

2011

# Max Hill v. Willis Nakai : Brief of Appellant

Utah Supreme Court

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Donald J. Winder; Winder & Counsel, PC .

Charles M. Bennett.

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**IN THE UTAH SUPREME COURT**

<b>IN THE MATTER OF THE ESTATE OF WILLIAM J. HANNIFIN,</b>  <b>Deceased.</b>	<b>Appellate Court Case No. 20111125-SC</b>  <b>On Appeal from the Third District Court, Case No. 103900808</b>
<b>MAX HILL, as Special Administrator of the Estate</b>  <b>Appellant,</b>  <b>vs.</b>  <b>WILLIS NAKAI, Individually and as Personal Representative of the Estate,</b>  <b>Appellee</b>	<b>Honorable Robert J. Hilder (Retired)</b> <b>Honorable Royal I. Hansen</b>
<b>APPELLANT'S BRIEF</b>	
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## **LIST OF ALL PARTIES.**

Willis Nakai

Max Hill, as special administrator for the following nineteen collateral relatives:

Diane Brough

Curtis Dean Shields

Mary Ann Steadman

York Shields

Max Hill

Kathy Smith

Rick Jens Jensen

Tammi Farnsworth

Teresa J. Pominski

Jill Woods

Stacey Oleska

Tim Fernau

Frederick R. Tasker

Nan Swarts

Merlin Vaun White

Patrick White

Cindy Post

Scott Carpenter

Josie Carpenter

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## STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this appeal pursuant to Utah Code Ann. §78A-3-102(3)(j) (2009).

## STATEMENT OF ISSUES

The issues on appeal are:

1. Whether the doctrine of equitable adoption is fundamentally flawed and should be overruled by the Supreme Court. *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 464 (Utah 1996) (citations omitted).
2. Whether the doctrine of equitable adoption has been effectively overruled by subsequent statutory enactments in the Utah Uniform Probate Code and the Utah Adoption Act. Because this issue concerns the interpretation of the relevant statutes, the standard of review is correction of error. *Parks v. Utah Transit Auth.*, 2002 UT 55, ¶4, 53 P.3d 473.
3. Whether the doctrine of equitable adoption has been overruled by a subsequent Supreme Court decision. Because this issue concerns the “effect of a prior judicial decision,” the standard of review is correction of error. *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 464 (Utah 1996) (citations omitted).
4. Whether the trial court’s findings of fact support its legal conclusion that Father William J. Hannifin agreed with Willis Nakai’s parents, Hilda Nakai and Tony Begay, to adopt Mr. Nakai. *In re Williams’ Estates*, 10 Utah 2d 83, 348 P.2d 683

(Utah 1960). Because Mr. Hill is not challenging the trial court's findings of fact, the issue of whether a contract exists is an issue of law and the standard of review is correction of error. *O'Hara v. Hall*, 628 P.2d 1289, 1290-91 (Utah 1981).

## **DETERMINATIVE STATUTES**

### **Utah Code Ann. §75-1-102 (1975). Purposes – Rule of construction.**

- (1) This code shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) The underlying purposes and policies of this code are:
  - (a) To simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;
  - (b) To discover and make effective the intent of a decedent in distribution of his property;
  - (c) To promote a speedy and efficient system for administering the estate of the decedent and making distribution to his successors;
  - (d) To facilitate use and enforcement of certain trusts; and
  - (e) To make uniform the law among the various jurisdictions.

### **Utah Code Ann. §75-1-201 (3) (1975). General Definitions.**

- (3) "Child" includes any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

### **Utah Code Ann. §75-1-201 (21) (1975). General Definitions.**

- (21) "Issue" of an individual means all of his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this title.

**Utah Code Ann. §75-1-201 (28) (1975). General Definitions.**

(28) "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

**Utah Code Ann. §75-2-103 (1975). 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 them by representation.
- (d) If there is no surviving issue, parent, or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half to the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of paternal grandparents if both are deceased, the issue taking by representation; and the other half passes to the maternal relatives in the same manner: but if there be no surviving grandparent or issue of grandparent on either the paternal or maternal side, the entire estate passes to the 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 relatives 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.

**Utah Code Ann. §75-2-109(1) (1975). Meaning of Child and Related Terms.**

(1) If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:

(a) An adopted person is the child of the adopting parent, and not of the natural parent, except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and the natural parent.

(b) In cases not covered by subsection (1)(a), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

(i) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(ii) The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established under this subsection (1)(b)(ii) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.

**Utah Code Ann. §75-2-701 (1975). Contracts concerning succession.**

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this part, can be established only by provisions of a will stating material provisions of the contract; an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

**Utah Code Ann. §75-3-718 (1992). Compensation of personal representative and attorney.**

(1) A personal representative and an attorney are entitled to reasonable compensation for their services. If a petition is filed which either directly or indirectly seeks approval of the personal representative's compensation or the attorney's compensation and if no objection is filed by an interested person to the compensation requested, reasonable compensation shall be the compensation sought in the petition. When an interested person objects to the personal representative's compensation, the court shall determine reasonable compensation for the personal representative based on the quality, quantity, and value of the services rendered to the estate and the circumstances under which those services were rendered, including the practice for other fiduciaries who are in similar circumstances to the personal representative in question. When an interested person objects to the attorney's compensation, the court shall determine reasonable compensation for the attorney based on rules adopted by the Judicial Council.

(2) When a petition seeks approval of or objects to a personal representative's compensation or an attorney's compensation, at least 10 days before the time set for the hearing of the petition, the petitioner or the petitioner's attorney shall send a copy of the petition to all interested persons either by certified, registered, or first class mail or by hand-delivery.

(3) If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, the personal representative may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the court.

## STATEMENT OF THE CASE

### **1. The Nature of the Case.**

Willis Nakai claimed to be the sole beneficiary of the estate of Father William J. Hannifin as Father Hannifin's equitably adopted son. Max Hill, Father Hannifin's first cousin, acting as special administrator of the estate and representing the decedent's nineteen collateral relatives, opposed Mr. Nakai's claim asserting that the common law doctrine of equitable adoption had been overturned by subsequent legislation and Supreme Court decisions, and that, in any event, Mr. Nakai was not entitled to the application of the equitable adoption doctrine under the facts of the case. As part of the proceedings, Mr. Nakai applied for an award of attorneys fees, and Max Hill opposed each application.

### **2. Course of Proceedings.**

On May 26, 2010, Appellee, Willis Nakai, filed his verified Application for Informal Appointment as Personal Representative of the Estate of William Hannifin. R.1-20. Mr. Nakai identified his interest in the estate as the decedent's "foster son." R.2, ¶5. He represented that the decedent, an Episcopal Priest, died without a spouse,

children, parents, brothers, sisters, or heirs, “other than Mr. Nakai” and his family. R.1, ¶¶1, 3, 4; R.2, ¶9.

On July 30, 2010, the Court entered an “Order<sup>1</sup> of Appointment of Personal Representative.” R.29-30. Thereafter, on August 4, 2010, one of the Father Hannifin’s fellow priests in the Episcopal Church, the Reverend Canon Caryl Marsh, acting on behalf of some of Father Hannifin’s collateral relatives and believing that Mr. Nakai was not entitled to Father Hannifin’s estate as his “heir,” filed an ex parte motion for a restraining order. R.35-39. On August 6, the trial court entered its “Ex Parte Temporary Restraining Order and Order to Vacate Appointment and Letters.” R.41-44. Although entitled an “Order to Vacate Appointment,” in the Order the trial court modified the text and “stayed” rather than “vacated” the order of appointment. R.42. After additional pleadings and hearings, the trial court eventually entered its Order on September 27, 2010 in which it continued Mr. Nakai’s appointment as personal representative “for the sole purpose of gathering assets and paying outstanding bills.”

On December 28, 2010, Max Hill, filed his “Petition for Order: (i) Appointing Max Hill Special Administrator with Limited Duties; (ii) Approving Heirs Private Agreement for Distribution of Estate; (iii) for Approval of Contingent Fee Agreement;

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<sup>1</sup> The Court should have entered a “Statement” of Informal Appointment. *Compare* Utah Code Ann. §75-3-301 *et al.* (procedures governing informal applications for probate) *with* Utah Code Ann. §75-3-401 *et al.* (procedures governing formal petitions for probate).

and (iv) for Miscellaneous Relief.” R.316-343. In the petition, he sought appointment as the Special Administrator of the estate with the limited duty and power to represent Father Hannifin’s nineteen collateral relatives in litigation contesting Mr. Nakai’s claim to the estate. R.321, ¶3.a. and b. If successful, Mr. Hill sought appointment as Personal Representative of the Estate. R.320, ¶20.

On January 19, 2011, the Court entered its order granting the relief sought in Mr. Hill’s petition (R.381-86), and Letters of Special Administration were issued. R.388-89.

On March 4, 2011, Mr. Nakai filed his “First Application for Attorney Fees and Costs as Personal Representative.” R.393-405. On March 17, 2011, Max Hill filed his “Response in Opposition to William Nakai’s Application for Attorney Fees.” R.406-14.<sup>2</sup>

On July 21, 2011, the Court, the Honorable Robert J. Hilder presiding, held a bench trial regarding Mr. Nakai’s claim to inheritance as an equitably adopted child and his application for attorney fees.

### **3. Trial Court Decision.**

On July 27, 2011, the trial court entered its “Findings of Fact, Conclusions of Law, Ruling and Order.” R.566-81. The trial court denied, *sub silentio*,<sup>3</sup> Mr. Hill’s claim that subsequent legislation and other Supreme Court decisions had effectively overruled *In re*

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<sup>2</sup> Prior to trial, Mr. Nakai supplemented his application. R.480-87. Mr. Hill addressed the supplement to Mr. Nakai’s application in his trial brief. R.518-27.

<sup>3</sup> The trial court orally denied Mr. Hill’s claim during the course of the trial, but the trial court did not include that denial as part of its written ruling.



*Williams' Estates*, 10 Utah 2d 83, 348 P.2d 683 (Utah 1960). It held that Mr. Nakai was entitled to be treated as Father Hannifin's equitably adopted son, declared him to be the sole beneficiary of Father Hannifin's estate, and granted him attorney fees (payable from the estate). R.577-79. Thereafter, on August 1, 2011, the trial court entered its "Ruling and Order Attorney Fees" expanding on its reasoning for awarding attorney fees to Mr. Nakai. R.583-85.

#### **4. Post Trial Proceedings.**

On August 4, 2011, Max Hill filed his "Motion for a New Trial Asking the Court to Amend the Court's July 27, 2011 Ruling Based on an Error of Law." R.586-589. The trial court entered its Order denying Mr. Hill's Motion on December 15, 2011. R.722-28. Mr. Hill filed his Notice of Appeal on December 29, 2011. R.729.

### **RELEVANT FACTS**

William J. Hannifin was born August 3, 1930; he became a Priest in the Episcopal Church prior to the events described below and remained so until his death. He never married and had no children. *See generally* Findings of Fact, Conclusions of Law, Ruling and Order, dated July 27, 2011 (the "Findings"), R.566-581; 566, ¶1. Father Hannifin spent much of his life helping Native American people, including Navajos. Findings, R.567, ¶3.

Willis Nakai was born May 13, 1944, to Navajo parents, Hilda Nakai and Tony Begay, and was at all times a member of the Navajo Tribe. Findings R.566, ¶2; 567, ¶4.

Hilda and Tony remained married until Hilda's death in the 1980's. Father Hannifin first met Mr. Nakai around 1956, when Mr. Nakai was 12 years old after Mr. Nakai enrolled in the Intermountain Indian School in Brigham City, Utah ("IIS"). Findings, R.567, ¶3.

The trial court found that Mr. Nakai was raised from infancy by his childless aunt until her tragic death when he was five or six years old. Although under custody of his mother Hilda and his maternal grandparents, Mr. Nakai was thereafter sent to a series of boarding schools, including IIS in Brigham City. As a result, Mr. Nakai spent very little time actually residing with either his parents or his grandparents. Findings, R. 567, ¶¶ 5-6.

In the summer of 1958, Father Hannifin drove to the Navajo Reservation near Aneth, Utah, to transport several children to attend Camp Tuttle, a youth camp near Salt Lake City sponsored by the Episcopal Church. Mr. Nakai was among these children. At the time of the visit, the trial court found that "Mr. Nakai was living with his mother and/or [his] maternal grandparents." Findings, R.568, ¶8. Although his father, Tony, was alive, married to, and living with Hilda, the trial court found that Tony "was not very involved in the family" and was "frequently away from home." *Id.*

During the visit, Father Hannifin had a conversation with Hilda and Mr. Nakai's maternal grandfather. Mr. Nakai's father was not a party to the conversation. Father Hannifin had difficulty understanding Navajo and Hilda and her father had difficulty understanding English. Findings, R.568, ¶9. Nonetheless, this discussion forms the foundation of Mr. Nakai's claim.

Based on stories told to Mr. Nakai by his parents, grandparents, and Father Hannifin, the trial court found that the gist of the conversation was as follows:

Mr. Nakai's mother asked Father Hannifin to take her then 14-year-old son and raise him as his own child. . . . Father Hannifin responded "No, unless you take me as one of your children, as one of your relatives, that's the only way I'm going to take your son." Mr. Nakai's grandfather then jokingly offered "to sell him to [Father Hannifin] for fifty cents." Findings, R.568-69, ¶11.

Mr. Nakai did not immediately return to Brigham City. But sometime later he returned and continued his education at IIS. Findings, R.569, ¶13.

Mr. Nakai's relationship with Father Hannifin evolved over time. Findings, R.570, ¶15. Initially, he lived at the boarding school and only spent holidays and weekends with Father Hannifin. Later, Mr. Nakai experienced some health problems while attending IIS, and Mr. Nakai thereafter began living in Father Hannifin's home. He continued to live there the remainder of his time at IIS and while attending Utah State. *Id.* He stopped living with Father Hannifin after January 25, 1969 when he married his wife. R.9.

While attending IIS, the Bureau of Indian Affairs paid all of Mr. Nakai's tuition, books, and boarding expenses. The trial court found that following his serious illness, "throughout all the remaining years of Mr. Nakai's minority and even subsequently, Father Hannifin provided an allowance, food, clothing, medical care as necessary and transportation." Findings, R.570-71, ¶16.

The trial court found:

Commencing with Mr. Nakai's return to Brigham City after the summer of 1958, Father Hannifin consistently provided emotional and material support as a father would for a son. Father Hannifin also taught Mr. Nakai to drive, monitored his schoolwork, [and] Father Hannifin commenced his lifelong involvement with [Mr. Nakai] in what . . . was clearly a parental role. . . .  
*Id.*

The trial court further found that:

From the time that Mr. Nakai returned to [IIS apparently in 1958] and commenced his life with Father Hannifin, he referred to Father Hannifin as his father, or "dad" and Father Hannifin referred to Mr. Nakai as his son. Findings, R.571, ¶17.

Although Mr. Hill is not challenging this finding, the record reveals the following trial court findings and other unrebutted facts that are important to Mr. Hill's argument in Section I below:

1. Father Hannifin's obituary described Mr. Nakai as Father Hannifin's foster son. T.Exh. 105, Findings, R.572, ¶20.
2. Father Hannifin's obituary identified another Native American as another foster son. *Id.*
3. Mr. Nakai sent thank you notes following Father Hannifin's funeral that stated: "Thank you for all the kindnesses, thoughts and prayers expressed for my foster father William Hannifin . . ." T.Exh. 103.
4. Mr. Nakai described himself in his initial petition to the Court as Father Hannifin's "foster son." T.Exh. 101 at 2, ¶5; R.2 ¶5.
5. In 2007, Father Hannifin prepared and signed a beneficiary form leaving his Wells Fargo Investment Account to Mr. Nakai as his "foster son." T. Exh. 111.

Although the trial court noted "there is a lack of evidence of formal recognition of the father-son relationship," it nonetheless found:

[F]rom the time Mr. Nakai returned to the school [in 1958], he never again lived with either his parents or grandparents. . . . Mr. Nakai visited the Reservation and his biological family no more than once each year and visited lasted a few days to at most two weeks, but was typically for a week. . . . [F]ollowing Mr. Nakai's return to Brigham City after the summer of 1958, both he and Father Hannifin held themselves out to the community and to family as father and son. Over the many following years, Father Hannifin assumed the role of and actively participated as a father to Mr. Nakai and later as a grandfather to Mr. Nakai's children. The record is replete with evidence that Father Hannifin was involved with Mr. Nakai and his family as a respected father, grandfather and even great-grandfather. Mr. Nakai continued to seek counsel from Father Hannifin as a parent and Father Hannifin gave that counsel over the decades. . . . The Court can and does determine that Mr. Nakai and Father Hannifin saw them as living in a father and son relationship and Father Hannifin assumed all of the duties and responsibilities of a parent. Findings, R.571-72, ¶¶19, 21.

In addressing the issue of whether the Mr. Nakai's parents promised to surrender all of their parental rights to Father Hannifin, the trial court identified four facts that it found controlling:

1. Hilda and her father asked Father Hannifin to raise Mr. Nakai as his own child and then gave Father Hannifin custody and control of Mr. Nakai several months later.
2. Neither Hilda, Mr. Nakai's father, nor Hilda's father thereafter ever again sought to exercise physical custody or control over Mr. Nakai.
3. Mr. Nakai never lived with his parents for any extended period. After the death of his aunt, he attended boarding schools.
4. Because of their impoverished conditions, Mr. Nakai's parents provided him with virtually no support after he left the reservation. The trial court noted that the financial condition on the reservation appeared to be the primary reason for asking Father Hannifin to raise Mr. Nakai. Findings, R.573-74, ¶24.

Acknowledging that “there was no formal relinquishment here” and that “Navajo parents never voluntarily relinquish their rights to their children,” the trial court nonetheless relied upon Navajo customs to find that there was “for all practical purposes a relinquishment of parental rights” Findings, R. 575, ¶26; R. 576, ¶27. In justification for this position, the trial court noted: “The Court does not require proof that a formal relinquishment occur, otherwise there would likely be a formal adoption.” Findings, R.575, ¶26.

Regarding Mr. Nakai’s father, Tony, the trial court held that neither a promise to relinquish nor a practical relinquishment were necessary for him. It did so based on its findings that:

1. Tony never participated actively in his son’s life;
2. Navajo custom follows a matriarchal order;
3. Although present during the 1958 conversation, Tony made no effort to participate in the conversation;
4. Tony never objected to Mr. Nakai living with Father Hannifin; and
5. There was no evidence Tony expected to be involved in the decision.

R.576, ¶30.

### **SUMMARY OF ARGUMENTS**

The equitable adoption doctrine is fundamentally flawed and should be overruled.

The enactment of the Utah Uniform Probate Code in 1975 effectively overruled the common law equitable adoption doctrine.

The enactment of specific adoption statutes after 1960 effectively overruled the common law equitable adoption doctrine.

The Supreme Court's 1981 decision in *Hills v. Hills*, 638 P.2d 516 (1981), effectively overruled the common law equitable adoption doctrine.

In applying the facts it found to the law, the trial court erroneously concluded that Father Hannifin and Mr. Nakai's parents had entered into a binding contract for Father Hannifin to adopt Mr. Nakai that could be specifically enforced on behalf of Mr. Nakai.

## ARGUMENT

### **I. BECAUSE THE CONCEPTUAL FOUNDATION FOR THE EQUITABLE ADOPTION DOCTRINE IS FUNDAMENTALLY FLAWED, THE SUPREME COURT SHOULD OVERRULE *IN RE WILLIAMS' ESTATES* IN ANY EVENT.**

#### **A. The Equitable Foundation for the Equitable Adoption Doctrine in Utah.**

In *Williams' Estates*, the Utah Supreme Court found that a person could establish rights of inheritance based on the concept of equitable adoption. Because “equity regards as done what should have been done,” the Supreme Court approved the doctrine for a putative adoptee by granting specific performance if there was a fully performed adoption contract (except for the formal adoption). *In re Williams' Estate*, 10 Utah 2d 83, 85, 348 P.2d 683 (Utah 1960).

#### **B. The Foundational Basis of the Equitable Adoption Doctrine is Illogical.**

While more than half the states have accepted the Equitable Adoption Doctrine,<sup>4</sup> none of the decisions in favor of the doctrine have undertaken a careful analysis of the application of equitable principles to the transmission of property at death. *See generally* 122 A.L.R. 5<sup>th</sup> 205, “Modern Status of Law as to Equitable Adoption or Adoption by Estoppel,” (2004) updated weekly (“Modern Status”). Because children seeking inheritance rights are normally innocent of any wrongdoing, the courts have used equitable principles to find that the child was adopted for inheritance tax purposes. But

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<sup>4</sup> A significant minority of states have refused to adopt the doctrine. *Id.*



none of the adopting states have examined whether equity and justice have any role to play when it comes to determining **any** person's right to be a successor to a decedent's property.

Utah law grants every resident the right to execute a will (or will substitute) that directs the distribution of that person's property. Utah Code Ann. §75-2-501 (1998). As the Model Utah Jury Instructions provide:

### **RIGHT OF TESTAMENTARY DISPOSITION**

Every person who is competent, over the age of 18 years, and not acting under [undue influence or fraud], has the right to make a will directing the disposition of that person's property upon death in any way that person sees fit. No one is required to make any disposition so that it will meet with the approval of a judge or jury or any other person.

The right to dispose of property by will is a fundamental right assured by law and does not depend upon this right being wisely used.

A will cannot be set aside solely because it may appear to you to be unreasonable or unjust; however, the naturalness or unnaturalness of the distribution provided for in the will is one fact you should consider in resolving the issues in this case.

MUJI Rule 23.4. If a decedent chooses to exercise the right to prepare and execute a will, and if the decedent excludes a child, adopted child, foster child, or a child having a claim to equitable adoption, that right is protected and enforced *regardless of how deserving and innocent the child might be*.

When a decedent chooses not to adopt a personal plan for the distribution of his or her property, the decedent nonetheless chooses a default plan for the distribution of his or her property – the laws of intestate succession. *Muldrow et al. v. Caldwell et al.*, 173 S.C. 243, 175 S.E. 501 (S.C. 1934) (“The fact that he died without having executed a will must

be taken as a reasonable assumption that he was satisfied with the will the law of the state made for him, if he chose to die intestate.”) The default plan represents the Legislature’s decision as to how the average Utah resident would want to leave his or her property had that average person executed a will. By not executing a personal plan, the decedent chooses the government’s plan.

It is incongruous for a will to be valid even if “unjust and unreasonable,” while the Utah Legislature’s determination of who would be an heir is subject to equitable adjustment based on equitable principles. Mr. Hill believes that the Court should reject equitable adoption as inconsistent with the laws of testate and intestate succession.<sup>5</sup>

But beyond this, the whole concept of equitable adoption is backwards. The majority of the adopting states **have limited its use to intestacy**. *See generally*, Modern Status; *see Id.*, Sections 16[a] and 16[b]. If a putative parent violates a contract to adopt, equity should protect the putative child with regard to the parent’s obligations to support and nurture the child. Adoption, which by its very nature is equitable, would be the natural place to apply, not exclude, the doctrine. *Wilson v. Pierce*, 14 Utah 2d 317, 318, 383 P.2d 925 (Utah 1963).

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<sup>5</sup> Prior to 1998, an express statement in a will disinheriting an heir would **not** preclude the heir from inheriting any portion of the estate falling into intestacy. *See* Utah Code Ann. §75-2-101(b) (1998) (permitting disinheritance of an heir’s rights of inheritance). If ever there was a place for the application of principles of justice and equity in inheritance law, that would have been the place. But the rule was not replaced **until** the Legislature modified the intestacy statute.

Thus, even had the Legislature not overruled *Williams' Estates*, the Supreme Court should reject the doctrine as unsound and flawed.

## **II. THE ADOPTION OF THE UTAH UNIFORM PROBATE CODE EFFECTIVELY OVERRULED THE EQUITABLE ADOPTION DOCTRINE.**

### **A. The Legislature Has Both the Right and the Responsibility to Determine the Extent of a Person's Right to Inherit in Intestacy.**

No one has a constitutional right to receive an intestate's property. As the United States Supreme Court stated in *Irving Trust Co. v. Day*:

Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.

314 U.S. 556, 562, 62 S.Ct. 398, 401, 86 L.Ed. 452 (U.S. 1942). When the legislature enacts laws governing inheritance and the determination of who is an heir at law, the courts should interpret those statutes to fulfill the legislative intent, regardless of whether the action creates, limits, or eliminates any particular person's inheritance rights. *Kunz & Co. v. State, Dept. of Transp.*, 949 P.2d 763, 767 (Utah App. 1997) (legislative province "to craft language of [Utah] statutes"); *c.f.*, *Maak v. IHC Health Services, Inc.*, 2007 UT App 244, ¶29, 166 P.3d 631 ("Public policy is the province of the [legislature], not the [judiciary].") Indeed, in resolving issues involving intestacy, courts regularly refer to the decedent's heirs as "statutory heirs." Westlaw search using: "*statutory heir*" % *wrongful /1 death* (where % means "but not"). Mr. Nakai is not a statutory heir.

While the majority of states have adopted the common law equitable adoption doctrine, none have done so in the context of the passage of the Uniform Probate Code, the adoption of specific adoption statutes, and a Supreme Court precedent, all after the adoption of the doctrine. *See generally* Modern Status. Those states that have declined to adopt the doctrine have done so based on the power of the legislature to determine intestate heirs. *Id.* at 3[b].

By enacting the Utah Uniform Probate Code in 1975, the Utah Legislature created specific rules regarding the inheritance of property in Utah contrary to the Supreme Court's decision in *Williams' Estate*. Mr. Hill asks the Court to affirm the legislative power and duty to determine successors' rights to an intestate's assets by overruling *Williams' Estate*, reversing the trial court decision, and ordering distribution of the decedent's estate to the decedent's statutory heirs.

**B. Utah Law Limits Inheritance to Children Who Are Naturally Born or Formally Adopted.**

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 decedent; . . .

Utah Code Ann. §75-2-103(1)(a) (1975).<sup>6</sup>

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<sup>6</sup> Amended by Laws 1998, c. 39, § 12, eff. July 1, 1998; Laws 2010, c. 93, § 6, eff. May 11, 2010; Laws 2010, c. 324, § 121, eff. May 11, 2010.

“Issue” of an individual means all of his lineal descendants of all generations, with the **relationship of parent and child** at each generation being **determined by the definition of child and parent** contained in this title.

Utah Code Ann. §75-1-201(21) (1975); emphasis added.<sup>7</sup>

**C. The Direction on How to Determine Who Is a Child Overrides *In re Williams’ Estates*.**

As enacted in 1975, Utah law expressly explained how a parent child relationship would be determined for purposes of intestate succession.

If, **for purposes of intestate succession**, a relationship of parent and child must be established to determine succession by, through, or from a person:

(a) An adopted person is the child of the adopting parent, and not of the natural parent, except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and the natural parent.

(b) [dealing with natural children born out of wedlock].

Utah Code Ann. §75-2-109(1) (1975);<sup>8</sup> emphasis added. Thus, the only two methods of identifying a child “for purposes of intestate succession,” were legal adoption and natural parentage. Note also that despite the legislatures intent that a child inherit from only the adopting parent, an equitably adopted child would inherit from either family.

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<sup>7</sup> Amended by Laws 1998, c. 39, § 9, eff. July 1, 1998; Laws 1999, c. 142, § 1, eff. May 3, 1999; Laws 2003, c. 49, § 34, eff. May 5, 2003; Laws 2004, c. 89, § 7, eff. July 1, 2004; Laws 2009, c. 278, § 1, eff. May 12, 2009; Laws 2010, c. 93, § 3, eff. May 11, 2010; substantive identical version of definition is now found in §75-1-201(9) and (25).

<sup>8</sup> Repealed by Laws 1998, c. 39, § 17, eff. July 1, 1998; reenacted in substance as §75-2-114, Laws 1998, ch. 39, § 22..

**D. The Definition of “Child” Further Supports Mr. Hill’s Position.**

“Child” includes any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved and **excludes any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.**

Utah Code Ann. §75-1-201(3) (1975);<sup>9</sup> emphasis added. Under this definition, the very persons who would be most likely to claim status as an equitably adopted child are the very people who, absent a legal adoption, are specifically excluded from consideration as a child. *Id.*; *see also* Utah Code Ann. §75-1-201(18) (1975)<sup>10</sup> (“Parent” . . . excludes any person who is only a stepparent, foster parent, or grandparent.”)

This case illustrates the problem in applying a common law concept in the face of these specific statutes. While the trial court found by clear and convincing evidence that Mr. Nakai referred to Father Hannifin as his father and Father Hannifin referred to Mr. Nakai as his son (Findings, R.571, ¶17), the trial court also found that:

1. Father Hannifin’s obituary described Mr. Nakai as Father Hannifin’s foster son. T.Exh. 105, Findings, R.572, ¶20,
2. His obituary identified another Native American as another foster son. *Id.*

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<sup>9</sup> Amended by Laws 1998, c. 39, § 9, eff. July 1, 1998; Laws 1999, c. 142, § 1, eff. May 3, 1999; Laws 2003, c. 49, § 34, eff. May 5, 2003; Laws 2004, c. 89, § 7, eff. July 1, 2004; Laws 2009, c. 278, § 1, eff. May 12, 2009; Laws 2010, c. 93, § 3, eff. May 11, 2010; this definition is now found in §75-1-201(5).

<sup>10</sup> Amended by Laws 1998, c. 39, § 9, eff. July 1, 1998; Laws 1999, c. 142, § 1, eff. May 3, 1999; Laws 2003, c. 49, § 34, eff. May 5, 2003; Laws 2004, c. 89, § 7, eff. July 1, 2004; Laws 2009, c. 278, § 1, eff. May 12, 2009; Laws 2010, c. 93, § 3, eff. May 11, 2010; this definition is now found in §75-1-201(33).

and the undisputed facts further established:

3. Mr. Nakai sent thank you notes following Father Hannifin's funeral that stated: "Thank you for all the kindnesses, thoughts and prayers expressed for my foster father William Hannifin . . ." T.Exh. 103.
4. Mr. Nakai described himself in his initial petition to the Court as Father Hannifin's "foster son." T.Exh. 101 at 2, ¶5; R.2 ¶5.
5. In 2007, Father Hannifin prepared and signed a beneficiary form identifying Mr. Nakai as his "foster son." T. Exh. 111.

Given these facts and Utah's express exclusion of a foster son from inheriting a decedent's estate, Mr. Nakai should not be considered Father Hannifin's heir.

Moreover, the whole equitable adoption doctrine is inconsistent with the Utah Uniform Probate Code's statement of its purposes:

- (1) This code shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) The underlying purposes and policies of this code are:
  - (a) To simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;  
...
  - (c) To promote a speedy and efficient system for administering the estate of the decedent and making distribution to his successors; . . .

Utah Code Ann. §75-1-102; as enacted in 1975, L. 1975, ch. 150, §2. The equitable adoption doctrine complicates the law and requires factual determinations that cannot be made efficiently and speedily.

**E. Utah Law Recognizes and Enforces Legislation that Effectively Overrules Prior Supreme Court Decisions.**

In two recent decisions regarding trust matters, the Supreme Court held that its prior decision interpreting the common law of trusts had been effectively overruled by a provision of the Utah Uniform Trust Code adopted in 2004. *Patterson v. Patterson*, 2011 UT 68, 266 P.3d 828; *see also Warne v. Warne*, 2012 UT 13, \_\_\_ P.3d \_\_\_ (petition for rehearing denied) (companion decision issued on the same date; petition for rehearing denied on March 1, 2012; not yet released for official publication).

In *Patterson*, the trial court had invalidated an attempted amendment to a private trust based on the Supreme Court's decision in *Banks v. Means*, 2002 UT 65, 52 P.3d 1190. *Id.* at ¶1. In *Banks*, applying the common law, the Court found that the attempted amendment there was void since it failed to follow the specific directions for amending the trust set forth in the trust agreement. *Id.* at ¶25. In *Patterson*, the appellant argued that *Banks*' requirement of strict compliance with the trust provisions permitting amendments had been effectively overruled by the adoption of Section 75-7-605 of the Utah Uniform Trust Code in 2004. Utah Code Ann. §75-7-605(3) 2004 (authorizing an amendment based on "substantial compliance" with the provisions of the trust). The Supreme Court agreed with the Appellant's argument that the adoption of the Utah Uniform Trust Code effectively overruled *Banks v. Means*. *Id.* at ¶22. Thus, "It is axiomatic that our precedent must yield when it conflicts with a validly enacted statute." *Id.* at ¶37.



In this regard, the Court in *Williams' Estates* cited three decisions in support of its adoption of the common law equitable adoption doctrine. Each of these cases has been effectively overruled by the enactment of the Utah Uniform Probate Code.<sup>11</sup> In *Williams' Estates*, the Court stated:

Although we have never decided this exact question we have required specific performance of contracts in contemplation of death, where a deceased person has failed to devise, transfer or convey certain property in accordance with an agreement for services which has been fully performed by the other party.

*Williams' Estates*, 10 Utah 2d at 85, 348 P.2d at 684. In each case cited in *Williams' Estates* (see fn. 11 below), the Supreme Court considered the enforcement of **oral contracts** to include a person as a devisee of the decedent's will. Those decisions were effectively overruled by the enactment of Section 75-2-701 in 1975. Utah Code Ann. §75-2-701; enacted L. 1975, ch. 150, §3 (requiring contracts to make a will to be in writing); repealed and reenacted as §75-2-514; L. 1998, ch. 39, §57 (substantially identical).

Not only does Section 75-2-701 reflect a legislative decision to choose efficiency over equity and justice, it also stands in stark contrast to the equitable adoption doctrine. While Mr. Nakai could not seek to enforce any oral promise by Father Nakai to leave him all or part of his estate, Mr. Nakai is able to enforce an oral promise that Father Hannifin

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<sup>11</sup> *Randall v. Tracy Collins Trust Co.*, 6 Utah 2d 18, 305 P.2d 480 (1956); *Van Natta v. Heywood*, 57 Utah 376, 195 P. 192 (1920); *Brinton v. Van Cott*, 8 Utah 480, 33 P. 218 (1893).

made to adopt him. While a decedent may make an oral promise to devise property to a person shortly before death and in front of witnesses, the oral promise to adopt is most often made many, many years earlier (here fifty-four years earlier) and no witness is available to testify to a present recollection of what was specifically said. It is illogical to approve the oral promise to adopt while denying the oral promise to devise. Furthermore, while Section 75-2-701 fulfills the legislative purpose of “promot[ing] a speedy and efficient system for administering the estate of the decedent and making distribution to his successors,” the court approved equitable adoption doctrine does not. Utah Code Ann. §75-1-102(2)(c).

In conclusion, the enactment of the Utah Uniform Probate Code in 1975 necessarily and effectively overruled *In re Williams’ Estates*, and Mr. Hill asks the Court to so rule.

### **III. THE ENACTMENT OF NEW ADOPTION LAWS AND A SUBSEQUENT SUPREME COURT DECISION REGARDING ADOPTION LAWS EFFECTIVELY OVERRULED THE EQUITABLE ADOPTION DOCTRINE.**

#### **A. New Adoption Laws Have Effectively Overruled *Williams’ Estates*.**

The equitable adoption doctrine is premised on the ability of the trial court to grant specific performance of a fully performed contract. *Williams Estates’*, 10 Utah 2d at 85, 348 P.2d at 684-85. Utah’s adoption statutes have abolished the equitable adoption doctrine by making any such agreement invalid. Section 78B-6-138 does so by setting the date a parent is relieved of parental rights and duties as the earlier of the date the court

orders those rights terminated or the date the court enters a legal adoption order. Utah Code Ann. §78B-6-138 (2008); *see also* §78B-6-103(2) (2010) (defining “adoption” as a court order); §78B-6-202(1) (2008) (“It is the intent . . . of the Legislature that in every adoption **the best interest of the child** should govern and be of foremost concern **in the court’s determination.**” Emphasis added).

Because the equitable adoption doctrine’s foundation is based on the ability of a court to grant specific performance of the adoption contract, the enactment of these statutes have eliminated the contract, the remedy, and thus the doctrine. *1-800 Contacts, Inc. v. Weigner*, 2005 UT App 523, ¶¶ 4-10, 127 P.3d 1241.

**B. The Supreme Court Has Effectively Overruled the Equitable Adoption Doctrine.**

The Supreme Court overruled the equitable adoption doctrine when it ruled as a matter of Utah common law that parents could not relinquish their parental rights and responsibilities by agreement. In *Hills v. Hills*, 638 P.2d 516 (1981), a divorcing couple stipulated that the husband would relinquish all parental rights and would be relieved of all parental duties. *Id.* at 516. The trial court included the parties’ agreement **in its Divorce Decree**. One month after the divorce was final, the mother brought an action to modify the decree to require the father to provide child support. The trial court modified the decree, and the father appealed.

The Supreme Court affirmed. It stated:

There is no merit to the contention that the parents' **stipulation** effectively terminated the father's parental obligations. **The right to support** from the parents belongs to the minor children and **is not subject to being bartered away, extinguished, estopped or in any way defeated by the agreement or conduct of the parents.** *Gulley v. Gulley*, Utah, 570 P.2d 127 (1977); *Baggs v. Anderson*, Utah, 528 P.2d 141 (1974); *French v. Johnson*, 16 Utah 2d 360, 401 P.2d 315 (1965). We cannot see how the incorporation of such a stipulation in a decree of the district court or the juvenile court gives it any greater effect. If parental rights and obligations are to be terminated, **this must be done by court decree in the manner prescribed by law.**

*Id.* at 517 (emphasis added). *See also Fauver v. Hansen*, 803 P.2d 1275, 1278 (Utah App. 1990) ("We emphasize that termination of parental rights and obligations is a serious procedure, which **must include a hearing where the court can consider the best interests of the child.**") (emphasis added).

These cases preclude a parent from promising to relinquish or from attempting to relinquish parental rights by agreement. For the remedy of specific performance to be used, there must be a valid contract that is being enforced. *1-800 Contacts, Inc. v. Weigner*, 2005 UT App 523, ¶¶ 4-10, 127 P.3d 1241. By preventing the contract from being valid in the first instance, these cases effectively preclude the remedy necessary to grant the relief Mr. Nakai seeks.

#### **IV. EVEN WERE THE DOCTRINE STILL PART OF UTAH LAW, MR. NAKAI HAS FAILED TO PROVE HE IS ENTITLED TO THE USE OF THE DOCTRINE.**

##### **A. Mr. Nakai Failed to Prove the Specific, Foundational Facts Required by *In re Williams' Estates*.**

Pursuant to *Williams' Estates*, Mr. Nakai was required to prove:

1. There was an agreement between the putative adoptee's parents (Hilda Nakai and Tony Begay) and the adopting parent (Father Hannifin);
2. Hilda and Tony promised to relinquish all of their rights and privileges as parents;
3. Father Hannifin promised to adopt the child;
4. Father Hannifin promised to care and provide for the child the same as though Mr. Nakai were his own child; and
5. Hilda, Tony, and Father Hannifin fully performed the agreement except that the formal, legal adoption never occurred.

*Williams' Estate, supra*, 10 Utah 2d at 85, 348 P.2d at 684-85. Absent proof of each of these elements, the doctrine of equitable adoption is not available as a remedy.

**B. Neither Mr. Nakai's Mother Nor His Grandfather Promised to Relinquish Parental Rights, and No Parental Rights Were Relinquished.**

As a legal conclusion, the trial court held that Father Hannifin, Mr. Nakai's mother, and Mr. Nakai's paternal grandfather reached an agreement to adopt during their 1958 conversation based on events that occurred after the alleged conversation. Findings, R. 576, ¶27;<sup>12</sup> R.571-72, ¶19. It did so based on *dicta* in *Williams' Estates*. After stating

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<sup>12</sup> Although included in the trial court's findings, the determination of whether an agreement existed is a conclusion of law. *O'Hara v. Hall*, 628 P.2d 1289, 1290-91 (Utah 1981) (existence of a contract is a conclusion of law unless there is a dispute as to a material fact). Here, Mr. Hill accepts the trial court's findings of fact. In addition, the Supreme Court is not bound by the trial court's characterization of a finding or conclusion. *50 West Broadway Assocs. v. Redevelopment Agency*, 784 P.2d 1162, 1171 (Utah 1989).

the adoptee's burden was clear and convincing evidence, the Court stated: "Some allowance, however, should be made for the fact that all the parties to such contract are dead, and the child was an infant when the contract was made." R. 575; ¶26; *Williams' Estates*, 10 Utah 2d at 85, 348 P.2d at 684-85.

The trial court erred in applying this approach to the current case. In this case, the trial court had direct evidence of what occurred at the time of the alleged agreement, and that direct, undisputed evidence, and the trial court's finding of fact with regard to that evidence, bar the legal conclusion that there was an adoption contract.

Father Hannifin did not promise to adopt Mr. Nakai. He promised to raise him as his own child. Findings, R.568-69, ¶¶11. This promise would support the legal conclusion that he agreed to treat Mr. Nakai as his foster son, particularly where the parents do not promise to relinquish their rights. Findings, R.575, ¶25.<sup>13</sup> In order to establish an equitable adoption, each party must make the required promises and then fully perform them. *Williams' Estates*, 10 Utah 2d at 85, 348 P.2d at 684. Finding that Mr. Nakai's mother and grandfather did not promise to relinquish their parental rights eliminates the consideration that would support a legal conclusion that there was an adoption agreement. *General Insurance Co. v. Carnicero Dynasty Corp.*, 545 P.2d 502,

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<sup>13</sup> In Missouri, when a claimed equitable adoption is based circumstantial evidence, "then the evidence must be consistent only with the existence of the equitable adoption and inconsistent with any other reasonable hypothesis leaving nothing to conjecture." *Bellinger v. Boatmen's Nat. Bank of St. Louis*, 779 S.W.2d 647, 650 (Mo. App. 1989).

504 (Utah 1976) (“Where consideration is lacking, there can be no contract.”) Without a valid agreement, there is no foundation for applying the remedy of specific performance.

*1-800 Contacts, Inc. v. Weigner*, 2005 UT App 523, ¶¶8-9, 127 P.3d 1241.

Instead of ruling against Mr. Nakai, the trial court justified its decision in his favor by citing facts the trial court believed established “that for all practical purposes a relinquishment of parental rights occurred.” Findings, R. ¶26.<sup>14</sup> That the trial court’s findings support this conclusion is questionable. It pointed to these facts:

1. Hilda and her father asked Father Hannifin to raise Mr. Nakai as his own child and then gave Father Hannifin custody and control of Mr. Nakai several months later.
2. Neither Hilda, Mr. Nakai’s father, nor Hilda’s father thereafter ever again sought to exercise physical custody or control over Mr. Nakai.
3. Mr. Nakai never lived with his parents for any extended period. After the death of his aunt, he attended boarding schools.
4. Because of their impoverished conditions, Mr. Nakai’s parents provided him with virtually no support after he left the reservation. The trial court noted that the financial condition on the reservation appeared to be the primary reason for asking Father Hannifin to raise Mr. Nakai.

Findings, R. 575, ¶14, (a) through (e). None of these facts point exclusively to an agreement to adopt. They apply with equal or greater force to Father Hannifin having promised to act as a foster parent, who then fulfilled that role.

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<sup>14</sup> This “finding” was in part a legal conclusion. See footnote 12, *supra*.

The trial court found a relinquishment of all practical rights notwithstanding Mr. Nakai never severed his relationship with his parents. He returned to see them each summer. Findings, R. 571, ¶18. In his initial application for probate, Mr. Nakai attached two pictures of his father, Tony, interacting with Father Hannifin in 2005. R.17.

Whether or not these facts constitute a relinquishment of parental rights “for all practical purposes,” the trial court did not find a promise to relinquish parental rights as required by *Williams’ Estates*. Nor could it have done so in light of its finding that “Navajo parents never voluntarily relinquish their rights to their children when [an adoption] does occur.” Findings, R.575, ¶25.<sup>15</sup>

**C. Mr. Nakai’s Father Did Not Promise to Relinquish Parental Rights, and No Parental Rights were Relinquished.**

Even if there was a promise to relinquish rights for all practical purposes followed by a fulfillment of that promise by Mr. Nakai’s mother and grandfather, the equitable adoption doctrine requires a promise by the natural **parents** to relinquish all parental rights. The trial court limited its finding of a relinquishment of all practical rights to Mr. Nakai’s mother and grandfather. Findings, R.576, ¶27; *see also*, R.568, ¶10. Rather than denying Mr. Nakai’s claim, the trial court simply did not require any promise from Tony

---

<sup>15</sup> Furthermore, a Utah court, applying Utah law, should apply the equitable adoption doctrine consistently regardless of the customs of the parties. The trial court granted a privileged status to Navajos that would not be available to non-Navajos.



nor any relinquishment, practical or otherwise. The trial court excused any proof regarding Tony's promises or actions because:

1. Tony never participated actively in his son's life;
2. Navajo custom follows a matriarchal order;<sup>16</sup>
3. Although present during the 1958 conversation, Tony made no effort to participate in the conversation;
4. Tony never objected to Mr. Nakai living with Father Hannifin; and
5. There was no evidence Tony expected to be involved in the decision.

Findings, R.576, ¶30.

At best, these negative findings regarding Tony's conduct would constitute acquiescence. *Smith v. Security Investment Ltd.*, 2009 UT App 355, ¶5, 223 P.3d 451. Silence cannot constitute consent absent an affirmative duty to speak, any more than silence can constitute a waiver of parental rights or be a basis for estoppel of a father's parental rights absent that duty. *See generally Soter's, Inc. v. Deseret Federal Sav. & Loan Ass'n*, 857 P.2d 935, 939-40 (Utah 1993). Where Mr. Nakai's father did not participate in the initial conversation (R.568, ¶10), never promised to relinquish his parental rights (R.576, ¶27), continued to see his son each summer (R.571, ¶18), and maintained a relationship with his son thereafter (R. 17), there was no duty to speak.

---

<sup>16</sup> Logically, this would mean that a mother's consent to the adoption of a child would be unnecessary if the child were raised in a patriarchal order.

In essence, the trial court entered findings in support of an unstated legal conclusion that Navajo fathers are not required to consent to the adoption of their children in these circumstances. Even if that is true as a matter of Navajo custom or law, Utah law expressly required a father's consent to an adoption in 1958.

Once a child is adopted its ties to its natural parents, unlike in cases involving mere custody, is permanently severed. Such a result, without the consent of the legitimate, natural parents, has not been favored by courts, it being considered that the natural relationship between parents and child is of an enduring and sacred character. Adoption proceedings are statutory and based on consent.

*Deveraux' Adoption v. Brown*, 2 Utah 2d 30, 32, 268 P.2d 995, 996-997 (Utah 1954).

And in order to qualify for an equitable adoption, the father must promise to relinquish all parental rights, and then fulfill that promise. *Williams' Estate, supra*, 10 Utah 2d at 85, 348 P.2d at 684-85. That did not occur here.

**D. The Trial Court Was Duty Bound to Follow the Williams' Court's Holding; it Was Not Entitled to Modify It.**

The trial court recognized that it was not following *Williams' Estates* when it stated: "The Court does not require proof that a formal relinquishment occur, otherwise there would likely be a formal adoption." This justification for modifying the requirements of *Williams' Estates* cannot withstand analysis. The equitable adoption doctrine exists if and only if there is no formal adoption. Although recognizing the equitable adoption doctrine as a "narrow" exception to the statutory laws of intestacy,

R.578, the trial court refused to apply the requirements set forth in *Williams' Estates* so that the doctrine could be used in favor of Mr. Nakai.

In doing so, the trial court violated the doctrine of *stare decisis*.

[T]he doctrine of stare decisis, as it applies to a court of appeals, has two facets. Vertical stare decisis, the first of these two facets, **compels a court to follow strictly the decisions rendered by a higher court**. Under this mandate, lower courts are obliged to follow the holding of a higher court, as well as any “judicial dicta” that may be announced by the higher court.

*State v. Menzies*, 889 P.2d 393, 399 fn 3. (Utah 1994) (emphasis added).

Mr. Hill asks the Court to apply the equitable adoption doctrine as set forth in *Williams' Estates* to the facts of this case and reverse the trial court’s conclusion that Mr. Nakai qualified as an equitably adopted child.

**V. THE SUPREME COURT SHOULD REMAND FOR FURTHER PROCEEDINGS REGARDING THE TRIAL COURT’S AWARD OF ATTORNEY FEES TO MR. NAKAI’S ATTORNEY.**

Initially, the trial court approved Mr. Nakai’s applications for attorney fees on the basis that he had won the case. R.579 (“Based on the result, and Mr. Nakai’s status in this case, a fee award is warranted.”) Thereafter, it entered its ruling and order approving the fees based on specific findings of reasonableness and pursuant to Utah Code Ann. §75-3-718. R.582-85. While this expanded the basis of the award, it remained firmly rooted in Mr. Nakai’s right to serve as personal representative. Under Section 75-3-718, “[a] personal representative and an attorney are entitled to reasonable compensation for their services.” §75-3-718(1).

If the Supreme Court reverses the trial court's ruling regarding Mr. Nakai's rights in this matter, Mr. Hill requests it remand for further proceedings the issue of attorney fees. One of the specific issues Mr. Hill raised below was that Mr. Nakai alleged in his Application for Informal Probate that he was the decedent's foster son. R.518-21. As such, he was not entitled to appointment. Utah Code Ann. §75-3-203(1) (1983). When his appointment was challenged by Reverend Canon Caryl Marsh, the trial court considered his appointment based on whether there had been a showing of irreparable harm. R.196. Finding there was no irreparable harm, the trial court continued Mr. Nakai's appointment "for the sole purpose of gathering assets and paying outstanding bills of the estate." R.197, ¶1. Neither Mr. Hill acting for the collateral heirs nor the collateral heirs themselves were parties to that proceeding. It is only because the trial court allowed Mr. Nakai to continue to serve as personal representative, **prior to adjudicating his rights as an equitably adopted son**, that Mr. Nakai was able to claim attorney fees in the first place. R.393-405 (first application for attorney fees filed March 4, 2011).

Therefore, if there is a reversal, the trial court should at least reconsider its ruling on attorney fees in light of the fact that Mr. Nakai had no claim to act as the personal representative either initially or eventually. Since the trial court awarded attorney fees based on Mr. Nakai's status as a personal representative, the trial court should reconsider

its ruling in light of the Supreme Court's reversal and the fact Mr. Nakai was never entitled to act as a personal representative.

### **CONCLUSION**


Based on these arguments, the Supreme Court should reverse the trial court, order it to enter judgment in favor of Max Hill as special administrator of the estate on behalf of the collateral heirs, order it to appoint Max Hill general personal representative of the estate, remand for reconsideration of the attorney fee award, and direct it otherwise to administer the estate pursuant to provisions of the Utah Uniform Probate Code.

### **CERTIFICATE OF COMPLIANCE WITH RULE 24(a)(1)**

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because it contains 9,682 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).
2. This Brief complies with the typeface requirements of Utah R. App. P.27(b) because it has been prepared in proportionally spaced Times New Roman typeface, font size 13, using WordPerfect X5.
3. The PDF version of the Brief was converted from WordPerfect X5 by its conversion engine.

Dated this 12 day of March, 2012.

**CHARLES M. BENNETT, PLLC**

A handwritten signature in black ink, appearing to read "C. M. Bennett", written over a horizontal line.

Charles M. Bennett, Attorneys for Max Hill as  
Special Administrator of the Estate

## CERTIFICATE OF SERVICE

I hereby certify that on the 1<sup>st</sup> day of March, 2012, I mail two copies of the

**APPELLANT'S BRIEF** to:

Donald J. Winder  
Winder & Counsel, PC  
460 South 400 East  
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "Cheryl Bennett", is written over a horizontal line.

## **ADDENDUM**

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<b>Tab</b>	<b>Description</b>
1	FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING AND ORDER, filed July 27, 2011.
2	RULING AND ORDER, Attorney Fees, filed August 1, 2012



## Tab 1

FILED DISTRICT COURT  
Third Judicial District

JUL 27 2011

By \_\_\_\_\_ SALT LAKE COUNTY  
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
-----

IN THE MATTER OF THE ESTATE OF	:	FINDINGS OF FACT,
WILLIAM J. HANNIFIN,	:	CONCLUSIONS OF LAW
	:	RULING AND ORDER
Deceased.	:	
	:	CASE NO. 103900808
	:	Judge Robert K. Hilder

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The Petition of Willis Nakai, which seeks to establish that he is the equitably adopted son of William Hannifin and therefore an heir to Mr. Hannifin's estate, was tried to the Court on July 21, 2011. Donald J. Winder represented Willis Nakai; and Charles M. Bennett represented Max Hill, Special Administrator of the Estate. After considering the testimony of the several witnesses, the exhibits, trial briefs, argument of counsel and being fully advised in the applicable law, the Court now enters the following:

FINDINGS OF FACT

1 The deceased, William J. Hannifin, was born August 3, 1930. Mr. Hannifin, who became a Deacon in the Episcopal Church in 1954 and a Priest in 1955, lived his entire adult life serving his church. He was never married and had no biological children.

2 Willis Nakai, born May 13, 1944, is a member of the Navajo Tribe.

3 Mr. Hannifin spent much of his life in communication with and often in proximity, to Native American people, including many Navajo people. Although there is some confusion in precise dates, it appears that Mr. Hannifin (who was then known as "Father Hannifin") first met Mr. Nakai around 1956, when he was 12-years-old and enrolled in the Intermountain Indian School in Brigham City, Utah.

4 Mr. Nakai was born to Hilda Handy Nakai and Tony Nakai Begay, who remained married until Hilda's death.

5 For reasons that were neither clear nor particularly relevant to this matter, Mr. Nakai was raised from infancy by his childless aunt, Bessie Begay, near Aneth, Utah. Unfortunately, Ms. Begay was killed by lightning when Mr. Nakai was about 5 or 6-years-old. It is probably true that, thereafter, Mr. Nakai was deemed to be in the custody of his mother and maternal grandparents, but in fact, after the death of his aunt, Mr. Nakai was sent to a series of boarding schools, including the Intermountain Indian School.

6 In fact, Mr. Nakai spent very little time actually residing with either his parents or his grandparents.

7 Through his work in Brigham City, Father Hannifin became involved with Navajo children and in the summer of 1958, he drove to the Navajo Reservation near Aneth, Utah, to transport several children

to attend Camp Tuttle, a youth camp sponsored by the Episcopal Church. Mr. Nakai was among these children.

8 At the time of this visit in 1958, Mr. Nakai was living with his mother and/or maternal grandparents. Mr. Nakai's father was not very involved in the family. He worked for the railroad and was frequently away from home.

9 At the time of the 1958 visit, despite difficulties understanding their respective primary languages, a conversation occurred between Father Hannifin, Mr. Nakai's mother and his maternal grandfather. Mr. Nakai recalls being present but he does not recall the conversation. Mr. Nakai knows the family account of what happened from family stories, which Father Hannifin, his mother and his grandfather recited to him over the years.

10 There is no evidence that Mr. Begay was a party to any of the 1958 discussions, which formed the alleged contractual basis for Mr. Nakai's equitable adoption claim.

11 The gist of the conversation, as shown by the evidence and as passed down orally over the decades, is that Mr. Nakai's mother asked Father Hannifin to take her then 14-year-old son and raise him as his own child. The evidence is uncontradicted that Father Hannifin responded "No, unless you take me as one of your children, as one of

your relatives, that's the only way I'm going to take your son."

Family lore recounts that the grandfather then jokingly offered "to sell him to [Father Hannifin] for fifty cents."

12 The joke notwithstanding, the Court finds that there is clear and convincing evidence that the oft-restated essentials of this 1958 conversation, along with the substantial evidence of performance of the agreement, constituted an agreement for Father Hannifin to step in and raise Mr. Nakai as his own son.

13 For reasons that did not become clear at trial and despite the fact that Mr. Nakai had apparently attended the Intermountain Indian School for one or two prior years, following the events of the summer of 1958, Mr. Nakai attended school near the Reservation and did not immediately transition to the custody of Father Hannifin.

14 At some point during the school year, Mr. Nakai returned to the Intermountain Indian School. Part of the reason was apparently that there was a law in effect that if Native American parents did not ensure the child was in school, they were subject to incarceration. In any event, Mr. Nakai moved to the Intermountain Indian School and Father Hannifin commenced his lifelong involvement with him in what the Court finds was a clearly a parental role. The only question to be determined herein is whether the role was as adoptive parent, with

full rights of parentage, rather than as a foster parent, *in loco parentis* or another quasi parent-child relationship.

15 It could be said that the relationship evolved because Mr. Nakai was initially a boarding student at the school, spending only his weekends and holidays in Father Hannifin's home. That of course is not an unusual arrangement for students in boarding school. In fact, it is not unusual for boarding school students to visit with their parents only once or twice per school term, or even just for holidays. In any event, as the years passed and as Mr. Nakai developed some health problems, he moved into Father Hannifin's home, which became his full-time home during the remainder of his secondary education and throughout his college education, when he commuted to Utah State University.

16 Commencing with Mr. Nakai's return to Brigham City after the summer of 1958, Father Hannifin consistently provided emotional and material support as a father would for a son. The Court finds that Mr. Nakai's school expenses were paid through a Bureau of Indian Affairs program, but throughout all the remaining years of Mr. Nakai's minority and even subsequently, Father Hannifin provided an allowance, food, clothing, medical care as necessary and transportation. Father Hannifin also taught Mr. Nakai to drive, monitored his schoolwork,

made all decisions regarding activities in which Mr. Nakai participated and generally provided for his health and welfare.

17 From the time that Mr. Nakai returned to the Intermountain Indian School and commenced his life with Father Hannifin, he referred to Father Hannifin as his father, or "dad" and Father Hannifin referred to Mr. Nakai as his son.

18 Also from the time Mr. Nakai returned to the school, he never again lived with either his parents or grandparents. The evidence is unrefuted that Mr. Nakai visited the Reservation and his biological family no more than once each year and visits lasted a few days to at most two weeks, but were typically for a week.

19 The evidence is clear and convincing that at all times following Mr. Nakai's return to Brigham City after the summer of 1958, both he and Father Hannifin held themselves out to the community and to family as father and son. Over the many following years, Father Hannifin assumed the role of and actively participated as a father to Mr. Nakai and later as a grandfather to Mr. Nakai's children. The record is replete with evidence that Father Hannifin was involved with Mr. Nakai and his family as a respected father, grandfather and even great grandfather. Mr. Nakai continued to seek counsel from Father Hannifin as a parent and Father Hannifin gave that counsel over the

decades.

20 The Court recognizes that there is a lack of evidence of formal recognition of the father-son relationship. There is no adoption decree, for example, and the obituary of Father Hannifin refers to Mr. Nakai Nakai as a "foster son" and also recognizes a second foster son. The other son was neither a party to this action nor represented at trial, and the Court heard very little evidence regarding his relationship with Father Hannifin. Under the circumstances, the Court finds that the absence of evidence supporting a father-son relationship with another "child" is not determinative of the relationship between Mr. Nakai and Father Hannifin. Nor is there evidence to support any comparison between these relationships that bears on the Court's findings.

21 The Court can and does determine that Mr. Nakai and Father Hannifin saw themselves as living in a father and son relationship and Father Hannifin assumed all of the duties and responsibilities of a parent. The thornier question is whether the relationship that practically demonstrated a father-son bond was sufficient to support a determination of an adoptive relationship that satisfies the equitable adoption doctrine.

22 There is substantial case law on equitable adoption in other



states, but all parties agree the primary authority for Utah's equitable adoption doctrine is the case of In re: Estate of Williams, 348 P.2d 683 (Utah 1960).

23 The foregoing Findings of Fact demonstrate the Court's determination that Father Hannifin, as putative adoptive father, agreed to adopt Mr. Nakai and to care and provide for him the same as though he were Father Hannifin's child. A remaining issue of full performance of the agreement by all parties, is also established in the foregoing findings as they relate to Father Hannifin's actions over many years.

24 The facts that bear on whether the parents agreed to relinquish all their rights to the child to Father Hannifin, are:

(a) Mr. Nakai's biological mother and maternal grandfather agreed to give custody and control of Mr. Nakai to Father Hannifin and asked him to raise Mr. Nakai as his own child.

(b) Mr. Nakai's biological mother and maternal grandfather sent Mr. Nakai into Father Hannifin's permanent care just a few months after making the agreement to adopt.

(c) Neither Mr. Nakai's biological mother, biological father, nor his maternal grandparents, ever again sought to exercise physical custody or control over Mr. Nakai. No effort was ever made to

return Mr. Nakai to their custody and control. This is true even though Mr. Nakai's biological parents remained married until his mother's death, when Mr. Nakai was a mature adult.

(d) Without imputing any lack of commitment to Mr. Nakai by his biological parents, the Court notes the un rebutted fact that except for a very short time in his life, Mr. Nakai never lived with his biological parents for any extended period. In fact, from his earliest infancy he was with his aunt. Following her death, he was sent to boarding school. He was nominally in the custody of his mother and father and perhaps his maternal grandparents, but for most of his life, except for a short time after the summer of 1958, Mr. Nakai was not in the custody of his biological family, except for the early years with his aunt.

(e) After physical relinquishment of custody to Father Hannifin, Mr. Nakai's biological parents provided him with virtually no support. In fact, the only evidence of any material support was Mr. Nakai's testimony that his family gave him \$.25 or \$.50 when he left home, which was meant to last a year. Again, this finding of fact is not intended to suggest any lack of care or concern by the biological parents. The testimony also establishes that the Nakai family were of very limited financial means. In fact, it appears that one of the

primary reasons they asked Father Hannifin to take their son was a lack of financial ability to raise him.

25 The Court has struggled with the legal requirement that Mr. Nakai's biological parents must agree to relinquish all their rights to the child to establish an equitable adoption, and the fact that there was no formal relinquishment here. However, the evidence shows that in the Navajo tradition, adoption is not uncommon within Navajo families, but Navajo parents never voluntarily relinquish their rights to their children when it does occur.

26 The Court further finds that in the context of a petition to establish an equitable adoption, the agreement to give a child to another, accomplished by the physical act of doing so along with the parents' forbearance from ever seeking to regain custody, shows, by clear and convincing evidence, that for all practical purposes a relinquishment of parental rights occurred. The Court finds this to be particularly true when there must be clear and convincing evidence of a contract to adopt, but "some allowance, however, should be made for the fact that all the parties to such contract are dead, and the child was an infant when the contract was made." Williams, at 684-85. The Court does not require proof that a formal relinquishment occur, otherwise there would likely be a formal adoption.

27 It is the Court's finding that Mr. Nakai's biological mother and maternal grandfather agreed to relinquish all practical parental rights to Mr. Nakai, but they did so in the context of an ancient tradition that caused them to not even consider relinquishment as it is more formally defined in statutory adoption law. The events also occurred sixty years before the death of Father Hannifin and there was no evidence or even a suggestion that he ever reneged his agreement.

28 The Court finds the clear and convincing evidence shows a relinquishment occurred, under these circumstances.

29 Father Hannifin and Mr. Nakai both fully performed their parts of the agreement to be father and son.

30 The Court also recognizes that nothing herein shows an affirmative act to relinquish all of Tony Begay's rights to Mr. Nakai. In fact, the record shows Tony Begay never participated actively in his son's life and although he was present on the property at the time the discussion occurred, he made no effort to take part and he never objected to the placement of Mr. Nakai was Father Hannifin. The evidence supports the view that Tony Begay's conduct was consistent with the Navajo custom of a matriarchal structure, and determination of clan structure through maternal bloodlines. No evidence suggests Mr. Begay expected to be more active in the placement decision.

31 Based on the evidence, the Court finds that although there are numerous ways to define a parent-child relationship, which definitions are normally at issue when the custody of the child is of concern, not all of these arrangements are true parent-child relationships. However, the clear and convincing evidence shows the sixty-year relationship and bonds between Father Hannifin and Mr. Nakai were consistent in all respects with the formation of and performance of an adoption contract by all parties thereto.

Based on the foregoing Findings of Fact, the Court now makes and enters its following:

#### CONCLUSIONS OF LAW

Equitable adoption has a narrow place in law and is not a legal doctrine that is universally-recognized nor applied. The Utah Supreme Court has however, indicated support for applying the doctrine under Utah law. See Williams, supra. In Williams, the Court noted:

It is generally recognized that where a child's parents agree with the adoptive parents to relinquish all their rights to the child in consideration of the adoptive parents' agreement to adopt such child, and to care and provide for it the same as though it were their own child, and such agreement is fully performed by all parties connected with such contract except there is no actual adoption, the courts will decree specific performance of such contract and thereby award to the child the same distributive share of the adoptive parents' estate as it would have been entitled to had the child actually been adopted as agreed.

Id. 684 (citations omitted). The Williams Court also recognized that "[a] contract to adopt the [child] . . . may be proved by circumstantial evidence, but such evidence must be clear and convincing. Some allowance, however, should be made for the fact that all the parties to such contract are dead, and the child was an infant when the contract was made. Id. 684-85.

Based on the language of Williams, the Court concludes that the doctrine of equitable adoption can be applied under narrow circumstances in Utah, where the clear and convincing evidence shows an agreement to adopt and performance thereof.

The Court concludes that based on the clear and convincing evidence set forth in the trial of this matter, there was an agreement that Father Hannifin would adopt Mr. Nakai as his son and Mr. Nakai's biological family agreed to relinquish all rights to Mr. Nakai in return. That agreement was never rescinded by Mr. Nakai's biological parents or family.

The evidence supporting performance of the parent-child relationship between Mr. Hannifin and Mr. Nakai is abundant. That evidence makes manifest that Mr. Hannifin assumed the duties and responsibilities of a parent to Mr. Nakai, who in return was, for all intents and purposes, his son. The only formal element lacking from

this relationship is a legal decree of adoption.

Based on the clear and convincing evidence, the Court concludes, that the contract to adopt was agreed to, performed and that the resulting equitable adoption of Mr. Nakai by Father Hannifin entitles Mr. Nakai to inherit from Father Hannifin's estate as though he were his legally adopted son. Mr. Nakai shall be entitled to the same portion of Mr. Hannifin's estate that he would have been entitled to had he actually been legally adopted as agreed.

#### ATTORNEY FEES

There is only one fee claim before the Court at this time as far as the Court can ascertain. Max Hill, Special Administrator, was represented by Mr. Charles Bennett pursuant to a contingency fee agreement. He was very well represented, but in light of the outcome in Mr. Nakai's favor, no fee is owing to Mr. Bennett.


Mr. Winder reserved the right to submit an updated fee claim for Mr. Nakai. Based on the result, and Mr. Nakai's status in this case, a fee award is warranted. The court will await the updated fee claim, but Mr. Winder is advised that if it is not received by Friday July 29, 2011-and preferably Thursday-the assigned judge may not have a chance to rule on reasonableness before his retirement. Should that occur, the matter will be submitted to the successor court, the

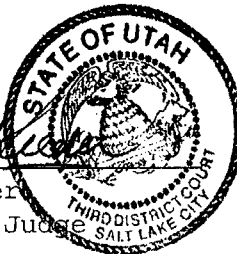
Honorable Royal I. Hansen.

Mr. Winder is invited to submit any additional Order he deems necessary to finalize this matter.

Dated this 27<sup>th</sup> day of July, 2011.

By the Court:

  
Robert K. Hilder  
District Court Judge



roh

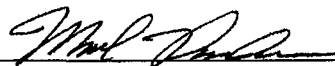


MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law, to the following, this 27<sup>th</sup> day of July, 2011:

Donald J. Winder  
Lance F. Sorenson  
Attorneys for Applicant Willis Nakai  
175 West 200 South, Suite 4000  
P.O. Box 2668  
Salt Lake City, Utah 84110-2668

Charles M. Bennett  
Attorney for Max Hill, Special  
Administrator of the Estate  
257 East 200 South, Suite 800  
Salt Lake City, Utah 84111



## Tab 2

FILED DISTRICT COURT  
Third Judicial District

AUG 01 2011

SALT LAKE COUNTY

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
-----

IN THE MATTER OF THE ESTATE OF  
WILLIAM J. HANNIFIN,

: RULING AND ORDER  
: Attorney Fees

:  
Deceased.

: CASE NO. 103900808  
: Judge Robert K. Hilder  
-----

This Ruling and Order supplements the Court's Findings, etc., issued July 27, 2011. The sole remaining issue is Mr. Nakai's first and supplemental fee applications. Mr. Nakai is not seeking fees incurred in conjunction with the dispute between him and the other heirs. His counsel now informs the Court that Mr. Nakai will not supplement his application through the trial date. Accordingly, the Court may now rule.

The Court must determine reasonableness and necessity of fees. To determine a reasonable award of attorney fees and costs the Court considers the following factors:

1. What legal work was actually performed?
2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?
4. Are there circumstances which require consideration of additional factors, including

those listed in the Code of Professional Responsibility?

Dixie State Bank, 764 P.2d at 990 (citations omitted). The Court briefly addresses all factors in the following narrative.

First, the work done is clearly explained, and nothing in the record before the Court suggests that work was done that was inappropriate in any way. In this rather unusual circumstance—one brought about through no fault of any party to the case—the personal representative's counsel have done what was needed. They have not done more than was necessary. Second, the Winder & Counsel billing rates are eminently fair; even low considering the experience and ability of the lawyers who have worked on this case. Third, the outcome vindicates the personal representative's litigation and administration decisions.

The Court notes that some costs would not necessarily pass muster as taxable costs under Rule 54(d), Utah Rules of Civil Procedure, and case law, but the rule does not control the outcome in this case. The question is whether the costs—or expenses—were necessary and appropriate. The Court finds that they are.

Based on the two applications on file, and the foregoing Ruling, the Court now ORDERS:

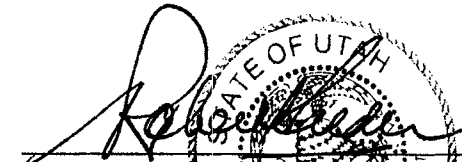
1. That compensation is awarded for professional services

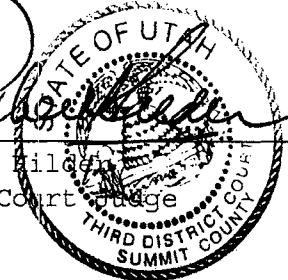
rendered by Winder & Counsel in the total amount of  
\$15,181.00 (fees) and \$1,051.33 (expenses), for a total  
award of \$16,232.33.

2. That the estate be authorized pursuant to Utah Code Ann. §  
75-3-718 to pay said amounts from the funds presently held  
by the Estate.

Dated this 30<sup>th</sup> day of July, 2011.

By the Court:

  
Robert K. Hilger  
District Court Judge

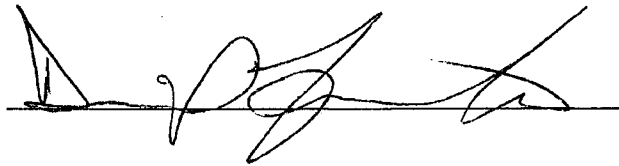


MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the  
foregoing <sup>*Ruling and Order*</sup> ~~Findings of Fact and Conclusions of Law~~, to the following,  
this 1<sup>st</sup> <sup>*August*</sup> ~~July~~, 2011:

Donald J. Winder  
Lance F. Sorenson  
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175 West 200 South, Suite 4000  
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257 East 200 South, Suite 800  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to be "D. Winder", is written over a horizontal line.