without serving the Appellant--the asserted Court Order dated December 27, 1989, pursuant to U.R.C.P. Rule No. 5(a)(App-16), and 58A(d)(App-22), the asserted Motion For Order Striking Pleadings and For Sanctions, Memorandum of Points and Authorities in support of its Motion to Strike Plaintiff's Pleadings and for Sanctions, also an Affidavit in Support of Costs, Expenses and Attorney Fees, (R at 261 through 272).

36. The Appellant immediately filed on January 8, 1990, Objections to Defendant's Motion for Order Striking Pleading for Sanctions, declaring no knowledge or receipt of any other signed court order professed by the Defendants to be signed on December 27, 1989, citing Graham v. Sawaya, 632 P.2d 853, (Utah 1981). And also applied to the Trial Court for protection under U.R.C.P. Rule No. 30(b)(2) (App-17), (R at 253 through 260).

37. The Trial Court Ruling dated February 21, 1990, (R at 275, 276), (App-2), failed and refused to apply or rule on U.R.C.P. Rule No. 30(b)(2) (App-17) and states:

"Accordingly pursuant to 37(b) of the Rules of Civil Procedure, the Court grants defendants' Motion to Strike Plaintiff's pleadings and orders plaintiff's claims dismissed with prejudice. No attorney's fees allowed."

38. The Appellant immediately filed on February 26, 1990, a Motion for a New Trial, contents to be self explanatory, (R at 277 through 282).

39. The Respondent filed on March 9, 1990, pursuant to the Court Order dated February 21, 1990, a proposed Order Striking Plaintiff's Pleadings and Order of Dismissal, (R at 283, 284).

40. The Appellant immediately filed March 12, 1990, Objections to the proposed Order Striking Plaintiff's Pleadings and Order of Dismissal, contents to be self explanatory, (R at 285, 286, and 287).

41. The Respondents filed on March 28, 1990, Memorandum in Opposition to Plaintiff's Motion for New Trial and Memorandum in Opposition to Plaintiff's Objection to Defendant's Motion for Order Striking Pleadings and for Sanctions and for Plaintiff's Objections to proposed Order, (R at 291, 292, 293; 288, 289, and 290).

42. The Respondents filed on April 20, 1990, Request for Ruling and Signing of the Order of Dismissal, (R at 294, 295).

43. The court sent out an unsigned, undated directive under the color of a Minute Entry stating "Counsel for Defendants, Thomas S. Taylor, is hereby directed to prepare an order consistent with the ruling by this court dated February 21, 1990." No signed court authority whatsoever! (R at 296)(App-8).

44. The Respondent with the usurped court authority put together the proposed order Striking Complaint and Dismissal of Action; Sanctions dated May 3, 1990, (R at 304, 305, and 306).

45. The Appellant filed on May 7, 1990, Request for Ruling and Granting of Plaintiff's Motion for a New Trial, (R at 297).

46. The Appellant filed on May 8, 1990, Objections to Proposed

Order Striking Complaint and Dismissal of Action; Sanctions, (R at 298, 299, and 300).

47. The Appellant filed on May 9, 1990, Amended Objections to proposed Court Order Striking Complaint and Dismissal of Action; Sanctions, (R at 301, 302, and 303).

48. The Trial Court apparently signed the usurped court authority proposed Court Order Striking Complaint and Dismissal of Action; Sanctions on May 16, 1990--without serving the Appellant --pursuant to U.R.C.P. Rule No. 5(a), (App-16), 58A(d), (App-22), (R at 304, 305, and 306), (App-3).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the Trial Court err in disregarding and ignoring U.R.C.P. Rule No. 30(b)(2) in requiring the Appellant to appear for a deposition as the only means of discovery for a Pro-Se litigant?

II. Did the Trial Court err in dilatorily filing, and defectively serving a Court Order as being a sufficient enough basis for imposing sanctions under U.R.C.P. Rule No. 37(2)(c)?

III. Did the Trial Court err in disregarding and ignoring the Appellant's Statutory, U.S. Constitutional Rights, U.R.C.P. and Summary Judgment Motion claims by the imposition of U.R.C.P. Rule No. 37(2)(c)?

DETERMINATIVE PROVISIONS SET OUT IN THE APPENDIX

- A. U.S. Constitution 14th Amendment. (App-13)
- B. Utah Constitution Art. XXII Sec. 2. (App-14)
- C. Utah Constitution Art. I Sec. II. (App-15)
- D. State of Utah Statutes:
Utah Uniform Probate Code Section No. 75-2-102 .(App-24)

Utah Uniform Probate Code Section No. 75-2-502 .(App-25)
Utah Judicial Code Section No. 78-2-2(3)(b)(5) .(App-26)

- E. State of Utah Rules of Civil Procedure:
Utah Rules of Civil Procedure Rule No. 5(a) . . .(App-16)
Utah Rules of Civil Procedure Rule No. 30(b)(2).(App-17)
Utah Rules of Civil Procedure Rule No. 32. . . .(App-18)
Utah Rules of Civil Procedure Rule No. 37. . . .(App-19)
Utah Rules of Civil Procedure Rule No. 43. . . .(App-20)
Utah Rules of Civil Procedure Rule No. 56(e) . .(App-21)
Utah Rules of Civil Procedure Rule No. 58A(d). .(App-22)
- F. Utah Code of Judicial Administration Rule Nos.
4-501(5)(9)(App-23)

SUMMARY OF THE ARGUMENTS

The Trial Court erred in disregarding and ignoring U.R.C.P. Rule No. 30(b)(2), in dilatorily filing, and defectively serving a Court Order, and in disregarding and ignoring the Appellant's Statutory, U.S. Constitutional Rights, U.R.C.P. and Summary Judgment Motion claims by the imposition of U.R.C.P. Rule No. 37(2)(c).

DETAIL OF THE ARGUMENTS

ISSUE I

THE TRIAL COURT ERRED IN DISREGARDING AND IGNORING U.R.C.P. RULE No. 30(b)(2) IN REQUIRING THE APPELLANT TO APPEAR FOR A DEPOSITION AS THE ONLY MEANS OF DISCOVERY FOR A PRO-SE LITIGANT.

May 23, 1989, the issue of Utah Rule of Civil Procedure (U.R.C.P.) Rule No. 30(b)(2)--(App-17), (R at 91)--arose after the Trial Court dilatorily denied the Appellant's request for a protective order (R at 53; 79) which was first requested on the basis of not giving answers on a deposition that could be used to answer the Appellant's requested discovery (R at 36, 37, and 38). Also, it would be too expensive, given the Appellant's lack of visible means of support (R at 48, 49). The second request was on similar grounds, because the Respondent's have withheld appropriate

vital information in the requested discovery (R at 66, 67; 54 through 63), and any support of the surviving spouse since October 14, 1987 (R at 188; 177; 81). The Appellant could answer no question that would make the purported Trust valid, the purported Trust Amendment valid, the proposed accounting distribution equitable, and the surviving spouse not valid. (R at 81, 82). Moreover, the Appellant has not willfully failed and refused to comply with discovery, i.e., interrogatories, request for admissions, and the production of documents (R at 91). However, the Appellant has refused to submit to a retaliatory "Kangaroo Court" under the guise of a deposition in the closets and back rooms of the Attorney's office, away from the public eyes and ears that will be present in open court. (R at 91, 92; 210, 211).

The August 25, 1989, Court Ruling (R at 113) fueled an onslaught of filings by each the Appellant and the Respondent. The Appellant claimed protection under the U.R.C.P. Rule No. 30(b)(2) (App-17), and a reiteration of the dilatory choice of discovery by the Respondent's (R at 190 through 193) giving valid justifiable reasons for not appearing for the Noticed Deposition (R at 205, 206; 215, 216). The Respondent's claimed sanctions under U.R.C.P. Rule No. 37(b)(c) and (E) (App-19), under the premise that the Appellant willfully failed to appear for the taking of her deposition, (R at 217 through 223). The Appellant replies (R at 207, 208 and 209) claiming protection under U.R.C.P. Rule 30(b)(2) (App-17), and open court is the only place for combat. This is strongly supported by this court in Carman v. Slavens, 546, P.2d 603 (Utah 1976). The U.S. Constitution 14th Amendment "Due Process" of law that has been defined by this court

as stated in Celebrity Club, Inc. v. Utah Liquor Control Com'n, 657 P.2d 1293, 1296, 1297 (Utah 1982).

"Many attempts have been made to further define 'due process' but they all resolve into the thought that a party shall have his day in court--that is each party shall have the right to a hearing before a competent court, with the privilege of being heard and introducing evidence to establish his cause on his defense, after which comes judgment upon the record thus made. . . Thus, the essential requirement of due process is that every citizen be afforded his 'day in court'."

Again, giving valid justifiable reasons for not appearing for the Noticed Deposition. A noted authority has stated, which should apply to the case at bar:

A trial court, in exercising its discretion in the imposition of sanctions for such violation, must do so in light of the particular facts of the case before it. In order to determine the proper sanctions, the court must now look to the party's reasons for such failure to comply."

Roberts v. Norden Division, United Aircraft Corp., 76 F.R.D. 80 (U.S. DC E.D. New York 1977). Certainly, the Appellant's request for a protective order, then protection under U.R.C.P. Rule No. 30(b)(2) (App-17), and the preference to open court, instead of a deposition, i.e, due process of law is a sufficient enough justifiable reason given the disrespect and the hateful statements made toward the Appellant by each, Mr. Thomas S. Taylor (R at 128),

". . . this Complaint is filed in bad faith and is vexatious in nature; . . . "

and his client, Ms. Martha F. Proctor's candid and secret written statement made to her Attorney, Mr. Thomas S. Taylor, (R at 135) referencing her response to documents, (R at 97, 98) and (R at 194 through 197) when she states,

"I am very sorry about the nasty letter from Mr. Echols to you. We have had so many problems like this for ten years, not so much from him, but from his mother."

further indicates the tone that would be present in a deposition, i.e., "Kangaroo Court" whereby verbal retaliatory abuse, and other cross-examination violations may be present when not represented and protected by legal council. This should be the very purpose of utilizing U.R.C.P. Rule No. 30(b)(2)(App-17) for Pro-Se litigants in the protection of deponents against this kind of action that may be protected by a judge in open court. U.R.C.P. Rule No. 30(b)(2) (App-17) states:

"If a party shows that when he was served with notice under this Subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.."

Moreover, this is strongly supported in U.R.C.P. Rule Nos. 32 (App-18) and 43 (App-20), whereby the language in U.R.C.P. Rule No. 32(a) specifically states, "Who was . . . represented at the taking of the deposition," infers that one must be represented before the deposition is admissible as evidence in a court proceeding, under the U.R.C.P. Rule No. 43, thus, requiring ". . . the testimony of witnesses shall be taken orally in open court . . . ". This is amplified in Wright and Miller, Federal Rules of Civil Procedure, 2142, pages 449 through 453. The Second Circuit Federal Court has stated, which should apply to the case at bar, in comparing depositions to open court:

" . . . that necessity ceases whenever the witness is within the power of the court, and may be produced upon the trial . . . A deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand . . . for it deprives of the advantage of having the witness before the jury."

Arnstein v. Porter, 154 F.2d 464, 469, 470 (C.C.A. 2nd Cir. 1946). See also Broadcast Music, Inc. et al. v. Havana Madrid Restaurant,

175 F.2d 80 (U.S. CA 8th Cir. 1949).

When applying the described and lengthy facts to the case law at bar, invoking and enforcing the valid Appellant's claim that the Appellant's deposition would be impotent at trial when utilizing U.R.C.P. Rule No. 30(b)(2) (App-17), and the deposition would only be a tribunal for verbal retaliatory abuse, a "Kangaroo Court", with no effect or force at trial. Therefore, as an enforceable, discovery tool it cannot be used against the Appellant, a Pro-Se litigant, and the sanctions imposed pursuant to U.R.C.P. Rule No. 37(2)(c) (App-19) is a reversible error, that should now be reversed.

ISSUE II

THE TRIAL COURT ERRED IN DILATORILY FILING, AND DEFECTIVELY SERVING A COURT ORDER AS NOT BEING A SUFFICIENT ENOUGH BASIS FOR IMPOSING SANCTIONS UNDER U.R.C.P RULE No. 37(2)(C).

1. The Court Order was mailed on May 8, 1989--seven (7) days after the deposition was to commence on May 1, 1989. See attached mailing envelope, (App-27), (R at 53).
2. The Court Order was mailed on May 17, 1989--received at least one (1) day after the scheduled deposition was to commence on May 18, 1989. See attached mailing envelope, (App-27), (R at 79).
3. The Court Order was mailed on August 25, 1989--more than two months after the scheduled deposition for June 5, 1989, (R at 113).
4. The Court Order dated December 11, 1989, (R at 237, 238), (App-1), was mailed on December 14, 1989, and could not be complied with, as timely noted in the Appellant's Motion filed December 15, 1989, (R at 239, 240).
5. The Court Order dated December 27, 1989, (R at 247, 248, and 249), was never served on the Appellant, no mailing certificate dated December 27, 1989 or thereafter, pursuant to U.R.C.P. Rule Nos. 5(a) (App-16), and 58A(d), (App-22). See also Graham v. Sawaya, 632 P.2d 853, (Utah 1981), and Nelson v. Jacobsen, 669 P.2d 1211, 1212 (Utah 1983). In addition, the Appellant's Objections to Motion for Order Striking Pleadings and for Sanctions filed

January 8, 1990, were disregarded and ignored by the Trial Court, (R at 253 through 258).

6. The Court Order dated February 21, 1990, (R at 275, 276), (App-2), is only an erroneous enforcement of the Court Order dated December 11, 1989. See Appellant's Motion for a New Trial, filed February 26, 1990, (R at 277 through 282).
7. The Court's unsigned, undated directive--Minute Entry-- is without any Judicial Authority; no force or effect whatsoever, (R at 296) (App-8) because,

"An unsigned minute entry does not constitute an entry of judgment, nor is it a final judgment for purposes of U.R.C.P. Rule Nos. 72(a), 58A(b) and (c)."

Wilson v. Manning, 645 P.2d 655 (Utah 1982).

8. The Court Order dated May 16, 1990, (R at 304, 305, and 306) (App-3), was not served pursuant to U.R.C.P. Rule No. 5(a) (App-16), which states:

". . . every order required by its terms to be served . . . entry of judgment under Rule 58A(d), and similar paper shall be served upon each of the parties."

Nor was this Court Order served pursuant to U.R.C.P. Rule No. 58A(d) (App-22) which states:

"The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court."

This did not happen, this has not happened, and this may not happen. Therefore, a case in point which should apply to the case at bar states:

"The Due Process Clauses of the United States and Utah Constitutions require notice to a party before his or her rights are affected by a judgment."

Graham v. Sawaya, 632 P.2d 853 (Utah 1981).

The Respondent's wish-list Court Orders, (R at 247, 248, 249; 305, and 306)(App-7 and 3) have no force or effect

whatsoever, and this detailed analysis of arguments validates and establishes the Appellant's forthright position that the Trial Court and the Respondent erred in dilatorily filing and defectively serving the promulgated Court Orders, whereby the imposed sanctions pursuant to U.R.C.P. Rule No. 37(2)(c) (App-19) is a reversible err that should now be immediately reversed.

ISSUE III

THE TRIAL COURT ERRED IN DISREGARDING AND IGNORING THE APPELLANT'S STATUTORY, U.S. CONSTITUTIONAL RIGHTS, U.R.C.P., AND SUMMARY JUDGMENT MOTION CLAIMS BY THE IMPOSITION OF U.R.C.P. RULE No. 37(2)(C).

This cause of action and appeal brought by the Plaintiff-Appellant (R at 1 through 24) should be about the fact-finding denials asserted by the Respondent's (R at 29 through 35), whereby the contested issues should be the statutory surviving spouse rights pursuant to Utah Uniform Probate Code No. 75-2-102 (App-24), undue influence set forth in Robertson v. Campbell, 674 P.2d 1232, 1233 (Utah 1983); compliance with the statute of wills set forth in Scott on Trusts § 53 page No. 4, and Utah Uniform Probate Code Section No. 75-2-502 (App-25) vs. the purported Trust (R at 6 through 14), the purported Trust Amendment (R at 17), the proposed accounting and distribution (R at 18 through 24), all negated by the Respondent's and the Trial Court's vigilant pursuit of a deposition (as the only means of discovery) away from the eyes and ears of open court--a violation of the Appellant's claims to the Appellant's U.S. Constitutional Rights 14th Amendment "due process", and the Appellant's protection pursuant to U.R.C.P. Rule No. 30(b)(2) (App-17), previously argued.

The Appellant's Motion for Summary Judgment (R at 116 through

189) dated September 8, 1989, and January 8, 1990, (R at 253 through 260) is clearly admitted by the Respondents (R at 224 through 226), pursuant to Utah Code of Judicial Administration Rule Nos. 4-501(5) and (9), (App-23) and the Utah Rules of Civil Procedure Rule No. 56(e) (App-21) (R at 232, 233, and 234), whereby the Appellant's claims should be granted against the Respondent's as a matter of law, rendering some financial security to the Appellant in the twilight years of the Appellant's life, spelled out with specific detail in (R at 277 through 282).

Certainly, the Trial Court erred in utilizing and imposing sanctions pursuant to U.R.C.P. Rule No. 37(2)(c) (App-19) as admitted by the Trial Court's substantial Appellant's, justification, pursuant to U.R.C.P. Rule No. 37(b) (App-19), when stating "No attorney's fees [be] allowed." (R at 276) (App-2).

CONCLUSION

The Appellant is the surviving spouse of William Henry Facer with limited Social Security income, who has not been able to afford or even find a lawyer who will represent her in this Cause of Action, because there is not enough money involved to interest a lawyer in investing time and energies in her behalf. Therefore, the Appellant has had to pursue the enforcement of her surviving spouse rights on her own.

The Appellant is representing the surviving spouses, either male or female, who are being financially and verbally abused by their mates and their mate's children, then, stripped--at the death of the spouse--of any financial security by the likes of this Cause of Action.

The Appellant is representing all Pro-Se litigants who request protection under the Utah Rules of Civil Procedure Rule No. 30(b)(2) (App-17), wherein the unrepresented person may not have the deposition used against him or her in trial. Nor, can the refusal of a deposition by the unrepresented person be a valid basis for sanctions to be imposed by any other Trial court in rendering impotent the valid cause of action. One's day in court on the merits of a controversy should apply in this case, instead of the deposition in the closets and back rooms of the attorney's office, an interrogation--a "Kangaroo Court"--which was to take place at the whines and the whims of the attorney and his client, then used as a tool to decide the case at bar outside the courtroom.

Pro-Se litigants need the protection of judges where appropriate intervention can take place in open court--needed to disrupt and abort verbal, retaliatory abuse, and irrelevant matters that would otherwise be tucked neatly within the pages of a deposition, which may not be used against them in trial.

The Appellant is a citizen of the United States of America, requesting protection and enforcement of her U.S. Constitutional Rights, 14th Amendment Section 1--Due Process and Equal Protection of the Laws (App-13)--whereby she requests a favorable ruling in her behalf, and more importantly, the upholding of your own Statutes, Case Laws, and Rules, particularly Utah Rule of Civil Procedure Rule No. 30(b)(2) (App-17).

Dated this 17th day of September, 1990.

Marie S. Facer

Marie S. Facer
Plaintiff-Appellant, Pro-Se
733 North 800 West
Provo, Utah 84601
(801) 377-0705

Mailing Certificate

I hereby certify that four (4) true and exact copies of the foregoing Appellant's Brief was hand delivered to Thomas S. Taylor, Attorney for the Defendants-Respondents, 2525 North Canyon Road, P.O. Box 1466, Provo, Utah 84603 on this 17th day of September, 1990, pursuant to Utah Supreme Court Rule No. 26(b).

Marie S. Facer

Marie S. Facer

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

MARIE S. FACER,)	Case Number CV 89-467
Plaintiff,)	
vs.)	RULING & ORDER
REED H. FACER, and MARTHA F.)	
PROCTOR,)	
Defendants.)	

This matter came before the Court on plaintiff's motions for Reconsideration of Ruling relating to discovery and deposition of the plaintiff, plaintiff's Motion to Quash, plaintiff's Motion for Order Compelling Discovery, plaintiff's Motion for Summary Judgment, and defendant's Motion to Strike. The Court, having considered the various motions, accompanying memoranda, and affidavits, enters now its RULING:

As noted by the Court in its August 25, 1989 RULING, plaintiff's Motion to Reconsider is denied.

Plaintiff's Motion to Quash Subpoena Duces Tecum is hereby denied.

As there appear to be genuine issues of material fact, plaintiff's Motion for Summary Judgment is denied.

Defendant's Motion to Strike and for Order for Sanctions is conditionally denied pending Plaintiff's response to the Court's ORDER herein.

(App-1)

Plaintiff's Motion for Order Compelling Discovery is conditionally denied pending plaintiff's appearance for deposition pursuant to the Court's ORDER herein. At such time as plaintiff complies with said ORDER, the Court will consider said Motion.

ORDER

The Court hereby order's plaintiff, MARIE S. FACER, to appear for deposition of the plaintiff as shall be noticed by plaintiff in the above entitled action. If plaintiff fails to appear, she shall be subject to Sanctions under Rule 37 of the Utah Rules of Civil Procedure including dismissal of the above entitled action.

DATED, at Provo, this 11TH, day of December, 1989.

BY THE COURT


GEORGE E. BALLIF, JUDGE

cc: Thomas Taylor
Marie Facer

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

MARIE S. FACER, the surviving
spouse,

Plaintiff,

Case Number: CV 89 467

vs.

RULING

GEORGE E. BALLIF, JUDGE

REED H. FACER, et al.,

Defendant.

This matter came before the court on defendants' motion for Order Striking Pleadings and for Sanctions. The Court having considered the motion and the accompanying memoranda and affidavits, enters now its Ruling:

The Court finds that plaintiff has consistently violated Orders of this Court to appear for deposition in this matter.

Accordingly, pursuant to 37(b) of the Rules of Civil Procedure, the Court grants defendants' Motion to Strike plaintiff's pleadings and orders plaintiff's claims dismissed with

prejudice. No attorney's fees allowed.

Defendant shall prepare an Order consistent with this Ruling.

Dated this 21st day of February, 1990.

BY THE COURT



GEORGE E. BALLIF, JUDGE

cc: Thomas Taylor
Marie S. Facer

Thomas S. Taylor, No. 3211
TAYLOR, MOODY & THORNE
Attorneys for Defendants
2525 North Canyon Road
P. O. Box 1466
Provo, Utah 84603
(801) 373-2721

Fr. 16, 1990
of 16, 1990
[Signature]

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

MARIE S. FACER,	:	ORDER STRIKING COMPLAINT
	:	AND DISMISSAL OF ACTION;
Plaintiff,	:	SANCTIONS
	:	
vs.	:	
	:	
REED H. FACER and MARTHA P.	:	
PROCTOR,	:	
	:	Civil No. <u>CV-89-467</u>
Defendants.	:	
	:	<u>Judge George E. Ballif</u>

Defendants having moved this Court for an Order Striking the Plaintiff's Complain, with prejudice and dismissing this action together with sanctions for costs and expenses incurred; and it appearing to the Court that there is just cause for the striking of the Complaint and the dismissing of the action with prejudice and the granting of sanctions due to Plaintiff's failure to, comply with three (3) Court Orders and being in contempt thereof.

The Court being fully informed herein and it appearing to the Court that the Plaintiff was duly noticed and served with all of the appropriate pleadings involving the taking of her deposition

and having disobeyed three (3) Court Orders for the taking of her deposition,

Since the ruling of the Court date February 21, 1990, and the filing of a proposed Order consistent with said ruling, the Plaintiff filed objections to said proposed Order and filed a Motion For a New Trial; the Defendants having responded to said pleading and the Court being fully advised has made a Minute Entry denying said objections and Motion For a New Trial.


IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff's objections are hereby overruled and denied.
2. Plaintiff's Motion For a New Trial is hereby denied.
3. Plaintiff's Complaint is hereby dismissed and stricken, with prejudice.
4. Defendants are awarded judgment against the Plaintiff in the sum of ONE HUNDRED FIFTY DOLLARS (\$150.00) for their costs incurred in the form of reporter fees relating to the deposition notices and reporter appearances and stand-by fees. No attorney's fees are allowed.

The Clerk of the Court is hereby ordered to enter this Order and Judgment against the Plaintiff as provided by law.

DATED this 16th day of May, 1990.

BY THE COURT:


GEORGE E. BALLIF, Judge

FILED

IN THE UTAH COURT OF APPEALS

JUN 28 1990
Mary T. Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

-----00000-----

Marie S. Facer, the surviving
spouse of William Henry Facer,

Plaintiff and Appellant,

v.

Reed H. Facer and Martha F.
Proctor, individually, and as
executors of the estate of
William Henry Facer,

Defendants and Appellees.

ORDER OF TRANSFER

Case No. 900282-CA

Upon the court's own motion, the above entitled appeal,
docketed in this court on May 29, 1990, is hereby TRANSFERRED to
the Utah Supreme Court pursuant to Utah R. App. R. 44, because said
appeal is within the original jurisdiction of that court.

Dated this 28th day of June 1990.

BY THE COURT:

Russell W. Bench
Russell W. Bench, Judge

(App-4)

326

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

July 3, 1990

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
SALT LAKE CITY

JUL 23 10 24 AM '90

OFFICE OF THE CLERK

CARMA SMITH
CLERK OF THE COURT
51 SOUTH UNIVERSITY
PROVO, UTAH 84601

Marie S. Facer, the surviving
spouse of William Henry Facer,
Plaintiff and Appellant,

v.

Reed H. Facer and Martha F.
Proctor, individually and as
executors of the Estate of
William Henry Facer,
Defendants and Appellees.

No. 900334
890400467

This day Notice of Appeal filed.

Geoffrey J. Butler, Clerk

(App-5)

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

July 30, 1990

OFFICE OF THE CLERK

Marine S. Facer
733 North 800 West
Provo, UT 84601

Marie S. Facer, the surviving
spouse of William Henry Facer,
Plaintiff and Appellant,

v.

Reed H. Facer and Martha F.
Proctor, individually and as
executors of the estate of
William Henry Facer,
Defendants and Appellees.

No. 900297
& 900334

This day the Court, sua sponte, hereby consolidates appeals
number 900297 and 900334 wherein the genesis of both appeals is case
number CV89-467 of the Fourth Judicial District.

All further pleadings shall henceforth be filed using the number
900297.

Geoffrey J. Butler, Clerk

(App-6)

FILED IN COURT

DEC 11 1989



Thomas S. Taylor, No. 3211
TAYLOR, MOODY & THORNE
Attorneys for Defendants
2525 North Canyon Road
P. O. Box 1466
Provo, Utah 84603
(801) 373-2721

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

MARIE S. FACER,	:	
	:	O R D E R
Plaintiff,	:	
vs.	:	
REED H. FACER and	:	
MARTHA F. PROCTOR,	:	
	:	Civil No. <u>CV-89-467</u>
Defendants.	:	
	:	<u>Judge George E. Ballif</u>

This matter coming before the Court on the Plaintiff's Motion For Reconsideration of Ruling relating to discovery and deposition of the Plaintiff; Plaintiff's Motion to Quash; Defendants' Motion For Order Compelling Discovery; Plaintiff's Motion For Summary Judgment; and Defendants' Motion to Strike. The Court having considered the various Motions and accompanying Memoranda and Affidavits, and having made its written Ruling,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. As noted by the Court in its August 25, 1989, Ruling, Plaintiff's Motion to Reconsider is denied.

(App-7)

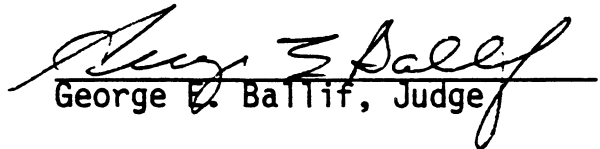
2. Plaintiff's Motion to Quash Subpoena Duces Tecum is hereby denied.

3. Defendants' Motion For Order Compelling Discovery and Defendants' Motion to Strike are conditionally denied pending Plaintiff's appearance for deposition pursuant to the Court's Order herein. At such time as Plaintiff complies with said Order, the Court will consider said Motion.

4. The Plaintiff, Marie S. Facer, is hereby ordered to appear for her deposition as shall be noticed by the Defendants in the above-entitled action. If Plaintiff, Marie S. Facer, fails to appear for her deposition as noticed by Defendant, she shall be subject to sanctions under Rule 37 of the Utah Rules of Civil Procedure including dismissal of the above-entitled action.

DATED this 21 day of December, 1989.

BY THE COURT


George E. Ballif, Judge

CERTIFICATE OF MAILING

I do hereby certify that I did mail a true and correct copy of the foregoing ORDER first class mail, postage prepaid to the following:

MARIE S. FACER
Plaintiff
733 North 800 West
Provo, Utah 84601

on this 18th day of December, 1989.

Peggy L. Maciel

plm.ae

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

MARIE S. FACER, THE SURVIVING
SPOUSE,

Plaintiff,

Case Number: CV 89 467

vs.

MINUTE ENTRY

GEORGE E. BALLIF, JUDGE

REED H. FACER & MARTHA F. PROCTOR,
et al.,

Defendant.

Counsel for defendants, Thomas S. Taylor, is hereby
directed to prepare an order consistent with the Ruling by this
Court dated February 21, 1990.

cc: Marie Facer
Thomas Taylor

(App-8)

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

AUGUST 2, 1990

OFFICE OF THE CLERK

Marine S. Facer
733 North 800 West
Provo, UT 84601

Appellant's Motion for
Summary Disposition
and Miscellaneous Motions

Respondent's Response to
Appellant's Motion for
Summary Disposition and
Motion to Strike Docketing
Statement

Marie S. Facer, the surviving
spouse of William Henry Facer,
Plaintiff and Appellant,

v.

Reed H. Facer and Martha F.
Proctor, individually and as
executors of the estate of
William Henry Facer,
Defendants and Appellees.

No. 900297
& 900334

The above case is set for argument in this Court on Monday, August 13, 1990.

All cases are set for 9 a.m.

Geoffrey J. Butler

NOTE: Oral argument shall be limited to 3 minutes per side absent exceptional circumstances.

(App-9)

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

August 7, 1990

OFFICE OF THE CLERK

Marine S. Facer
733 North 800 West
Provo, UT 84601

Marie S. Facer, the surviving
spouse of William Henry Facer,
Plaintiff and Appellant,

v.

Reed H. Facer and Martha F.
Proctor, individually and as
executors of the estate of
William Henry Facer,
Defendants and Appellees.

No. 900297
& 900334

Appellant's motion for summary reversal and Appellee's motion to strike docketing statement are both denied, and the court's ruling on the issues is reserved for plenary presentation and consideration of the case.

The case has been withdrawn from the law and motion calendar, and the parties will not be heard on their respective motions.

Geoffrey J. Butler, Clerk

(App-10)

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

August 24, 1990

OFFICE OF THE CLERK

Marine S. Facer
733 North 800 West
Provo, UT 84601

Marie S. Facer, the surviving
spouse of William Henry Facer,
Plaintiff and Appellant,

v.

Reed H. Facer and Martha F.
Proctor, individually and as
executors of the estate of
William Henry Facer,
Defendants and Appellees.

No. 900297
& 900334

THIS DAY, record index on appeal filed. Appellant's brief is due October 3, 1990. The record in this case may be withdrawn from the district court only upon written request of the attorney of record.

Geoffrey J. Butler, Clerk

(App-11)

Thomas S. Taylor, No. 3211
TAYLOR, MOODY & THORNE
Attorneys for Defendants
2525 North Canyon Road
P. O. Box 1466
Provo, Utah 84603
(801) 373-2721

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

MARIE S. FACER,	:	
Plaintiff,	:	ORDER DENYING MOTION FOR RECONSIDERATION
vs.	:	
REED H. FACER and MARTHA F. PROCTOR,	:	
Defendants.	:	Civil No. <u>CV-89-467</u>
	:	<u>Judge George E. Ballif</u>

This matter coming on duly and regularly before the Court on the Motion of the Plaintiff to reconsider the Ruling of this Court relating to discovery and deposition of the Plaintiff. The Court having considered all matters, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff's Motion To Reconsider the Proposed Protective Order of the Plaintiff's and the taking of the Plaintiff's deposition, be and the same is hereby denied.

2. Plaintiff is ordered to appear for the deposition of the Plaintiff as noticed by the Defendants.

(App-12)

DATED this ____ day of September, 1989.

BY THE COURT:

George E. Ballif, Judge

CERTIFICATE OF MAILING

I do hereby certify that I did mail a true and correct copy of the foregoing ORDER DENYING MOTION FOR RECONSIDERATION first class mail, postage prepaid to the following:

Marie S. Facer, Plaintiff
733 North 800 West
Provo, Utah 84601

on this 7th day of September, 1989.

Peggy L. Lowder

pll.ab

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Proceeds of sale of decedent's homestead, rights of surviving spouse and children in, 6 A. L. R. 2d 515.

Proceeds of voluntary sale of homestead, exemption of, 1 A. L. R. 483, 46 A. L. R. 814.

Recital in deed or mortgage disclaiming homestead as respects property described or affirming homestead in other property, 128 A. L. R. 414.

Reconveyance or encumbrance of homestead by husband without joinder of wife to settle purchase money debt, validity, 45 A. L. R. 413, 422.

Rentals: homestead exemption as extending to rentals derived from homestead property, 40 A. L. R. 2d 897.

Rents and profits: homestead rights as affecting accountability of cotenant for

rents and profits or use and occupation, 51 A. L. R. 2d 437, 441.

Separation agreement as barring right to homestead, 34 A. L. R. 2d 1045.

Statutes abolishing homestead exemption as against particular classes of claims, validity, 6 A. L. R. 1143.

Undivided interest as estate in real property to which homestead claim may attach, 74 A. L. R. 2d 1371.

Wife as head of family within homestead or other property exemption provision, 67 A. L. R. 2d 779.

Wife living out of state, homestead rights, 92 A. L. R. 1054.

Wife's absence enforced by act of husband as causing loss of homestead rights, 42 A. L. R. 1162, 129 A. L. R. 305.

Sec. 2. [Property rights of married women.]

Real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.

Compiler's Notes.

Section 3 of this article, prohibiting the manufacture, sale and storage of intoxicating liquors was repealed November 7, 1933, effective January 1, 1934. The repealing amendment was proposed by House Joint Resolution No. 5, Laws 1933 (2nd Spec. Sess.), p. 57.

Comparable Provision.

South Dakota Const., Art. XXI, § 5.

Cross-Reference.

Statutory provisions, 30-2-1 et seq.

In general.

By constitutional provisions and statutory enactments, common-law disabilities of married women have been abrogated, and married women are in all respects, with reference to their separate property and power to contract, on same footing as other persons. *Williams v. Peterson*, 86 U. 526, 46 P. 2d 674.

Property exempt as a homestead cannot be cut up into several different estates, since the homestead laws protect the physical thing as a whole from lien or sales so long as the exemption continues. *Panagopulos v. Manning*, 93 U. 198, 69 P. 2d 614.

This provision, eliminating common-law incapacity, does not confer rights upon wife different from those of husband, and does not invalidate statute giving husband homestead in property of deceased wife. *In re Petersen's Estate*, 97 U. 324, 93 P. 2d 445.

Life estate.

Irrespective of language in *Panagopulos v. Manning*, 93 U. 198, 69 P. 2d 614 (1937), the question of possession is not determining and a fee owner subject to a life estate can claim a homestead exemption. *Rich Co-operative Assn. v. Dustin*, 14 U. (2d) 408, 385 P. 2d 155.

Marriage as revoking prior will.

Since Constitution gives woman such rights over her disposable property as would not be affected by her marriage or by appearance of new heir, woman's prior will was not revoked upon her subsequent marriage. *Armstrong, Estate of v. Logan*, 21 U. (2d) 86, 440 P. 2d 881.

Collateral References.

Husband and Wife 111-114.
41 C.J.S. *Husband and Wife* §§ 233-236.
41 Am. Jur. 2d 43, *Husband and Wife* § 29.

Sec. 3. (Repealed November 7, 1933, effective January 1, 1934.)

Deficiency judgment, right to jury trial of issues as to, 112 A. L. R. 1492.

Driving while intoxicated or similar offense, right to trial by jury in criminal prosecution for, 16 A. L. R. 3d 1373.

Fingerprint, palm print, or bare footprint evidence as violating right to jury trial, 28 A. L. R. 2d 1141.

Garnishment; issues in garnishment as triable to court or to jury, 19 A. L. R. 3d 1393.

Indoctrination by court of persons summoned for jury service as violation of right to jury trial, 89 A. L. R. 2d 215.

Interlocutory ruling of one judge on right to jury trial as binding on another judge in same case, 132 A. L. R. 68.

Juvenile court delinquency proceedings, right to jury trial in, 100 A. L. R. 2d 1241.

Mandamus or prohibition as remedy to enforce right to jury trial, 41 A. L. R. 2d 780.

Provisions for determining custody or commitment of juvenile delinquents without jury trial as denial of due process, 100 A. L. R. 2d 1241.

Removal of public officer, right to jury trial in proceedings for, 3 A. L. R. 232, 8 A. L. R. 1476.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 A. L. R. 3d 1321.

Right to consent to trial of criminal case before twelve jurors, 70 A. L. R. 279, 105 A. L. R. 1114.

Right to jury trial as to fact essential to action or defense but not involving merits thereof, 170 A. L. R. 383.

Right to jury trial in action under Fair Labor Standards Act, 174 A. L. R. 421.

Right to jury trial in disbarment proceedings, 107 A. L. R. 692.

Right to jury trial in proceeding to determine insanity or incompetency, 33 A. L. R. 2d 1145.

Right to jury trial in suit to remove cloud, quiet title, or determine adverse claims, 117 A. L. R. 9.

Seizure of property alleged to be illegally used, right to jury trial, 17 A. L. R. 568, 50 A. L. R. 97.

Substitution of judge: right to jury trial as violated by substitution in criminal case, 83 A. L. R. 2d 1032.

Validity of statute allowing for separation of jury, 34 A. L. R. 1128, 79 A. L. R. 821, 21 A. L. R. 2d 1088.

Waiver of jury trial in criminal cases and effect thereof on jurisdiction of court, 48 A. L. R. 767, 58 A. L. R. 1031.

Law Reviews.

The Supreme Court: 1969 Term, Michael E. Tigar, 84 Harv. L. Rev. 1, 165.

New Data on the Effect of a "Death Qualified Jury" on the Guilt Determination Process, George L. Jurow, 84 Harv. L. Rev. 567.

Jury Trial in Civil Cases, Glen W. Clark, 10 Mont. L. Rev. 38.

Right to Trial by Jury in State Court Prosecutions, 22 S. L. J. 875.

Right to Civil Jury Trial in Utah: Constitution and Statute, Ronan E. Degnan, 8 Utah L. Rev. 97.

Due Process Standard of Jury Impartiality Precludes Death-Qualification of Jurors in Capital Cases, 1969 Utah L. Rev. 154.

No-Fault Automobile Insurance in Utah—State Constitutional Issues, 1970 Utah L. Rev. 248.

Sec. 11. [Courts open—Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Comparable Provision.

Montana Const., Art. III, § 6.

Actions by court.

Court of equity has jurisdiction to open probate proceeding and to proceed against bond of administratrix where she has practiced extrinsic fraud on the court. *Weyant v. Utah Savings & Trust Co.*, 54 U. 181, 182 P. 189, 9 A. L. R. 1119.

Actions by state.

This section did not alter the law with respect to certain rights which are vested in the state, which alone can exercise sovereign powers; therefore, it does not prevent the state from reserving to itself the sole right to bring actions for the dissolution of building and loan associations. *Union Savings & Investment Co. v. District Court of Salt Lake County*, 44 U. 397, 140 P. 221, Ann. Cas. 1917A, 821.

litigation as its agent for service of process in unconnected actions or proceedings, 9 A L R 3d 738

Civil liability of one making false or fraudulent return of process, 31 A L R 3d 1393

Construction of phrase "usual place of abode," or similar terms referring to abode, residence, or domicile, as used in statutes relating to service of process, 32 A L R 3d 112

Airplane or other aircraft as "motor vehicle" or the like within statute providing for constructive or substituted service of process on nonresident motorist, 36 A L R 3d 1387

Sunday or holiday, validity of service of summons or complaint on, 63 A L R 3d 423

In personam jurisdiction under long-arm

statute of nonresident banking institution, 9 A L R 4th 661

In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state, 16 A L R 4th 1318

Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state, 37 A L R 4th 852

Key Numbers. — Corporations ⇐ 507; Counties ⇐ 219, Municipal Corporations ⇐ 1029 Process ⇐ 21, 23, 24, 50 to 58, 63, 64, 82, 84 to 111, 127 to 153, 161 to 165, Schools and School Districts ⇐ 119, States ⇐ 204

Rule 5. Service and filing of pleadings and other papers.

(a) **Service: When required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written notice other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, notice of signing or entry of judgment under Rule 58A(d), and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except as provided in Rule 55(a)(2) (default proceedings) or pleadings asserting new or additional claims for relief against them which shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Service: How made.**

(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(2) A resident attorney, on whom pleadings and other papers may be served, shall be associated as attorney of record with any foreign attorney practicing in any of the courts of this state.

Rule 30. Depositions upon oral examination.

(a) **When depositions may be taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in Subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) **Notice of examination; general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone.**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this Subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken and the manner of recording, preserving, and filing the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under Subdivision (c), any changes made by the witness, his signature identifying the deposition as his own or the state-

Rule 32. Use of depositions in court proceedings.

(a) **Use of depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of [a] deponent as a witness or for any other purpose permitted by the Utah Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and when an action has been brought in any court of the United States or of any state and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Utah Rules of Evidence.

(b) **Objections to admissibility.** Subject to the provisions of Rule 28(b) and Subdivision (d)(3) [(c)(3)] of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) **Effect of errors and irregularities.**

(1) **As to notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order

liams v. Nelson, 65 Utah 304, 237 P. 217 (1925) (decided under prior law).

Separate trials.

—Court's discretion.

Severance is within the sound discretion of the trial court and, absent abuse of such discretion, will not be upset on appeal. King v. Barron, 95 Utah Adv. Rep. 3 (1988).

—Separate issues.

When a court considers it convenient or desirable in the interest of justice, any separate issue may be tried separately. Page v. Utah Home Fire Ins. Co., 15 Utah 2d 257, 391 P.2d 290 (1964).

Cited in Lignell v. Berg, 593 P.2d 800 (Utah 1979); Tripp v. Vaughn, 747 P.2d 1051 (Utah Ct. App 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d Actions §§ 127, 156 et seq.; 75 Am. Jur. 2d Trial §§ 7 to 16.

C.J.S. — 1 C.J.S. Actions §§ 109, 117 to 122; 88 C.J.S. Trial §§ 6 to 10.

A.L.R. — Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 A.L.R.3d 456.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in actions involving personal injury, death, or property damage, 78 A.L.R. Fed. 890.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in civil rights actions, 79 A.L.R. Fed. 220.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Fed-

eral Rules of Civil Procedure, in actions involving patents and copyrights, 79 A.L.R. Fed. 532.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in contract actions, 79 A.L.R. Fed. 812.

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in civil rights actions, 81 A.L.R. Fed. 732.

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in actions involving patents, copyrights, or trademarks, 82 A.L.R. Fed. 719.

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in actions involving securities, 83 A.L.R. Fed. 367.

Key Numbers. — Action ⇐ 56, 60; Trial ⇐ 2 to 4.

Rule 43. Evidence.

(a) **Form.** In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court.

(b) **Evidence on motions.** When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. (Amended, effective Jan. 1, 1987.)

Amendment Notes. — The 1986 amendment, in Subdivision (a), deleted the former last two sentences, relating to presentation of evidence governed by statute or rule, and to competency of witness, respectively, added "the Utah Rules of Evidence, or a statute of this state" at the end of the first sentence, and substituted "Utah Rules of Evidence or other rules adopted by the Supreme Court" for "Statutes of this state or under the rules of evidence heretofore applied in the courts of this state" in the first sentence; deleted former Subdivisions (b) to (d) and (f), relating to scope of examination

and cross-examination, record of excluded evidence, affirmation in lieu of oath, and exclusion of witnesses, respectively; and redesignated former Subdivision (e) as present Subdivision (b).

Compiler's Notes. — This rule is similar to Rule 43(a) and (e), F.R.C.P.

Cross-References. — Evidence generally, § 78-25-2 et seq.

Relevancy and its limits, Rules 401 to 411, U.R.E.

Witnesses, Rules 601 to 615, U.R.E.

action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Affidavit.

- Contents.
- Corporation.
- Inconsistency with deposition.
- Necessity of opposing affidavits.
- Resting on pleadings.
- Sufficiency.
- Hearsay and opinion testimony.
- Superseding pleadings.
- Unpleaded defenses.
- Verified pleading.
- Waiver of right to contest.
- When unavailable.
- Who may make.
- Affirmative defense.
- Answers to interrogatories.
- Appeal.
- Standard of review.
- Attorney's fees.

Damages.

- Discovery.
- Evidence.
- Facts considered.
- Improper evidence.
- Proof.
- Weight of testimony.
- Improper party plaintiff.
- Issue of fact.
- Corporate existence.
- Deeds.
- Lease as security.
- Judicial attitude.
- Motion for new trial.
- Motion to dismiss.
- Motion to reconsider.
- Notice.
- Provision not jurisdictional.
- Waiver of defect.
- Procedural due process.
- Summary judgment.

NOTES TO DECISIONS

Cited in *Oil Shale Corp. v. Larson*, 20 Utah 2d 369, 438 P.2d 540 (1968).

COLLATERAL REFERENCES

Am. Jur. 2d. — 22A Am. Jur. 2d Declaratory Judgments §§ 183, 186, 203 et seq.
C.J.S. — 26 C.J.S. Declaratory Judgments §§ 17, 18, 104, 155.
A.L.R. — Right to jury trial in action for declaratory relief in state court, 33 A.L.R.4th 146.
Key Numbers. — Declaratory Judgment ¶ 41, 42, 251, 367.

Rule 58A. Entry.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) **Judgment in other cases.** Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; notation in register of actions and judgment docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

(f) **Judgment by confession.** Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

(3) It must authorize the entry of judgment for a specified sum.

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

(Amended, effective Sept. 4, 1985 and Jan. 1, 1987.)

rial facts" as provided in paragraphs (4) and (5), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages. If a memorandum of points and authorities is filed in support of a motion, it must be served on the opposing party or counsel and filed with the court no later than ten (10) days before the date set for hearing.

(2) The responding party shall file and serve upon all parties within ten (10) days after service of a motion, but no later than five (5) days before the date of hearing, a statement answering points and authorities and counter-affidavits.

(3) The moving party may serve and file reply points and authorities within five (5) days after service of the responding party's points and authorities. Upon the expiration of the five (5) day period to file reply points and authorities, either party may notify the Clerk to submit the matter for decision.

(4) The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the movant relies.

(5) The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(6) A copy of the motion, supporting memorandum and documents shall be filed with the clerk's office as provided in the Rules of Civil Procedure. Motions based upon depositions or supported thereby shall not be heard unless the depositions are filed in the clerk's office at least two working days before the hearing unless otherwise ordered by the court upon good cause shown.

(7) A courtesy copy of the motion, memorandum of points and authorities and documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Courtesy copies of all affidavits shall be given to the judge within the time limits required by the Rules of Civil Procedure. Copies shall be clearly marked as courtesy copies and indicate the hearing date. Courtesy copies shall not be filed with the clerk of the court.

(8) Decision on a motion shall be rendered without a hearing unless requested by the Court, in which event the Clerk shall schedule a date and time for such hearing. If a hearing is not requested by the Court, counsel shall notify the Clerk of the Court, in writing, to submit the motion to the Court for decision. The notification shall contain a certificate of mailing to opposing counsel and parties.

(9) In cases where the granting of a motion would dispose of the action or any issues therein on the merits with prejudice, the party resisting the motion may request a hearing and such request shall be granted unless the motion is summarily denied. If no request is made within ten (10) days of notifying the

clerk to submit the motion for decision, a hearing on the motion shall be deemed waived.

(10) All motions for summary judgment or other dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the Court.

(11) The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

Rule 4-502. Discovery procedures in civil cases.

Intent:

To establish a procedure for the filing of discovery documents.

To establish a limitation on discovery procedures within 30 days of trial.

Applicability:

This rule shall apply to the District, Juvenile and Circuit courts.

Statement of the Rule:

(1) Parties conducting discovery under Rules 33, 34 and 36 of the Utah Rules of Civil Procedure shall not file discovery requests with the clerk of the court, but shall file only a certificate of service stating that the discovery requests have been served on the other parties and the date of service. The responding party shall file a similar certificate with the clerk of the court.

(2) The party serving the discovery request shall retain the original with the original proof of service affixed to it and serve a copy of the discovery request and proof of service upon the opposing party or counsel. The party responding to the discovery request shall retain the original with the original proof of service affixed to it, and serve a copy of the responses and the proof of service upon the opposing party or counsel. The discovery requests and response shall not be filed with the clerk of the court unless the court on motion and notice and for good cause shown so orders.

(3) Any party filing a motion to compel compliance with a discovery request or a motion which relies upon the discovery response shall attach a copy of the discovery request or response which is at issue in the motion.

(4) Depositions taken pursuant to the Rules of Civil Procedure shall not be filed with the clerk of the court unless the court on motion and notice and for good cause shown so orders. The reporter before whom the deposition is taken shall deliver the original to the party conducting the deposition, and shall deliver copies to the other parties requesting the same. The reporter shall then file a certificate with the clerk of the court certifying to whom the original and copies were delivered and the dates they were delivered. Any party moving for the publication of a deposition shall provide the court with the original or copy in the party's possession at the time the motion to publish is made.

(5) All parties shall be entitled to conduct discovery proceedings in accordance with this rule. All discovery proceedings shall be completed, including all responses thereto, and all depositions and other documents filed with the court no later than thirty (30) days before the date set for trial of the case. The right to conduct discovery proceedings within thirty (30) days before trial shall be within the discretion of the court. Motions to conduct discovery within thirty (30) days before trial shall be presented to the judge assigned to the

Section

75-2-1008. Death before taking effect of act.

Part 11

**Personal Choice and Living Will
Act**

- 75-2-1101. Short title.
- 75-2-1102. Intent statement.
- 75-2-1103. Definitions.
- 75-2-1104. Directive for medical services.
- 75-2-1105. Directive for medical services after injury or illness is incurred.
- 75-2-1106. Special power of attorney.
- 75-2-1107. Medical services for terminally ill persons without a directive.
- 75-2-1108. Current desires of declarant.
- 75-2-1109. Pregnancy.
- 75-2-1110. Notification to physician.
- 75-2-1111. Revocation of directive.
- 75-2-1112. Physician compliance with directive.
- 75-2-1113. Presumption of validity of directive.
- 75-2-1114. Physician liability for compliance with directive.
- 75-2-1115. Illegal destruction or falsification of directive.
- 75-2-1116. Compliance with directive is not suicide.
- 75-2-1117. No insurance or health care may require a directive.
- 75-2-1118. Directive not mercy killing.

PART 1

INTESTATE SUCCESSION

75-2-101. Intestate estate.

Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this code. 1975

75-2-102. Intestate share of the spouse.

The intestate share of the surviving spouse is the entire intestate estate unless there are surviving issue, one or more of whom are not issue of the surviving spouse, in which case the intestate share of the surviving spouse is one-half of the intestate estate. 1988

75-2-103. Share of heirs other than surviving spouse.

(1) The part of the intestate estate not passing to the surviving spouse under Section 75-2-102, or the entire intestate estate if there is no surviving spouse, passes as follows:

- (a) To the issue of the decedent by representation.
- (b) If there is no surviving issue, to his parent or parents equally.
- (c) If there is no surviving issue or parent, to the issue of the parents or either of the (A 20-24) representation

relatives on the other side in the same manner as the half.

(e) If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, then the entire estate passes to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote. 1975

75-2-104. Requirement that heir survive decedent for 120 hours.

Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state under Section 75-2-105. 1975

75-2-105. No taker.

If there is no taker under the provisions of this part, the intestate estate passes to the state for the benefit of the state school fund. 1975

75-2-106. Representation.

If under this code all or any part of the decedent's estate is to pass to the issue of a described person, including the decedent, by representation, that part is divided into as many equal shares as there are living children of the person and deceased children of the person who left issue who survive the decedent, even if at the time of the decedent's death all of the children of the person are deceased, each living child of the person, if any, receiving one share, and the share of each deceased child being divided among the deceased child's issue by representation in the same manner. 1977

75-2-107. Kindred of half blood.

Relatives of the half blood inherit the same share they would inherit if they were of the whole blood. 1975

75-2-108. Afterborn heirs.

Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent. 1975

75-2-109. Meaning of child and related terms.

1) If, for purposes of intestate succession a rela-

Objector failed to sustain his burden of proving incompetency where he showed only that elderly testatrix was physically weak, pessimistic, distrustful, forgetful, and tending toward paranoia; and where it also appeared that eight months after the alleged undue influence

the testatrix prepared and executed an olographic will of substantially the same content as the previous will made at the time of the alleged undue influence. In re Holteb's Estate, 17 U. (2d) 29, 404 P. 2d 27.

75-2-502. Execution.—Except as provided for holographic wills, writings within section 75-2-513, and wills within section 75-2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will. The signing by the witnesses must be in the testator's presence and in the presence of each other.

History: C. 1953, 75-2-502, enacted by L. 1975, ch. 150, § 3.

Editorial Board Comment.

The formalities for execution of a witnessed will have been reduced to a minimum. *Execution under this section normally would be accomplished by signature of the testator and of two witnesses; each of the persons signing as witnesses must "witness" any of the following: the signing of the will by the testator, an acknowledgment by the testator that the signature is his, or an acknowledgment by the testator that the document is his will. Signing by the testator may be by mark under general rules relating to what constitutes a signature; or the will may be signed on behalf of the testator by another person signing the testator's name at his direction and in his presence. There is no requirement that the testator publish the document as his will, or that he request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses if he later acknowledges to the witnesses that the signature is his or that the document is his will, and they sign as witnesses. [Last sentence in Utah version omitted in official text of Code.] There is no requirement that the testator's signature be at the end of the will; thus, if he writes his name in the body of the will and intends it to be his signature, this would satisfy the statute. The intent is to validate wills which meet the minimal formalities of the statute.*

A will which does not meet these requirements may be valid under section 75-2-503 as a holograph.

Cross-References.

Probate and administration, 75-3-101 et seq.

Proof of will, 78-25-12.

Collateral References.

Wills 111, 113-123.

94 C.J.S. *Wills* §§ 169-177, 182-197.

79 Am. Jur. 2d 430, *Wills* § 210.

Also see Am. Jur. 2d, New Topic Service, Uniform Probate Code.

Admissibility and credibility of testimony of subscribing witness tending to impeach execution of will or testamentary capacity of testator, 79 A. L. R. 394.

Admissibility of evidence other than testimony of subscribing witnesses to prove due execution of will, or testamentary capacity, 63 A. L. R. 1195.

Admissibility of testator's declarations upon issue of genuineness or due execution of purported will, 62 A. L. R. 2d 855.

Assistance: validity of will signed by testator with the assistance of another, 98 A. L. R. 2d 824.

"Attestation" or "witnessing" of will, required by statute, as including witnesses' subscription, 45 A. L. R. 2d 1365.

Beneficiary under nuncupative will as witness thereto, 28 A. L. R. 2d 796.

Character as witness of one who signed will for another purpose, 8 A. L. R. 1075.

Character of instrument as will, or its admissibility to probate as such, as affected by its failure to make any disposition of property or by fact that there is no beneficiary entitled to take thereunder, 147 A. L. R. 636.

Codicil as affecting application of statutory provision to will, or previous codicil not otherwise subject, or as obviating objections to lack of testamentary ca-

78-1-2.3. Number of juvenile judges and jurisdictions.

- (1) The number of juvenile court judges shall be:
 - (a) one juvenile judge in the First Juvenile District;
 - (b) three juvenile judges in the Second Juvenile District;
 - (c) four juvenile judges in the Third Juvenile District;
 - (d) two juvenile judges in the Fourth Juvenile District, but these judges shall also serve as judges of the Eighth Juvenile District;
 - (e) one juvenile judge in the Fifth Juvenile District;
 - (f) one juvenile judge in the Sixth Juvenile District; and
 - (g) one juvenile judge in the Seventh Juvenile District.
- (2) Judges under Subsection (1)(d) shall stand for retention election in every county in both districts under Section 20-1-7.7.

1990

78-1-2.4. Number of circuit judges.

The number of circuit court judges shall be:

- (1) three circuit judges in the First District;
- (2) eight circuit judges in the Second District;
- (3) fifteen circuit judges in the Third District;
- (4) five circuit judges in the Fourth District;
- (5) two circuit judges in the Fifth District;
- (6) one circuit judge in the Sixth District;
- (7) two circuit judges in the Seventh District;
- and
- (8) one circuit judge in the Eighth District.

1988

78-1-3. Effect of act on election functions.

(1) Any justice or judge of a court of record, whose election to office was effective on or before July 1, 1985, shall hold the office for the remainder of the term to which he was elected. The justice or judge is subject to an unopposed retention election as provided by law at the general election immediately preceding the expiration of the respective term of office.

(2) Any justice or judge of a court of record whose appointment to office was effective on or before July 1, 1985, is subject to an unopposed retention election as provided by law at the first general election held more than three years after the date of the appointment.

(3) Any justice or judge of a court of record whose appointment to office was effective after July 1, 1985, is subject to an unopposed retention election as provided by law at the first general election held more than three years after the date of the appointment.

1988

**CHAPTER 2
SUPREME COURT**

Section

- 78-2-1.** Number of justices — Terms — Chief justice and associate chief justice — Selection and functions.
- 78-2-1.5, 78-2-1.6.** Repealed.
- 78-2-2.** Supreme Court jurisdiction.
- 78-2-3.** Repealed.
- 78-2-4.** Supreme Court — Rulemaking, judges pro tempore, and practice of law.
- 78-2-5.** Repealed.

78-2-1. Repealed.

78-2-7.5. Service of sheriff to court.

78-2-8 to 78-2-14. Repealed.

78-2-1. Number of justices — Terms — Chief justice and associate chief justice — Selection and functions.

- (1) The Supreme Court consists of five justices.
- (2) A justice of the Supreme Court shall be appointed initially to serve until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a justice of the Supreme Court is ten years and commences on the first Monday in January following the date of election. A justice whose term expires may serve upon request of the Judicial Council until a successor is appointed and qualified.
- (3) The justices of the Supreme Court shall elect a chief justice from among the members of the court by a majority vote of all justices. The term of the office of chief justice is four years. The chief justice may serve successive terms. The chief justice may resign from the office of chief justice without resigning from the Supreme Court. The chief justice may be removed from the office of chief justice by a majority vote of all justices of the Supreme Court.

(4) If the justices are unable to elect a chief justice within 30 days of a vacancy in that office, the associate chief justice shall act as chief justice until a chief justice is elected under this section. If the associate chief justice is unable or unwilling to act as chief justice, the most senior justice shall act as chief justice until a chief justice is elected under this section.

(5) In addition to the chief justice's duties as a member of the Supreme Court, the chief justice has duties as provided by law.

(6) There is created the office of associate chief justice. The term of office of the associate chief justice is two years. The associate chief justice may serve in that office no more than two successive terms. The associate chief justice shall be elected by a majority vote of the members of the Supreme Court and shall be allocated duties as the chief justice determines. If the chief justice is absent or otherwise unable to serve, the associate chief justice shall serve as chief justice. The chief justice may delegate responsibilities to the associate chief justice as consistent with law.

1990

78-2-1.5, 78-2-1.6. Repealed.

1971, 1981

78-2-2. Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

- (3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:
- (a) a judgment of the Court of Appeals;
 - (b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
 - (c) discipline of lawyers;
 - (d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

- (i) the Public Service Commission;
- (ii) the State Tax Commission;
- (iii) the Board of State Lands and Forestry;
- (iv) the Board of Oil, Gas, and Mining; or
- (v) the state engineer;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction of a first degree or capital felony; and

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) general water adjudication;

(f) taxation and revenue; and

(g) those matters described in Subsection (3)(a) through (f).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings.

1989

78-2-3. Repealed.

1986

78-2-4. Supreme Court — Rulemaking, judges pro tempore, and practice of law.

(1) The Supreme Court shall adopt rules of procedure and evidence for use in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the rules of procedure and evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.

(2) Except as otherwise provided by the Utah Constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah.

(3) The Supreme Court shall by rule go (App-26A) practice of law, including admission to prac

The appellate court administrator shall appoint clerks and support staff as necessary for the operation of the Supreme Court and the Court of Appeals. The duties of the clerks and support staff shall be established by the appellate court administrator, and powers established by rule of the Supreme Court.

1986

78-2-7. Repealed.

1986

78-2-7.5. Service of sheriff to court.

The court may at any time require the attendance and services of any sheriff in the state.

1988

78-2-8 to 78-2-14. Repealed.

1986, 1988

CHAPTER 2a

COURT OF APPEALS

Section

78-2a-1. Creation — Seal.

78-2a-2. Number of judges — Terms — Functions — Filing fees.

78-2a-3. Court of Appeals jurisdiction.

78-2a-4. Review of actions by Supreme Court.

78-2a-5. Location of Court of Appeals.

78-2a-1. Creation — Seal.

There is created a court known as the Court of Appeals. The Court of Appeals is a court of record and shall have a seal.

1986

78-2a-2. Number of judges — Terms — Functions — Filing fees.

(1) The Court of Appeals consists of seven judges. The term of appointment to office as a judge of the Court of Appeals is until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum or fraction thereof for the period served.

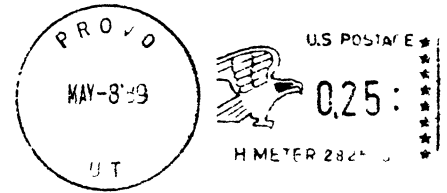
(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge

Fourth Judicial District Court

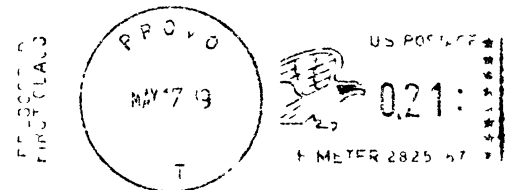
Ray M. Harding Judge
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Fourth Judicial District Court

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