

1990

georgia J. Russell v. Gene J. Russell, Geneil P. russell,
ADA J. Russell and Helen Russell Green : Brief of
Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

J. Franklin Allred, Stephanie M. Sapperstein; Attorneys for Appellant.

Wendell P. Ables; Attorney for Appellee.

Recommended Citation

Brief of Appellant, *Russell v. Russell*, No. 900184.00 (Utah Supreme Court, 1990).

https://digitalcommons.law.byu.edu/byu_sc1/2974

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

ON LEVING
ES
b
K
HVIN

KFU
45.9
.S9
DOCKET NO. _____

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF)
MERVIN J. RUSSELL,)
Deceased.)
Case No. P-86-052)
GEORGIA J. RUSSELL,)
Plaintiff,)
vs.)
GENE J. RUSSELL, GENEIL P.)
RUSSELL, ADA J. RUSSELL and)
HELEN RUSSELL GREEN)
Defendants.)
Case No. 87-208)
ADA J. RUSSELL, HELEN J.)
RUSSELL, GENE RUSSELL and)
GENEIL RUSSELL, his wife)
Plaintiffs,)
vs.)
GEORGIA J. RUSSELL,)
Defendant.)
Case No. 87-213)

UTAH SUPREME COURT,
BRIEF
45.9
.S9
DOCKET NO. 90-0184
Case No. 90-0184
(Priority No. 15)

BRIEF OF APPELLANT

Appeal from a jury trial in the Third District Court in Tooele County, State of Utah, the Honorable Scott Daniels, presiding.

J. FRANKLIN ALLRED, P.C
STEPHANIE M. SAPERSTEIN,
Attorneys for Appellant-
Contestant Gene J. Russell
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 531-1990

FILED
JUN 8 1992

WENDELL P. ABLES
Attorney of Appellee
536 East 400 South
Salt Lake City, Utah 84102
Telephone: (801) 532-7424

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF)	
MERVIN J. RUSSELL,)	
Deceased.)	
Case No. P-86-052)	
<hr/>	
GEORGIA J. RUSSELL,)	
Plaintiff,)	
vs.)	
GENE J. RUSSELL, GENEIL P.)	
RUSSELL, ADA J. RUSSELL and)	Case No. 90-0184
HELEN RUSSELL GREEN)	(Priority No. 15)
Defendants.)	
Case No. 87-208)	
<hr/>	
ADA J. RUSSELL, HELEN J.)	
RUSSELL, GENE RUSSELL and)	
GENEIL RUSSELL, his wife)	
Plaintiffs,)	
vs.)	
GEORGIA J. RUSSELL,)	
Defendant.)	
Case No. 87-213)	

BRIEF OF APPELLANT

Appeal from a jury trial in the Third District Court in Tooele County, State of Utah, the Honorable Scott Daniels, presiding.

J. FRANKLIN ALLRED, P.C
STEPHANIE M. SAPERSTEIN,
Attorneys for Appellant-
Contestant Gene J. Russell
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 531-1990

WENDELL P. ABLES
Attorney of Appellee
536 East 400 South
Salt Lake City, Utah 84102
Telephone: (801) 532-7424

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION	2
STATEMENT OF THE ISSUES	2
DETERMINATIVE CONSTITUTIONAL PROVISIONS, ETC	2
STATEMENT OF THE CASE.	2
STATEMENT OF THE FACTS	3
ARGUMENT	13
POINT I: THE TRIAL COURT ERRONEOUSLY REQUIRED THE PARTIES TO STIPULATE TO APPELLANT- CONTESTANT' S EXPERT WITNESS TESTIMONY	13
A. The trial court abused its discretion under Rule 403 of the Utah Rules of Evidence.	13
B. The trial court misstated the stipu- lation to the jury.	16
C. Appellant was prejudiced by the stipulation	21
POINT II: THE COURT ERRONEOUSLY APPLIED THE CLEAR AND CONVINCING EVIDENCE STANDARD OF PROOF TO THE ISSUE OF UNDUE INFLUENCE ON THE WILL	24
CONCLUSION	29
ADDENDUM	31

TABLE OF AUTHORITIESCASES

	<u>Page</u>
<u>Anderson v. Brinkerhoff</u> , 756 P.2d 95 (Utah App. 1988)	28
<u>Anderson v. Thomas</u> , 159 P.2d 142 (Utah 1945)	28
<u>Baker v. Patee</u> , 684 P.2d 632 (Utah 1984)	26, 27
<u>Higley v. McDonald</u> , 685 P.2d 496 (Utah 1984)	20
<u>In re Bryan's Estate</u> , 25 P.2d 602 (Utah 1933)	26
<u>In re Estate of Kesler</u> , 702 P.2d 84 (Utah 1985).	24, 26 28
<u>In re Estate of Price</u> , 388 N.W.2d 72 (Neb. 1986)	25, 29
<u>In re Goldsberry Estate</u> , 81 P.2d 1106 (Utah 1938).	16, 27
<u>In re Hanson's Estate</u> , 52 P.2d 1103 (Utah 1935).	25, 27
<u>In re Lavelle's Estate</u> , 248 P.2d 372 (Utah 1952)	25, 26 28
<u>In re Swan's Estate</u> , 295 P.2d 682 (Utah 1956).	24, 28
<u>In the Marriage of Lorenz</u> , 801 P.2d 893 (Or.App. 1990)	20
<u>Kearney v. Kansas Public Service, Co.</u> , 665 P.2d 757 (Kan. 1983)	13
<u>Knesser v. Peterson</u> , 675 P.2d 1193 (Utah 1984)	27
<u>Mountain Fuel Supply v. Salt Lake City, Corp.</u> , 752 P.2d 884 (Utah 1988)	2
<u>Perkins v. Fitwell Artificial Limb Co.</u> , 514 P.2d 811 (Utah 1973)	13
<u>Peterson v. Carter</u> , 579 P.2d 329 (Utah 1978)	26
<u>State v. Bishop</u> , 753 P.2d 439 (Utah 1988).	15
<u>State v. Florez</u> , 777 P.2d 452 (Utah 1989).	15, 16
<u>State v. Larson</u> , 775 P.2d 415 (Utah 1989).	2
<u>State v. Velasquez</u> , 672 P.2d 1254 (Utah 1983).	20
<u>Turley v. Turley</u> , 649 P.2d 434 (Mont. 1982).	26

J. FRANKLIN ALLRED, P.C. (#A0058)
STEPHANIE M. SAPERSTEIN (#5541)
Attorneys for Appellant
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 531-1990

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF:)
MERVIN H. RUSSELL,)
Deceased.)
Case No. P-86-052)

GEORGIA J. RUSSELL,)
Plaintiff,)
vs.)
GENE J. RUSSELL, GENEIL P.)
RUSSELL, ADA J. RUSSELL and)
HELEN RUSSELL GREEN,)
Defendants.)
Case No. 87-208)

Case No. 90-0184
(Priority No. 15)

ADA J. RUSSELL, HELEN J.)
RUSSELL, GENE RUSSELL and)
GENEIL RUSSELL, his wife,)
Plaintiffs,)
vs.)
GEORGIA J. RUSSELL,)
Defendant.)
Case No. 87-213)

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Appellant-contestant appeals from a jury verdict entered against them in the contest of the Will of Mervin J. Russell. This court obtains jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(j).

STATEMENT OF THE ISSUESPOINT I

The trial court abused its discretion by requiring the parties to stipulate to the testimony of appellant's expert witness. The standard of review is prejudicial abuse of discretion. State v. Larson, 775 P.2d 415 (Utah 1989).

POINT II

The Court erroneously applied the clear and convincing evidence standard of proof to the issue of undue influence in a Will. The standard of review is one of correctness giving no deference to the trial court's ruling. Mountain Fuel Supply v. Salt Lake City, 752 P.2d 884 (Utah 1988).

CONSTITUTIONAL PROVISIONS AND STATUTES

Rule 403 of the Utah Rules of Evidence.

STATEMENT OF THE CASE

Appellant Gene Russell contests the Will of Mervin J. Russell and related documents. The Honorable Scott Daniels presided over a jury trial In the Matter of the Estate of Mervin J. Russell on May 22-25, 1989. The jury verdict declared valid a Will dated November 9, 1983, and Cancellation of Antenuptial Agreement dated January 25, 1983. The jury verdict declared

invalid a quit-claim deed dated June 25, 1982, and Cancellation of Antenuptial Agreement dated August 14, 1982. Appellant-contestant Gene Russell filed a motion for a new trial on June 26, 1989. The motion was denied on March 5, 1990. The judgment was entered on March 7, 1990. Appellant-contestant filed a Notice of Appeal on April 6, 1990.

STATEMENT OF FACTS

Ada and Mervin Russell were married in January 1938, (T. 442) and divorced in September of 1971 (T. 358). Mervin and Ada Russell are the parents of Will contestants Gene Russell and Helen Russell (T. 358). Mervin Russell, the decedent, married his second wife, Georgia Russell, on January 17, 1972 (T. 192).

On January 11, 1972, Mervin and Georgia executed an antenuptial agreement (T. 192). Mervin's attorney, Ed Skeen, prepared the antenuptial agreement (T. 303) and testified that its purpose was to prevent Mervin's children, Gene Russell and Helen Russell, from being deprived of longtime Russell family property and to keep Georgia's relatives from getting any interest in Mervin's property (T.304).

The Russell family had been working the subject land for four generations (T. 359). The Russell family always planned that Gene would inherit the land (T. 359). When she was eight years old and again at 13, Mervin Russell told his daughter Helen that his land would someday be Gene's land (T. 160 and 162).

Ada Russell, Mervin's ex-wife, and Mervin often discussed Gene's inheritance of the Russell land (T. 446). Gene Russell

testified that it was "understood" in the family that he would inherit the property (T. 369). Mervin reiterated his desire to pass on his land to Gene when Gene adopted a son in 1966 (T. 163 and 361). Gene and Mervin worked as partners on the ranch until 1973 when Mervin took another job (T. 373).

In the summer of 1971, Ada and Mervin Russell discussed Gene's inheritance for the last time when they talked about an antenuptial agreement upon Mervin's remarriage (T. 446).

Again, immediately before Mervin and Georgia were married, Mervin had separate conversations with both Gene and Helen (T. 166 and 362). Mervin told them he asked Georgia to sign an antenuptial agreement so that Gene and Helen would inherit all his assets (T. 166 and 363). Georgia Russell testified that it was Ada and not Mervin who wanted an antenuptial agreement (T. 194). In late December 1971, Mervin confided to Helen that he was worried Georgia may be marrying him for his property (T. 167).

Georgia and Mervin married in January 1972. In April 1972, Mervin told Helen that he made a big mistake and never should have married Georgia (T. 181).

In 1975, Mervin sold all of his sheep to pay off a P.C.A. note (T. 376). From 1972 through 1976, Mervin worked for Getty Oil and seldom participated in the ranch operation (T. 367). However, in 1977 or 1978, Mervin told Gene he was going to take over ranch operations (T. 369).

In March of 1976, the ranch was in financial difficulty and Mervin was going to sell some cows to pay the bills (T. 679

and 691). Gene's ex-wife Geneil borrowed \$5,100.00 from her father and loaned it to Mervin so that he did not have to sell any cows (T. 681). Georgia and Mervin repaid the loan in March 1977 (T. 681). However, Georgia Russell testified that she knew nothing about the loan until Helen told Mervin that Geneil had borrowed money from her father to use in the ranch operation (T. Russell 25). Georgia also testified that Mervin was not aware of this (T. Russell 25).

In January 1982, Mervin underwent two operations for a ruptured appendix and a bladder obstruction (T. 394). In April 1982, Mervin returned to LDS Hospital for a fever of unknown origins (T. 97).

On May 14, 1982, Mervin and Georgia met with their attorney, Ed Skeen (T. 314). Georgia Russell testified that Mervin gave Skeen instructions about drafting a quit-claim deed, a Will and an agreement canceling the antenuptial agreement (T. 239). However, Mr. Skeen testified that if a simple will had been requested that day, he would have drafted it while the client waited (T. 318-319).

Georgia Russell testified that on May 14th, Mervin asked Skeen to put everything in Georgia's name and that he wanted to "get rid of that marriage thing." (T. 241) She also testified that Skeen replied, "Mervin, we can't put everything in her name alone because you can die or she can die before you can, so we will put the things in both of your names," and Skeen did that (T. 241).

On May 30, 1982, Mervin again went into LDS Hospital for a fever of unknown origins (T. 100). He remained in LDS Hospital until August 2, 1982 (T. 100). On June 2, 1982, Mervin collapsed from a blood clot in his lungs which obstructed his circulation (T. 101-102). Mervin underwent an exceedingly dangerous medical procedure called a pulmonary embolectomy (T. 102). This procedure has a very high mortality rate (T. 102). He was comatose for two to three days (T. 104). He was in the shock-trauma intensive care area until approximately June 15, 1982 (T. 104), and he stayed in intermediate intensive care from June 15th to July 15, 1982 (T. 105).

During Mervin's intensive care stay, Georgia Russell visited Ed Skeen's office on June 10th, June 22nd and June 24, 1982 (T. 326). Mr. Skeen testified that he does not recall the subject of the meetings (T. 326). Georgia Russell testified she probably went to Skeen's office and asked the status of the preparation of a quit-claim deed giving Georgia a joint interest in Mervin's property (T. 208) and then requested it to be finished (T. 209).

Georgia testified that she asked about the deed because if Mervin had died before the deed was executed, the antenuptial agreement was effective and she would not have gotten the property (T. 209). She testified that on May 29th, Mervin told her to "be sure to get Ed and to see Ed gets that done for me." (Testimony of Georgia Russell, p. 40, hereinafter "T. Russell").

Skeen testified that he did not prepare the deed (T. 313). Louise Chadwick, Ed Skeen's secretary, testified that

neither she nor Skeen ordered, requested or prepared the deed (T. 344). Georgia testified that Skeen left word for the typist to prepare the deed (T. 211). An unknown person called and told her that the deed was finished (T. 211). The deed had several blanks and the property descriptions were listed in a random and haphazard way (T. 313). Skeen never would have given a deed in such condition to a client (T. 313). Louise Chadwick testified that on the basis of notations on the deed, it must have been prepared by the law firm word processing pool between 11 p.m. and 3 a.m. on the morning of June 25, 1982 (T. 344).

Georgia picked up the deed on the morning of June 25th (T. 211). She did not go to work because executing the deed that day was important (T. 211).

In late afternoon Mervin signed the deed (T. 207 and 213) (Addendum 1). The witnesses to the deed's execution were Blaine and Judith Russell and Jim and Macell Beverage (T. 212). Upon Georgia's request, Louise Chadwick came to the hospital and notarized Mervin's and Georgia's signatures (T. 212 and 345).

Blaine Russell testified that Mervin looked very ill and didn't speak (T. 572). Dr. James Orme testified as an expert witness that on June 25, 1982, Mervin Russell had the motor function to sign his name, but he was not capable of going through the thought process and reasoning necessary to execute a deed or to have opinions regarding it (T. 108).

Sometime during that summer, Georgia requested Skeen's office to draft some additional witness affidavits of attesting to

Mervin's mental state to accompany the June 25th deed (T. 216 and 330). Jim and Macell Beverage signed those affidavits (T. 330). She requested the deeds because, "Mr. Russell was always great on having witnesses to everything." (T. 218).

On August 2, 1982, Mervin transferred to the University Medical Center for physical therapy (T. 121 and 125). While at the University, Mervin asked Helen to get Gene and Ed Skeen to the hospital immediately (T. 175). He then asked Helen, "Are you up to fighting Georgia?" (T. 175). Helen did not answer (T. 175). Mervin continued that he had "gotten in too far" before he realized what was happening (T. 175). Mervin transferred to Holy Cross Hospital on August 13, 1982 (T. 127).

On August 14, 1982, a cancellation of the antenuptial agreement was executed (T. 219) (Addendum 2). Contradicting Georgia's testimony that Mervin worried about witnesses and notaries, the agreement had neither witness signatures nor was it notarized (T. 219). Georgia testified that she called Skeen about the agreement the end of May and not in August (T. 237 and T. Russell 58). The agreement arrived in the mail (T. 238).

At this point, Georgia's own testimony is conflicting about the circumstances regarding the execution of this agreement. However, at trial Georgia testified that she took the agreement to Holy Cross Hospital on August 14, 1982 (T. Russell 48). She handed Mervin the document and read it to him (T. Russell 50). She laid it on his stomach and offered him a pen (T. Russell 50). Mervin

requested that she sign his name for him (T. Russell 51). Georgia signed Mervin's name on the top signature line (T. Russell 51).

Mervin Russell was released from Holy Cross Hospital on October 2, 1982 (T. 99).

On January 24, 1983, Skeen met with Mervin and Georgia to execute a second cancellation of the antenuptial agreement (T. 326) (Addendum 3). Skeen met them behind the Tooele courthouse (T. 327). Skeen sat in the truck with Mervin, and Georgia sat in Skeen's car (T. Russell 65). Mervin signed the document (T. 328). Skeen notarized the document (T. 327). The document was incorrectly dated for the 25th of January when the actual date was January 24, 1983 (T. 327). Skeen testified that it was not possible that he would have notarized the document without being in the presence of the parties signatory to it (T. 328). Georgia signed the agreement after Mervin (T. Russell 66).

On November 3, 1983, Georgia called Ed Skeen and left a message with his secretary, "Did everything the Court's award to him solely (that's not divided with Ada) is in his name with Georgia as joint tenants only. Not to be divided with Gene." (T. 348). Louise Chadwick testified that she underscored the word "not" because it was emphasized by Georgia (T. 349). Georgia also called Skeen on November 3, 1983, and November 10, 1983 (T. 347 and 348).

On November 7, 1983, Ed Skeen sent a letter (Addendum 4) to Georgia enclosing a draft of a Will in accordance with a previous phone conversation (T. 321). The letter also stated, "If

there are any changes you may desire, let me know. I will hold original for signature the next time you and Mer come to town." (T. 718, Plaintiff's Exhibit 67). Skeen testified that the cover letter to Georgia referred to Mervin's Will (T. 321). Louise Chadwick surmised that the referenced Will would be Mervin's (T. 593). When Mervin was ill, Skeen often sent things to Georgia because she was taking care of him (T. 321).

Georgia, on the other hand, testified that no draft of the Will accompanied the letter (T. Russell 70). She claims it could have been a draft of her Will (T. Russell 72). She also testified that she never called Skeen about the Will (T. 238). According to Georgia, all instructions resulted from the May 14, 1982, meeting with Ed (T. 239). She testified no one gave subsequent instructions or advice (T. 242). On the other hand, Skeen testified that he followed the Russells' instructions when waiting to complete the Will until November 1982 (T. 319).

On November 9, 1983, Mervin executed a Will (Addendum 5) naming Georgia as the sole devisee (T. 319). Skeen prepared an original and duplicate original of the Will and arranged to meet Mervin and Georgia in a parking lot of his former office building (T. 316). At the meeting, Skeen sat in Mervin's truck with him (T. 587). Tom Parker, a lawyer and tenant in the 400 South office, stood alongside the truck (T. 588). Mervin read over the Will in the presence of Skeen, Tom Parker and Louise Chadwick (T. 316).

Mervin first signed the original Will on a witness line (T. 589 and 644). Tom Parker pointed out the mistake (T. 644).

Mervin then signed on the correct line (T. 644). Because of the mistake, Mervin signed the duplicate original Will on the correct line only (T. 590). Louise Chadwick notarized the Will (T. 590).

Several witnesses testified that after Mervin's hospitalization, Mervin's speech was slurred and he did not want to talk (T. 179, 502, 529, 573, 611). Helen Russell testified that in 1984 and 1985, "Mervin was hard to visit with. He didn't want to talk. If I asked him a question, he would answer it if he felt like it. But he just didn't want to talk. He was so sick, he just didn't want to be bothered." (T. 179).

Like the August 1982 cancellation of the antenuptial agreement, Georgia admitted that she signed Mervin's name to a January 12, 1984, grazing lease and did not tell anyone that she had signed Mervin's name (T. 227). Georgia Russell continued to sign Mervin's name on documents after his death. Again, Georgia signed Mervin's name to another grazing lease in January 1987 and did not notify the lessor that Mervin died in January 1985.

Mervin Russell died on October 12, 1985 (T. 222).

In 1986, Gene Russell and Helen Russell contested the Will, both cancellations of the antenuptial agreement and the June 1982 deed on the basis of incompetency and undue influence. After a trial in May 1989, a jury found the deed and August 1982 cancellation invalid and the Will and January 1983 cancellation valid. On special interrogatories the jury answered that Mervin Russell did not have the mental capacity to execute the June 1982 deed and the August 1982 cancellation. The jury found that Mervin Russell

had the mental capacity to execute the January 1983 cancellation and the Will. The jury found that none of the documents were procured by the undue influence of Georgia Russell.

SUMMARY OF ARGUMENT

1. The trial court abused its discretion under Rule 403 of the Utah Rules of Evidence when it forced appellant-contestant to stipulate to the facts of its own expert witness. The expert witness would have testified that Georgia Russell signed Mervin Russell's name to the August cancellation and attempted to disguise her handwriting. Over appellant's objections, the Court then misstated the stipulation to the jurors. The Court noted its mistake but decided that it was harmless error. However, a party may set aside a stipulation for good cause shown. Appellant was prejudiced when the Court forced him into the stipulation and then misstated the stipulation. Appellant was deprived of the full weight of its expert witness testimony which would question the veracity of Georgia Russell's testimony.

2. The Court erroneously applied a clear and convincing standard of proof on the issue of undue influence on the Will. The correct standard should be a preponderance of the evidence. Utah has not decided this issue. The courts require substantial proof to show undue influence. However, substantial proof is not a clear and convincing evidence standard. The standard of proof in undue influence on a deed is clear and convincing. It should not be the same standard for a Will. Claims of undue influence on Wills and deeds are two different actions. Actions to set aside deeds are

actions in equity. Actions to contest a Will are actions at law. Also, a deed is effective upon delivery, rarely shows undue influence on its face, may be relied upon by third parties and have a standard of clear and convincing evidence to show incompetence. A Will transfers property on an event in the future, must be admitted to probate upon notice to all interested parties and protects third parties under the probate code. The standard of proof is a preponderance of the evidence to show incompetence to make a Will.

ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY REQUIRED THE PARTIES TO STIPULATE TO APPELLANT-CONTESTANT'S EXPERT WITNESS TESTIMONY.

A. The trial court abused its discretion under Rule 403 of the Utah Rules of Evidence.

The trial judge has wide discretion in his control over the examination of a witness. Perkins v. Fitwell Artificial Limb Co., 514 P.2d 811 (Utah 1973). Rule 403 of the Utah Rules of Evidence states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Exercise of that discretion is not reversible unless the court abuses its discretion and prevents a witness from answering a proper question on a material matter. Perkins, 514 P.2d at 813; Kearney v. Kansas Public Service Co., 665 P.2d 757 (Kan. 1983).

Here, the Court abused its discretion when it forced the contestant to stipulate away its right to present testimony.

As his second witness at trial, contestant's counsel, Mr. Allred, called Christine Thornburry as an expert witness on handwriting. Shortly into her testimony, the trial court orchestrated a stipulation of facts in the witness' testimony.

In a proffer outside of the jury's presence, the court and both counsel participated in the following discussion:

THE COURT: Hold on. Now are you going to-- Mr. Ables, are you going to contest either of those two facts: Either that this document of August 14th was not signed by Merv Russell or that it was signed by someone attempting to disguise their own handwriting?

MR. ABLES: It was signed by Georgia Russell on August 14th, we stipulate to that. And I think that question of disguising, I don't think that's relevant at all. She has admitted she signed it.

THE COURT: You are not going to--

MR. ABLES: Let me--Mr. Skeen's deposition-- I mean this--I don't think you need a real swift document examiner for that because he handed this same document to Ed Skeen, who is about 84 years old; asked him if--in whose handwriting it was. He says, "It looks like Georgia's to me."

THE COURT: You aren't going to contest, then, that it appears to have been written by someone who was disguising their testimony. You won't agree to that, right?

MR. ABLES: I think--well, I don't know whether that is relevant or not.

THE COURT: It is relevant. My question is do you agree to it? It is clearly relevant. She is going to say looks like someone disguising their handwriting. There is no question it is relevant. If your objection is relevancy, I

will overrule that objection. If you will stipulate to that, then she doesn't need to testify. So you just say and we can get on with it.

MR. ALLRED: I wonder if I might say one other thing, Your Honor. Here's why it is important. This comes back to the Rule 30(e) dealing with filing of depositions.

THE COURT: I have already ruled that it is important. That's okay.

MR. ALLRED: That's okay?

THE COURT: I ruled in your favor on that. You don't need to talk me into it.

I just need to know whether you agree to it, Mr. Ables

MR. ABLES: All right. We will stipulate to that.

(Transcript of Christine Thornburry testimony, pp. 4-6, hereinafter "T. Thornburry") Contestant's counsel objected to being forced into any stipulation regarding his expert's testimony (T. Thornburry 9)

The courts have recognized the value of testimony rather than a stipulation. "As a general rule, a party may not preclude his adversary's offer of proof of admission or stipulation." State v. Bishop, 753 P.2d 439 (Utah 1988); see also State v. Florez, 777 P.2d 452 (Utah 1989). In Bishop, this court followed the rationale that "[a] cold stipulation can deprive a party of legitimate moral force of his evidence, and can never fully substitute for tangible, physical evidence or the testimony of witnesses. In most cases, a party has the right to present to the jury a picture of the events relied upon." Bishop, 753 P.2d at 475 quoting United States

v. Grassi, 602 F.2d 1192 (5th Cir. 1979), vacated on other grounds, 448 U.S. 902, 100 S.Ct. 3041, 65 L.Ed.2d 1131 (1980).

Contestant's expert witness provided relevant, if not essential, evidence to his case. Her testimony was not subject to the exception in Rule 403 excluding relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.

In Florez, this court quoted with approval from People v. Hills, 532 N.Y.S.2d 269 (N.Y. App. Div. 1988), appeal denied 73 N.Y.2d 855, 537 N.Y.S.2d 502, 534 N.E.2d 340 (N.Y. 1988):

The Court in Hills explained that by definition, "a stipulation is a voluntary agreement between the parties, not a unilateral decision of one party forced upon another," and that the risks involved in accepting or refusing offered stipulations "do not call for the involuntary imposition of a particular strategy by either the opposing counsel or the court."

Florez, 777 P.2d at 455, quoting Hills, 532 N.Y.W.2d at 273.

The right to provide relevant testimony is imperative in contested will cases since "investigation in regard to undue influence must necessarily assume a fairly wide range, especially when the will is caused to be drawn by the sole beneficiary." In re Goldsberry Estate, 81 P.2d 1106 (Utah 1938). Georgia Russell is the sole devisee of the Will.

B. The trial court misstated the stipulation to the jury.

Thus, over the objections and reluctance of both parties, the Court orchestrated the stipulation. Before the jury returned to the courtroom, the Court stated the stipulation again.

Okay. In November of 1988--this witness examined some documents in November of 1988. She gave the opinion to Mr. Allred that the August 14th document was not signed by Mervin Russell in her opinion. Secondly, that it was signed by some other person attempting to disguise their own handwriting. That on May 11th or 12th of 1989 she came to the conclusion and indicated to Mr. Allred that the person who had signed it was Georgia Russell. And secondly that there are two other documents which she looked at, one dated January 12th, 1984--exhibit what? Do you know?

* * *

. . .Those documents were signed--were--were not signed by Mervin Russell but in her opinion they were not signed by someone attempting to disguise their handwriting.

(T. Thornburry 12-13.)

Appellee's counsel, Mr. Ables, also wanted to stipulate that Georgia signed the August 1982 cancellation (T. Thornburry 14). Contestant's counsel Mr. Allred objected, "I don't think that should be part of the stipulation. I think it should show that they are stipulating to the testimony as accurate, and not get on there to start out making their excuses." (T. Thornburry 14). The Court answered, "I guess that's right." (T. Thornburry 14).

The Court announced the following stipulation to the jury:

The document examiner will testify that she examined that document, along with other sample signatures, and came to the conclusion that the document was not signed by Merv Russell; that is, that his name was not signed by him, that it was in fact signed by someone who was attempting to disguise their own handwriting. She came to that conclusion and gave her opinion to Mr. Allred in November of 1988.

Later, on May 11th or 12th, just 10 or 11 days ago, she came to the further conclusion that the person who had signed that document was Georgia Russell. She gave that opinion to Mr. Allred at that time.

She would also testify that two other documents, one dated January 12, 1984, and one dated January 26, 1987, which will be marked Exhibits 57-A and 60, were also not signed by Merv Russell, but the person who signed his name on those documents was not in any way attempting to disguise their own signature.

(T. 154)

The Court then confirmed the stipulation with contestant's counsel (T. 154). Contestant's counsel objected to the Court's rendition of the stipulation because the stipulation was not what the testimony would have been but to the facts themselves (T. 154). The following occurred on the record and before the jury:

THE COURT: I believe that is the extent of the stipulation; is that right, Mr. Allred.

MR. ALLRED: I think their agreement was they admitted she signed it, admitted it was disguised.

MR. ABLES: No, we didn't do that.

THE COURT: Wait a minute.

MR. ABLES: Absolutely not.

THE COURT: That was the agreement.

MR. ABLES: No, it wasn't.

THE COURT: I think--just a minute. Approach the bench, please.

THE COURT: The lawyers agree that would be this witness's testimony if she continued to testify, and based upon that, the witness has been excused.

(T. 154-155)

The Court misstated the stipulation. Before the jury, Mr. Allred attempted to correct the Court and Mr. Ables immediately objected to such a version of the stipulation. Mr. Ables' objection gave the jury the impression that contestant's counsel was less than forthcoming in any representations he made to the jury.

Later in the trial, contestant's counsel again objected to both being required to stipulate and the rendition of the stipulation (T. 434). Mr. Allred stated that the stipulation was to the facts of the witness' testimony (T. 435). Mr. Ables argued that he only stipulated to the witness' opinion (T. 435-436). The Court then declared:

THE COURT: Well, this is a problem. I have to admit that I kind of messed this up, because you stipulated to more than that. You stipulated to the fact it was disguised.

MR. ALLRED: That's correct.

THE COURT: And if you weren't going to stipulate to that, I should have let the expert testify, because then it is a contested issue and it is a question of credibility, and I should have let the jury hear the testimony so that they could weigh the testimony of Georgia as opposed to the testimony of the document examiner.

The reason I didn't is because I thought that you were stipulating that it was a fact, and then when we got to the end of the transcript, I didn't say that much to the jury.

(T. 436)

Mr. Allred requested a jury instruction that the stipulation was misstated and that the parties stipulated to the

fact that the handwriting was disguised, which was why counsel let his witness go (T. 437). Mr. Ables suggested that the Court state a new stipulation. The Court ruled that:

Well, I admit to having made an error in this situation, but I think it is a small one and I don't think that it takes a lot to--I think it is fairly harmless. I don't think it takes a lot to solve the problem. I think we will leave the stipulation as it is with the understanding that Mr. Ables is not going to ask questions that would allow Mrs. Russell to deny that she disguised the handwriting.

Then you can argue to the jury we have this testimony from the examiner, that it was disguised and it is unrefuted, that she didn't ever deny it. And I think if you can do that, that will solve the problem.

(T. 438-439)

However, at this point, the Court should have set aside the stipulation. It is a well settled rule that stipulations are conclusive and binding on the parties unless upon timely notice and for good cause shown, relief is granted therefrom. Higley v. McDonald, 685 P.2d 496, 499 (Utah 1984).

A court can set aside a stipulation for inadvertence, justifiable cause, mistake of fact if the mistake is not due to failure to exercise due diligence and it could not have been avoided by exercise of ordinary care. State v. Velasquez, 672 P.2d 1254, 1265 (Utah 1983). A stipulation agreed to in open court can also be set aside for the actual absence of consent. In the Matter of Marriage of Lorenz, 801 P.2d 893 (Or. App. 1990). Even if the court has power to force the parties into a stipulation, the

parties may move to set aside the stipulation for justifiable cause.

Here, appellant was justified to request that the stipulation be set aside. There seems to be no meeting of the minds as to what the stipulation was, there was mutual mistake, the Court admitted that it had made a mess and since both parties were very reluctant, there seems to be an absence of consent.

C. Appellant was prejudiced by the stipulation.

The refusal of the Court to allow contestant's witness to testify prejudiced appellant. Appellant was deprived of presenting the full weight of the evidence of Georgia Russell's deviousness. Besides Thornburry's testimony that Georgia attempted to disguise her handwriting when she signed Mervin's name on the August 1982 cancellation, Georgia's deviousness was illustrated in two other incidents. The first incident is when Georgia categorically denied any knowledge about Mervin's signature on the August cancellation. In March 1988, Georgia Russell was deposed on this subject. Pursuant to the Utah Rules of Civil Procedure, Georgia was entitled to make changes in the deposition within 30 days. If no changes were made, the deposition is deemed correct. However, 14 months later and one day before trial in May 1989, Georgia filed a list of corrections to her March 1988 deposition (T. 245). She filed her changes, after appellant-contestant submitted his trial witness list which included an expert witness on handwriting (T. 246). Georgia denied that her changes were a result of the witness list (T. 246).

In her deposition, Georgia originally testified that she could not recall whether she asked Mervin to sign the agreement (T. 290). She changed her answer to "He asked me to sign it." (T. 290). Georgia changed her answer because, "I had looked at the document and had realized that was the one I signed for him." (T. 291).

In her deposition, Georgia acknowledged that the bottom signature of Georgia R. Russell was hers (T. 293). She then testified that she did not see the signature of Mervin Russell applied (T. 293). However, she changed her answer that she knew about Mervin's signature because it was her signature (T. 293). Georgia also originally testified that she did not recognize the handwriting on the date (T. 293). She changed her answer to "Yes." (T. 294). Georgia also originally testified that she did not recognize the handwriting and that it was not hers, but then changed her answer that she did recognize it because it was her handwriting (T. 295).

The second incident centers around the \$5,100.00 loan to Mervin and Georgia from Geneil and Gene Russell. In his opening statement, Georgia's counsel told the jury that "[a]s a result of that sheep operation, Geneil claims she lost \$5,000 and that, so Georgia went ahead and borrowed money from her credit union and paid Geneil's credit union for the money that had been lost due to Mr. Russell's mismanagement and misappropriation of the money that was paid back to her." (Opening Statement by Mr. Ables, pp. 10-11)

Gene testified that his ex-wife had borrowed \$5,100 from her father to loan to Mervin so that Mervin would not have to sell any cows (T. 691). During Gene's testimony at trial, Mr. Allred noticed that the memo line on the check had been x'd out (T. Russell 55 and 56) (Addendum 6). After court that day, Mr. Allred had the document examiner determine that the x's covered the words "Repayment of Loan to Mervin Russell-In Full." (T. Russell 55 and 56) Once it became apparent that this message was at issue, Georgia Russell produced the original, unaltered check on the following day at trial (T. Russell 55 and 56).

Georgia admitted that she saw Mr. Allred examining the copy of the check at a break in the trial on the previous day (T. Russell 75). In her testimony, Georgia explained that she "Xed" the message out because, "I wanted it to be processed through the bank so that there would be no further claim that Mer owed any more money. So Mer did not want this on there any way and I cannot tell you when I 'Xed' this out. But I was getting real tired of all the money. . .that was going out and none coming in." (T. Russell 28)

On cross-examination, Georgia testified that she brought the original check to court that day, May 24th, because her interest was piqued because Allred was so interested in that particular check (T. Russell 75). Georgia admitted that she had the unaltered copy of the check at the time the altered copy was entered into evidence (T. Russell 79). Georgia also testified that she can't remember Geneil ever loaning her and Mervin \$5,100.00 (T. Russell 83). Georgia testified that she altered the check not to

deceive the court but because she was "getting very, very weary of all of the outgo and no income." (T. Russell 85-86).

Both of these incidents and Georgia's insistence that she had no part in executing any of the documents at issue create a situation where Christine Thornburry could call into question the veracity of Georgia's testimony. To force appellant to stipulate away any potential force that oral testimony may have had was clearly prejudicial in this case.

POINT II

THE COURT ERRONEOUSLY APPLIED A CLEAR AND
CONVINCING STANDARD OF PROOF ON THE ISSUE OF
UNDUE INFLUENCE ON THE WILL.

In Jury Instruction No. 16, the Court instructed that "Gene Russell and Helen Russell have the burden to establish by clear and convincing evidence that the same documents were obtained through the undue influence of Georgia Russell." The application of this standard is an error of law. The correct standard of proof should be a preponderance of the evidence. No Utah court has decided this issue.

It is undisputed that in order to create a Will, the testator must be able to (1) identify the object of one's bounty and know one's relationship to them, (2) recall the nature and extent of one's property and (3) form some understandable plan for disposition of that property. Matter of Estate of Kesler, 702 P.2d 86, 88 (Utah 1985). A contestant must show by a preponderance of the evidence that the testator was incompetent to make a Will. Id. at 88. See also In re Swans Estate, 293 P.2d 682, 686 (Utah 1956).

A party may also contest a Will because another party unduly influenced the testator. Undue influence occurs when the testator's volition at the time the Will was made was overpowered to the extent that he would have done it had he been free from that control. In re Lavelle's Estate, 248 P.2d 372, 375-376 (Utah 1952). In such a case, the Will then represents the desire of the person exercising the influence rather than that of the testator. Id. at 376.

Undue influence must be shown by substantial proof. Id. at 378. The courts require substantial proof because "it is not usually possible to procure direct evidence of the statements and conduct which one accused of undue influence has used on the decedent. One of the two is dead; the other cannot be expected to give evidence against himself." In re Hanson's Estate, 52 P.2d 1103, 1110 (Utah 1935).

Usually, undue influence is surrounded by all possible secrecy. In re Estate of Price, 388 N.W.2d 72, 78 (Neb. 1986). It is difficult to prove by direct and positive proof and is a matter of inferences from facts and circumstances surrounding the testator, his life, character, and mental condition and the opportunity afforded designing persons for the exercise of improper control. Id.

A contestant may establish undue influence without showing any physical coercion or constraint since the influence may be subtle and entirely without outward demonstration. Nevertheless, competent evidence must show that one accused of

undue influence dominated the will of the testator--that the testament is in fact and effect the will of the accused and not that of the testator. In re Bryan's Estate, 25 P.2d 602, 610 (1933).

Appellant does not dispute that the standard in proving undue influence on a deed is clear and convincing evidence. Although undue influence must be established by substantial proof, this does not mean a clear and convincing standard. Baker v. Pattee, 684 P.2d 632 (Utah 1984); Peterson v. Carter, 579 P.2d 329, 330 (Utah 1978).

Substantial evidence is also required to prove incompetency in both deeds and Wills. Turley v. Turley, 649 P.2d 434 (Mont. 1982) (substantial evidence needed to set aside deed for incompetency); In re Estate of Kesler, 702 P.2d 86, 88 (Utah 1985). Kesler has a preponderance of the evidence standard but still requires substantial evidence. Substantial evidence speaks to the kind of evidence provided. "There must be an exhibition of more than influence or suggestion, there must be substantial proof." In re Lavelle's Estate, 248 P.2d 372, 375 (Utah 1952). "The evidence may be inherently weak and still be deemed 'substantial' and substantial evidence may conflict with other evidence presented." Turley, 649 P.2d at 437, citations omitted.

The courts never interpreted substantial evidence as meaning a clear and convincing standard. No reason exists to require different standards of proof to testamentary incapacity and undue influence.

Undue influence strikes at the heart of whether the testator can form an understandable plan and follow on his own volition. As long as substantial evidence is provided, undue influence should carry the same standard of proof as incompetence. This court has recognized that the testator may not have lacked testamentary capacity but still be easily capable of being influenced. In re Hanson's Estate, 52 P.2d 1103, 1117 (Utah 1935).

Undue influence on a Will should not carry the same standard of clear and convincing standard to prove undue influence on a deed. The two actions are fundamentally different.

Deeds are effective upon delivery without notice to third parties. (Knesser v. Peterson, 675 P.2d 1193, 1194 (Utah 1984).) In fact, a deed is invalid if it is executed with no intent to transfer a present interest. Baker v. Pattee, 684 P.2d 632 (Utah 1984). Any transfer of a Will becomes effective only at some point in the future when the testator dies. Before that death, devisees under the Will only have an expectation and not a present interest.

A deed rarely if ever shows undue influence on its face. A proceeding to attack a deed involves one who seeks to obtain a judgment which requires another to make restoration either by money payment or by doing a positive act. In re Goldsberry's Estate, 81 P.2d 1106, 1109 (Utah 1938). A Will must be admitted to probate after notice to all interested persons. The proceeding to probate a Will involves the issue only as to whether the document offered is or is not that thing which the law denominates a Will. The

notice is for all those who are interested and claim the document not to be a Will. Id.

Third parties may rely on a recorded deed long before the parties who are injured by the undue influence learn of the injury. The probate code protects the rights of third parties regardless of the outcome of the Will contest. See, Utah Code Ann. §75-3-801 (re: creditor's claims against estate); Utah Code Ann. §75-3-605 (re: creditor's right to demand bond).

The standard of proof to attack deeds on grounds of incompetency of the transferor is clear and convincing. Baker v. Pattee, 684 P.2d 632 (Utah 1984); Anderson v. Brinkerhoff, 756 P.2d 95 (Utah App. 1988). The standard of proof to contest a Will on grounds of lack of capacity is preponderance of the evidence. Matter of Estate of Kesler, 702 P.2d 86, 88 (Utah 1985).

An attack on a deed is an action in equity. Baker v. Pattee, 684 P.2d 632 (Utah 1984); Anderson v. Thomas, 159 P.2d 142 (Utah 1945). A contest of a Will is an action at law. In re Lavelle's Estate, 248 P.2d 372, 375 (Utah 1952); In re Swans's Estate, 293 P.2d 682 (Utah 1956). The Nebraska Supreme Court has recognized that such a difference bears on the standard of proof for undue influence.

In In re Estate of Price, 388 N.W.2d 72, 77 (Neb. 1986), the Court stated, "[t]he reason for the different treatment rests, however, not on the nature of the instruments involved, both of which are of equal dignity, but in the nature of the causes of action involved." Id. According to Price, the courts historically

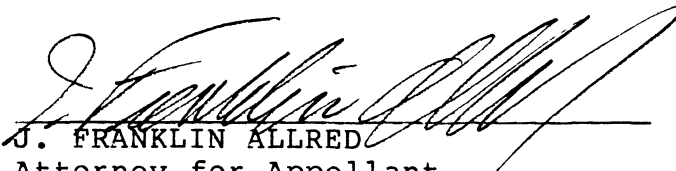
have required fraud to be proven in equity cases by clear and convincing evidence and to be proven in law actions by a preponderance of the evidence. Id. Claims of undue influence in wills and deeds should be accorded the same difference. Thus, the Court concluded that the standard of proof for undue influence on a Will is the preponderance of the evidence. Id.


Likewise, actions to set aside deeds and Wills involve fundamental differences. The standard of proof for undue influence on a Will should not be clear and convincing but rather a preponderance of the evidence.

CONCLUSION

For the foregoing reasons, the judgment should be reversed in part and the case remanded for new trial to determine the validity of the Will and the January 25, 1983, cancellation agreement.

Respectfully submitted this 7th day of June, 1992.


J. FRANKLIN ALLRED
Attorney for Appellant


STEPHANIE M. SAPERSTEIN
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Brief of Appellant was mailed, postage prepaid, to

Wendell P. Ables, 536 East 400 South, Salt Lake City, Utah 84102,
on the _____ day of June, 1992.

ADDENDUM

ADDENDUM ONE

QUIT CLAIM DEED

MERVIN J. RUSSELL and GEORGIA J. RUSSELL, his wife, grantors, of Ophir, County of Tooele, State of Utah, hereby QUIT CLAIM to MERVIN J. RUSSELL and GEORGIA J. RUSSELL, his wife, as joint tenants, Grantees, of Ophir, County of Tooele, State of Utah, for the sum of Ten and no/100 Dollars, and other good and valuable consideration, the following described tracts of land in Tooele County, State of Utah:

East $\frac{1}{2}$ of Northwest $\frac{1}{4}$; South $\frac{1}{2}$ of Northeast $\frac{1}{4}$ of Section 8, Twp. 6 South of Range 5 West, S.L.M. containing 160 acres;

ALSO: Northeast $\frac{1}{4}$; East $\frac{1}{2}$ of Northwest $\frac{1}{4}$; Lots 1 and 2, of Section 7, Twp. 7 South of Range 5 West, S.L.M. Cont. 319.76 acres;

ALSO: The Southeast of Northwest $\frac{1}{4}$ and lots 2 and 3, of Section 31, Twp. 5 South, Range 5 West, S.L.M. except a tract of 8 acres com. at the Southeast corner of Lot 3, thence North 10 chs; thence West 8 chs; thence South 10 chs; thence East 8 chs to beg. except right of way over 1.39 acres granted to State Road Comm. containing 107.73 acres;

ALSO: West $\frac{1}{2}$ of Southwest $\frac{1}{4}$, Section 17, Twp. 6 South, Range 5 West, S.L.M. Cont. 80 acres;

ALSO: The South $\frac{1}{2}$ of Section 2, Twp. 5 South, Range 4 West, S.L.M. Cont. 320 acres.

ALSO: Lots 1, 2, 3, 4, and Northeast $\frac{1}{4}$ of Section 11, Twp 5 South of Range 4 West, S.L.M. Cont. 309.47 Acres.

Commencing 9.60 chains South of the Northwest corner of Section 29, Township 5 South, Range 5 West; thence North 81°15' East 20.20 chains; thence South 5 chains; thence South 81°15' West 20.20 chains; thence North 5 chains to the place of beginning.

PARCEL 1: The Southeast quarter of the Northwest quarter and Lots 2 and 3 of Section 31, Township 5 South, Range 5 West, Salt Lake Base and Meridian.

EXCEPTING THEREFROM the following described property:
Commencing at the Southeast corner of said Lot 3 and running

thence West 8 chains; thence North 10 chains; thence East 8 chains; thence South 10 chains to the point of beginning.

PARCEL 2: The South half of Section 2, Township 5 South, Range 4 West, Salt Lake Base and Meridian.

PARCEL 3: Lots 1, 2, 3, 4, and the Northeast quarter of Section 11, Township 5 South, Range 4 West, Salt Lake Base and Meridian.

PARCEL 4: The West half of the Northwest quarter; the Northwest quarter of the Southwest quarter of Section 31, Township 5 South, Range 4 West, Salt Lake Base and Meridian.

PARCEL 5: The Southeast quarter of the Southeast quarter of Section 32, Township 5 South, Range 4 West, Salt Lake Base and Meridian; the Southwest quarter of the Southwest quarter of Section 32, Township 5 South, Range 4 West, Salt Lake Base and Meridian; Lots 1 and 2 and the Southwest quarter of the Northeast quarter of Section 5, Township 6 South, Range 4 West, Salt Lake Base and Meridian.

PARCEL 6: The Black Shale Lode mining claim, Lot 3029, containing 19.945 acres; West Shore, Selma, Sister Mary, West Selma, Four o'clock, Esther, Alice, Maggie Kelly, Honest Dick, Lola Barker and Black Sheep Lode mining claims, Lot No. 3164, containing 184.22 acres; Douglas No. 1 and Douglas No. 2 lode mining claims, Lot No. 3142, containing 26.156 acres; Gold Button, Buena Vista, Mary Jean No. 1, Mary Jean No. 2 and Mary Jean Fraction lode mining claims, Lot No. 3231, containing 57.127 acres; Hecla No. 1, Hecla No. 3, Hecla No. 3, and Hecla No. 4 lode mining claims, Lot No. 3079, containing 66.27 acres; Syndicate No. 1, Syndicate No. 2, Monopolist Nos. 1, 2, 3, 4, 5, 6, 7, and 8 lode mining claims, Lot No. 3487, containing 107.04 acres; Grannet Mountain lode mining claim, Lot No. 3681, Quartet No. 1, Kansas Boy, Kansas Boy Fraction, Kansas Boy No. 3 and Kansas Boy No. 4 lode mining claims, Lot No. 3935, containing 80.972 acres; Edna May, Louis No. 1, Louis No. 2 and Louis No. 3 lode mining claims, Lot No. 3381, containing 68.733 acres; Ivanhoe, Coin, Albion and Try Again lode mining claims, Lot No. 4192, containing 64.376 acres; all situated in Camp Floyd Mining District, in said County and State; also Gold Bug No. 1, Gold Bug No. 3, Gold Bug No. 3 and Gold Bug No. 4 lode mining claims, Lot No. 3356, containing 55.20 acres; and Senator Stewart, Cedar Hill and Dolly Faunce lode mining claims, containing 61.921 acres, situated in Ophir Mining District in said County and State.

EXCEPTING land for highway known as Project No. DE-2 situated in Louis Claim No. 3 of Mineral Survey No. 3381 in Section 4, Township 6 South, Range 4 West, Salt Lake Base and Meridian. Said tract of land is 100 feet wide, 50 feet on each side of the center line of survey of said project. Said center line is described as follows:

Beginning at the intersection of the Southeasterly boundary line of said Louis Claim No. 3 and said center line of survey at Engineer's Station 773+23, which point is approximately 225 feet North 63°20' East along said Southeasterly boundary line from the Southwest corner of said Louis Claim No. 3; thence Northwesterly 243.3 feet along the arc of a 1°00' curve to the left (Note: Tangent to said curve

at its point of beginning bears North 44°09' West) to the intersection of said center line of survey at Engineer's Station 775+66.3, and a line perpendicular to said center line of survey, which point is approximately 70 feet North and approximately 1383 feet North 46°35' West from the East quarter corner of said Section 4, as shown on the official map of said project on file in the office of the State Road Commission of Utah. Above described tract of land contains 0.56 of an acre, of which 0.55 of an acre, more or less, is now occupied by the existing highway. Balance 0.01 of an acre, more or less.

PARCEL 7: Lots 1 and 4 in Block 16 of the St. John Town Plat

meadow

PARCEL 8: Lots 4, 5, and 6 in Block 1 of the St. John Pasture Plat.

PARCEL 9: Beginning at the Southeast corner of the Southwest quarter of Section 20, Township 5 South, Range 5 West, Salt Lake Base and Meridian; running thence North 9.5 chains; thence West 20 chains; thence South 9.5 chains; thence East 20 chains to the point of beginning.

PARCEL 10: Beginning 15.28 chains North of the Southwest corner of the Northwest quarter of Section 29, Township 5 South, Range 5 West, Salt Lake Base and Meridian; running thence North 81°15' East 20.20 chains; thence North 10.24 chains; thence South 81°15' West 25.52 chains; thence South 8°45' East 10 chains; thence North 81°15' East 3.66 chains to the point of beginning.

PARCEL 11: The Northeast quarter; the East half of the Northwest quarter, and Lots 1 and 2 of Section 7, Township 7 South, Range 5 West, Salt Lake Base and Meridian.

PARCEL 12: The East half of the Northwest quarter and the South half of the Northeast quarter of Section 8, Township 6 South, Range 5 West, Salt Lake Base and Meridian; the West half of the Southwest quarter of Section 17, Township 6 South, Range 5 West, Salt Lake Base and Meridian.

PARCEL 13: The West half of the Northeast quarter; the South half of the Northwest quarter; the West half of the Southeast quarter and the Southwest quarter of Section 17, Township 7 South, Range 6 West, Salt Lake Base and Meridian; West half of the Northeast quarter and Northwest quarter of Section 20, Township 7 South, Range 6 West, Salt Lake Base and Meridian.

PARCEL 14: The following described real property in Tooele County, State of Utah: The Golden Eagle Lode Mining claim described as follows, to-wit: Mineral patent, Certificate No. 0638. Survey No. 5841, embracing a portion of Township 5 South of Range 4 West, Salt Lake Base and Meridian, in the Ophir Mining District in the County of Tooele, State of Utah: Beginning at corner No. 1 marked 1-5841, from which U.S. Mineral Monument No. 1 bears South 78°53' West 1640.8 feet distant; thence first course, South 72°43' East 2 feet intersect line 4-5, an East line of Lot No. 162, the Grand Gulch Lode Claim; 152.4 feet intersect line 2-3 of Lot No. 151-B, the Baltic Mill Site Claim, at South 16°40' West 203.1 feet from corner No. 2; 600 feet to corner No. 2 marked 2-5841, from which discovery cut bears North 26°10' West 416.9 feet distant; thence, second course, North 19°48' East 1198.3 feet

intersect line 2-3 of the Nile No. 4, Lode Claim survey No. 5623 at South 76°55' East 580.8 feet from Corner No. 2; 1500 feet to corner No. 3, marked 3-5841; thence third course North 72°43' West 600 feet to corner No. 4 marked 4-5841; thence, fourth course, South 19°48' West 248.5 feet intersect line 3-4 of the Nile No. 3 Lode Claim, Survey No. 5623 and line 1-2 of said Nile No. 4 Lode Claim, at North 6°24' East 297.4 feet and 97.4 feet from corners Nos. 3 and 2 respectively; 545.9 feet intersect line 2-3 of said Nile No. 3 Lode Claim, at North 76°53' West 69.4 feet from corner No. 3; 927.9 feet intersect line 2-3 of Survey No. 5535, the Bell No. 3 Lode Claim, at North 10° East 103.7 feet from corner No. 2, 1027.3 feet intersect line 1-2 of said Survey No. 5535, at North 61° 30' West 17.8 feet from Corner No. 2; 1298.2 feet intersect line 1-2 of said Lot No. 151-B at North 73° 20' West 141.4 feet from corner No. 2; 1494.4 feet intersect said line 4-5 of Lot No. 162; 1500 feet to corner No. 1, the place of beginning; expressly excepting and excluding from these presents all that portion of the ground hereinbefore described, embraced in said mining claims or Survey No. 5535; said Lots Nos 151-B and 162; said Nile No. 3, Nile No. 4, Lode Claims Survey No. 5623 and also all that portion of said Golden Eagle vein or lode and of all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground; said survey No. 5841, extending 1500 feet in length along the Golden Eagle vein or lode; the premises herein granted, containing 15.274 acres, more or less.

All of Lots 6, 7, and 8 and the East 150 feet of Lot 9, Block 11, the East half of Lot 7, Block 12, all of Lots 2 to 8 inclusive, Block 13; all of Lots 1 to 9 inclusive, Block 14; All of Lots 1 to 9 inclusive, Block 15; all of Lots 2 to 8 inclusive, Block 17; all of Lots 1 to 9 inclusive, Block 18; all of Lots 1 to 10 inclusive, Block 19; all of Block 20; all of Lot 9, Block 21, all of Block 22, except Lot 1; all of Block 23, except the West half of Lots 1, 2, and 3. All Lots and blocks described in this paragraph are located in Plat "A": Ophir Survey. Together with all water rights appurtenant to the foregoing patented mining claims and other property including but not limited to those water rights awarded to Annie Worthing and Charles D. Daniels, described in paragraph VI in the decree of the District Court of Tooele County, dated December 20, 1919 in the case of Ophir Creek Water Company, a corporation, plaintiff vs. Ophir Hill Consolidated Mining Company, a corporation, defendant.

PARCEL 15: The Northeast quarter of the Northeast quarter of Section 15, Township 5 South, Range 5 West, Salt Lake Base and Meridian, excepting road and portion conveyed to Warren and Gertrude Penney.

PARCEL 16: Lots 3, 4, and 5 of Section 4, Township 10 South, Range 5 West, Salt Lake Base and Meridian.

PARCEL 17: Lots 5, 6, 7, and 8 and the Southeast quarter of the Southwest quarter of Section 5, Township 10 South, Range 5 West, Salt Lake Base and Meridian.

PARCEL 18: Beginning at the center of Section 36, Township 5 South, Range 6 West, Salt Lake Base and Meridian, running thence North 298 feet; thence East 1320 feet; thence South 50.5 feet; thence West 577.5 feet; thence South 247.5 feet; thence West 742.5 feet to the point of beginning.

PARCEL 19: The North half of Section 13, Township 5 South, Range 5 West, Salt Lake Base and Meridian.

PARCEL 20: The Northwest quarter of Section 14, Township 5 South, Range 5 West, Salt Lake Base and Meridian.

PARCEL 21: The North half of the Northeast quarter; the South half of the Northeast quarter of Section 14, Township 5 South, Range 5 West, Salt Lake Base and Meridian.

PARCEL 22: The South half of the Northwest quarter and the Northwest quarter of the Southwest quarter of Section 14, Township 6 South, Range 6 West, Salt Lake Base and Meridian.

PARCEL 23: Lots 7, 8, 9, 10, 11, 19, 23, 24, 25, 26 and 27 of Section 30, Township 4 South, Range 3 West, Salt Lake Base and Meridian. Lots 4 and 5; the North half of the Northeast quarter, the Southeast quarter of the Northeast quarter of Section 31, Township 4 South, Range 3 West, Salt Lake Base and Meridian; also the Southeast quarter of the Southeast quarter of Section 25, Township 4 South, Range 4 West, Salt Lake Base and Meridian.

PARCEL 24: The South half of the Southwest quarter of Section 12, Township 5 South, Range 5 West, Salt Lake Base and Meridian.

PARCEL 25: The East half of the Southwest quarter; the Southwest quarter of the Southwest quarter of Section 11, Township 5 South, Range 5 West, Salt Lake Base and Meridian.

PARCEL 26: Section 12, Township 5 South, Range 4 West, Salt Lake Base and Meridian.

PARCEL 27: East half of the Northwest quarter; the Northeast quarter of the Southwest quarter; Lots 1, 2, and 3 of Section 16, Township 5 South, Range 4 West, Salt Lake Base and Meridian.

PARCEL 28: Lots 1, 2, 3, and 4 and the East half of the West half and the West half of the East half of Section 7, Township 5 South, Range 3 West, Salt Lake Base and Meridian.

PARCEL 29: All of Section 2, Township 6 South, Range 4 West of the Salt Lake Base and Meridian.

Containing 7017.32 acres, more or less.

Subject to existing rights of way.

TOGETHER with the following water rights as more fully described in the action entitled Ophir Creek Water Company vs. Ophir Hill Consolidated Mining Company, dated December 20, 1919, in the District Court in and for Tooele County:

The water rights decreed to Annie Worthing in paragraph VI of said decree being a right for 10,000 gallons of water each 24 hours from the pipeline of Ophir Hill Consolidated Mining Company and 25/100 c.f.s. from the natural flow of Ophir Creek all for the irrigation of Golden Eagle Lode Mining Claim Survey 5841.

ALSO together with all stock water rights used in the operation of this livestock unit.

Hecla, Hecla No. 1, Hecla No. 2, Hecla No. 3 and Hecla No. 4, U.S. Survey 3079, containing 66.240 acres, more or less.
Black Shale, U.S. Survey 3029, containing 19.945 acres, more or less.

Douglas No. 1, U.S. Survey 3142, containing 27.830 acres, more or less.

Buena Vista, Gold Button, Mary Jean No. 1, Mary Jean No. 2, Mary Jean Fraction, U.S. Survey 3231, containing 57.127 acres, more or less.

Granite Mountain, (aka Grannet Mt. No. 4,) Quartet No. 1, Kansas Boy, Kansas Boy Fraction, Kansas Boy No. 3 and Kansas Boy No. 4, U.S. Survey 3681 (should be Survey No. 3935), 80.973 acres.

Syndicate No. 1, Syndicate No. 2, U.S. Survey 3487 and Monopolist Nos 1 to 8 inclusive, U.S. Survey 3487, containing 107.40 acres.

Ivanhoe, Albion, Coin and Try Again, U.S. Survey 4192, 64.376 acres.

West Shore, Selma, West Selma, Sister Mary, Four O'Clock, Alice, Esther, Maggie Kelly, Honest Dick, Lola Barker and Black Sheep, U.S. Survey 3164, containing 184.27 acres.

NE $\frac{1}{4}$ of NE less 3.09 ac. at road Comm. Also 6.91 ac. to Warrent & Gertrude Fenney. All in Ser. 15, T. 5 S., R. 5 W.

Lots 3, 4, 5, Sec. 4, T. 10 S., R. 5 W., S.L.M. cont. 96.58 acres.

Lots 5, 6, 7, 8, SE of SW $\frac{1}{4}$, Sec 5, T. 10 S. R. 5 W. S.L.E. cont. 170.04 acres.

Beg. at center of Sec. __, T. 5 __, R. __ W., __ 238 ft; E. 1320 ft.; __ 50 $\frac{1}{2}$ ft. W. 577 $\frac{1}{2}$ ft; S. ____ ft; W. ____ ft; to beginning. cont. 4.13 acres.

W of NE, S $\frac{1}{2}$ of NW, ____ of SE ____ of Sec. 17, T. 7 S., R. 6 W., S.L.M. cont. 400 acres.

W of NE, NW of Sec. 20, T. 7 S., R. 6 W. S.L.M. cont. 240 acres.

S $\frac{1}{2}$ of NW, N of N of Sec. 13, T. 5 S., R. 5 W., S.L.M. cont. 240 acres.

NW of Sec 14, T. 5 S., R. 5 W., S.L.M. cont. 160 acres.

N of NE, S. of NE of Sec. 14, T. 5 S., R. 5 W., S.L.M. cont. 160 acres.

SW of NW; N of SW, Sec. 14, T. 6 S., R. 6 W., cont. 120 acres.

Lots 7, 8, 9, 10, 11, 19, 23, 24, 25, 26, & 27. Sec. 30, T. 4 S., R. 3 W., S.L.M. Lots 4 and 5; NE; SB NE; Sec. 31 T. 4 S., R. 3 W., S.L.M. SE, SE Sec. 25 T. 4 S., R. 4 W., S.L.M. Con. in all 546.30 acres.

S of NE, Sec. 13, T. 5 S., R. 5 W., SL.M. cont. __ acres.

S $\frac{1}{2}$ of S, Sec. 12, T. 3 S., R. 5 W., S.L.M. cont. 80 acres.

__ of SW, SW of SW Sec. 11, T. 5 S., R. 5 W., S.L.M. cont. 120 acres.

All of Sec. 12, T. 5 S., R. 4 W., S.L.M. cont. 640 acres.

E of NW NE of SW, Lots 1, 2, 3, Sec. 18, T. 5 S., R. 4 W., S.L.M. cont. 240.37 acres.

Lots 1, 2, 3, 4, E of W, W of E of Sec. 7, T. 5 S., R. 3 W., S.L.M. cont. 502.92 acres.

Commencing 9.60 chains South of the Northwest corner of Section 29, Township 5 South, Range 5 West; thence North 81°15' East 20.20 chains; thence South 5 chains; thence South 81°15' West 20.20 chains; thence North 5 chains to the place of beginning.

South ½ of Section 35, Township 4 South, Range 4 West, Salt Lake Base and Meridian, and the South ½ of Section 34, Township 4 South, Range 4 West, Salt Lake Base and Meridian.

East ½ of Northwest ¼, Northeast ¼ of Southwest ¼, Lots 1, 2, 3, Section 18, Township 5 South, Range 4 West, Salt Lake Meridian. Containing 240.37 acres.

All of Section 12, Township 5 South, Range 4 West. Containing 640 acres.

WITNESS the hands of said grantors this 25th day of June, 1982.

Mervin J. Russell
MERVIN J. RUSSELL

Georgia J. Russell
GEORGIA J. RUSSELL

Signed in the presence of:

Glaire S. Russell

Judith A. Russell

STATE OF UTAH)
) ss.:
County of Salt Lake)

On the 25th day of June, 1982, personally appeared before me MERVIN J. RUSSELL and GEORGIA J. RUSSELL, his wife, the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

My Commission Expires:

January 31, 1983

Lucy A. Chadwick
Notary Public

Residing at:

Salt Lake County

ADDENDUM TWO

AGREEMENT CANCELING ANTENUPTIAL AGREEMENT

THIS AGREEMENT, by and between MERVIN J. RUSSELL and
GEORGIA R. RUSSELL,


W I T N E S S E T H:

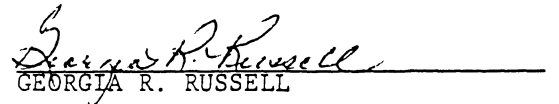
WHEREAS on or about the 11th day of January, 1972,
the parties hereto entered into an Antenuptial Agreement, in
writing, a copy of which is attached; and

WHEREAS the parties desire to terminate subject agree-
ment;

NOW, THEREFORE, it is agreed that said Antenuptial
Agreement is hereby terminated.

DATED this 14th day of August, 1982.


MERVIN J. RUSSELL


GEORGIA R. RUSSELL

Attachment

ADDENDUM THREE

AGREEMENT CANCELING ANTENUPTIAL AGREEMENT

THIS AGREEMENT, by and between MERVIN J. RUSSELL and
GEORGIA R. RUSSELL,

W I T N E S S E T H:

WHEREAS on or about the 11th day of January, 1972,
the parties hereto entered into an Antenuptial Agreement, in
writing, a copy of which is attached; and

WHEREAS the parties desire to terminate subject agree-
ment;

NOW, THEREFORE, it is agreed that said Antenuptial
Agreement is hereby terminated.

DATED this 14th day of August, 1982.

Mervin J. Russell
MERVIN J. RUSSELL

Georgia R. Russell
GEORGIA R. RUSSELL

Attachment

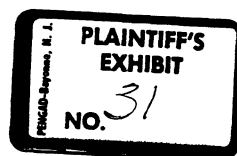
State of Utah)
County of Salt Lake) ss.

On the 25th day of January, 1983, personally appeared before
me MERVIN J. RUSSELL and GEORGIA R. RUSSELL, his wife, the signers
of the above instrument who duly acknowledged to me that they
executed the same.

E. J. Skeen
E. J. SKEEN

My Commission Expires:
Sept 7 1986

Residing In:
Salt Lake City



LAW OFFICE OF
VAN COTT BAGLEY CORNWALL & MCCARTHY
A PROFESSIONAL CORPORATION
SUITE 1800 40 SOUTH MAIN STREET
SALT LAKE CITY UTAH 84144



LAW OFFICES OF
VAN COTT, BAGLEY, CORNWALL & McCARTHY

A PROFESSIONAL CORPORATION

SUITE 1600

50 SOUTH MAIN STREET

SALT LAKE CITY, UTAH 84144

TELEPHONE (801) 532-3333

TELEX 453149

ADDRESS ALL CORRESPONDENCE TO

POST OFFICE BOX 3400

84110-3400

INIS McCARTHY
NARD J. LEWIS
ID E. SALISBURY
INT. MACFARLANE JR.
B. LEWIS
SCOTT WOODLAND
RMAN S. JOHNSON
ID L. GILLETTE
NARD K. SAGER
PHEN D. SWINDLE
BERT D. MERRILL
NARD H. STAHL
N. F. MECHAM
NT J. GIAUQUE
COTT SAVAGE
INIS B. FARRAR
NIS WANGSGARD
IN S. KIRKHAM
NETH W. YEATES
ID L. COOK

JOHN A. SNOW
DAVID A. GREENWOOD
MAXILIAN A. FARBMAN
ARTHUR B. RALPH
BRENT H. STEVENSON
ALAN L. SULLIVAN
ROBERT K. ROGERS
J. RAND HIRSCHI
ROBERT A. PETERSON
JAMES A. HOLTHAMP
J. KEITH ADAMS
WILLIAM B. WRAY JR.
PATRICK A. SHEA
PHILLIP WM. LEAR
THOMAS T. BILLINGS
RICHARD C. SKEEN
DANNY C. KELLY
STEVEN D. WOODLAND
THOMAS A. ELLISON

HARD H. JOHNSON II
IUEL O. GAUFIN
MICHAEL KELLER
COTT LUNDBERG
GORY K. ORME
FREY E. NELSON
RICIA M. LEITH
E. LAHEY
ID J. JORDAN
IN R. HOLMES
WEL N. EMERY
NT D. CHRISTENSEN
STEPHEN MARSHALL
IL M. DURHAM
JGLAS L. DAVIES

RONALD G. MOFFITT
ELIZABETH A. WHITSETT
J. PETER MULHERN
JEANNE BRYAN INOUE
JOHN N. OWENS
S. DAVID COLTON
PATRICK J. O'HARA
TERESA SILCOX
ROBERT B. LENCE
MATTHEW F. McNULTY III
NANCY J. HARPER
LAWRENCE S. SKIFFINGTON
JAMES W. STEWART
S. ROBERT BRADLEY
M. CATHERINE CALDWELL

BENNETT HARRNESS & KIRKPATRICK
1874-1890

BENNETT MARSHALL & BRADLEY
1890-1896

BENNETT HARRNESS HOWAT
SUTHERLAND & VAN COTT
1896-1902

SUTHERLAND VAN COTT & ALLISON
1902-1907

VAN COTT ALLISON & RITER
1907-1917

VAN COTT RITER & FARNSWORTH
1917-1947

OF COUNSEL
CLIFFORD L. ASHTON
GEORGE M. McWILLAN
EDWIN J. SKEEN
JOHN CRAWFORD
JAMES U. JENSEN

November 7, 1983

Mrs. Georgia Russell
R.D. No. 8
Ophir, Utah 84071

Dear Georgia:

I am enclosing a draft of a Will in accordance with our telephone conversations of Friday and today. In the event there is any property that has not been put into joint tenancy, we can handle it through this instrument. If there are any additions, corrections, or changes that you desire be made, please let me know. Otherwise, I will hold the original for signature the next time you and Mer come to town.

Respectfully,

EJS:lc

E. J. SKEEN

Enclosure



ADDENDUM FIVE

VAN COTT, BAGLEY, CORNWALL & McCARTHY
E. J. SKEEN
50 South Main Street, Suite 1600
Post Office Box 3400
Salt Lake City, Utah 84110-3400
Telephone: 532-3333

LAST WILL AND TESTAMENT
OF
MERVIN J. RUSSELL

I, MERVIN J. RUSSELL, being of sound mind, hereby make the following Will which shall replace any and all previous Wills or Codicils thereto.

I.

I nominate and appoint my wife, GEORGIA J. RUSSELL, as my personal representative and authorize her to serve without bond or other security for the faithful performance of her duties.

II.

I direct that my Personal Representative shall pay all of my just debts, expenses of last illness, and funeral expenses out of any funds on hand.

III.

I give and bequeath to my son, GENE J. RUSSELL, the sum of Five Dollars (\$5.00), and I give and bequeath to my daughter, HELEN GREEN, the sum of Five Dollars (\$5.00). I give and bequeath all of my property, real, personal, and mixed, wherever located, to my wife, GEORGIA J. RUSSELL.

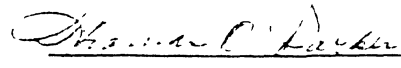
IN WITNESS WHEREOF, I sign my name to this Last Will and Testament on this 9th day of November, 1983, at Salt Lake City Utah; and being first duly sworn, do hereby declare to the undersigned Notary that I sign and execute this instrument as my Last Will and Testament and that I sign it willingly, that I execute it

as my free and voluntary act for the purposes expressed in it,
that I am 18 years of age or older, of sound mind and under no
constraint or undue influence.




MERVIN J. RUSSELL, Testator

The foregoing instrument, consisting of this and one
other typewritten page, was on the date last above written by the
said MERVIN J. RUSSELL, the above named testator, signed, sealed,
published and declared to be his Last Will and Testament in the
presence of us, who thereupon at his request and in his presence
and in the presence of each other, subscribed our names as wit-
nesses thereto the day and year last above written.



Residing at: Salt Lake City
North Lake City, Utah



Residing at. 1513 Michigan Ave
Salt Lake City, Utah

STATE OF UTAH)
) ss.:
County of Salt Lake)

Subscribed, sworn to, and acknowledged before me by the
testator and by the witnesses named herein on this March day of
November, 1983.



Notary Public

My Commission Expires:
January 31, 1987

Residing at: Salt Lake County

