

2011

Max Hill v. Willis Nakai : Brief of Appellee

Utah Supreme Court

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Recommended Citation

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IN THE UTAH SUPREME COURT

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

Deceased.

MAX HILL, as Special Administrator of
the Estate,

Appellant,

vs.

WILLIS NAKAI, Individually and as
Personal Representative of the Estate,

Appellee.

Appellate Court Case No. 20111125-SC

On Appeal from the Third District Court,
Case No. 103900808

Honorable Robert J. Hilder (Retired)
Honorable Royal I. Hansen

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Estate

FILED
UTAH APPELLATE COURTS

MAY 16 2012

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and as Personal Representative of the
Estate

LIST OF PARTIES

Willis Nakai, for himself and as Personal Representative of the Estate

Max Hill, for himself and as special administrator for the following nineteen collateral relatives of the deceased:

Diane Brough

Curtis Dean Shields

Mary Ann Steadman

York Shields

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

TABLE OF CONTENTS

LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
STATEMENT OF JURISDICTION	vii
STATEMENT OF THE ISSUES	vii
STATUTORY PROVISIONS	viii
STATEMENT OF THE CASE	x
Proceedings before the Trial Court	xi
Trial Court Decision	xiii
Post Trial Proceedings	xiii
RELEVANT FACTS	xiv
ARGUMENT	1
EQUITABLE ADOPTION REMAINS A VIABLE LEGAL CONCEPT	1
CHANGES TO THE PROBATE CODE IN UTAH HAVE NOT OVERRULED THE EQUITABLE ADOPTION DOCTRINE	3
Appellant's Cited Cases do not Establish an "Effective Overruling" of the Equitable Adoption Doctrine	7
THE TRIAL COURT PROPERLY CONSIDERED AND APPLIED THE FACTS TO THE ACCEPTED LEGAL FRAMEWORK FOR EQUITABLE ADOPTION IN DETERMINING NAKAI WAS EQUITABLY ADOPTED BY FATHER HANNIFIN	8
The Trial Court Correctly Concluded Mr. Nakai's Mother and Grandfather Relinquished Their Rights to Mr. Nakai	10

Verbal and Specific Relinquishment of Parental Rights by Mr. Nakai's Father at the Time of the Agreement Not Required to Establish Equitable Adoption	14
Trial Court Properly Applied the Facts of the Matter to the <i>Williams</i> Requirements	15
THE TRIAL COURT CORRECTLY AWARDED ATTORNEY FEES TO NAKAI PURSUANT TO HIS DESIGNATION AS PERSONAL REPRESENTATIVE AND REMAND IS NOT APPROPRIATE REGARDLESS OF THE COURT'S DETERMINATIONS	16
CONCLUSION	18
CERTIFICATE OF COMPLIANCE WITH RULE 24	19
CERTIFICATE OF SERVICE	20
ADDENDUM	21

TABLE OF AUTHORITIES

Cases

<i>Barlow v. Barlow</i> , 463 P.2d 305 (Col. 1969)	14
<i>Coon v. American Compressed Steel</i> , 133 S.W.3d 75 (Mo. Ct. App. 2004).	4, 5
<i>Ellison v. Thompson</i> , 242 S.E.2d 95 (1978)	11
<i>Goebel v. Salt Lake City Southern R. Co.</i> , 104 P.3d 1185 (Utah 2004).....	2
<i>Hillis v. Hillis</i> , 638 P.2d 516 (Utah 1981)	7
<i>Hughes v. Cafferty</i> , 89 P.3d 148 (Utah 2004)	12, 13
<i>Hulsey v. Carter</i> , 588 S.E.2d 717 (Ga. 2003).....	14
<i>In re Estate of Smith</i> , 326 P.2d 400 (Utah 1958).....	2
<i>In the Matter of the Interest of J.J.S., a Minor</i> , 4 Navajo Rptr. 192, ¶ 40 (Navajo D. Ct. 1983)	13
<i>In re Gary's Estate</i> , 211 P.2d 815 (Ariz. 1949)	12
<i>In re Owens Estate</i> , 91 P. 283 (Utah 1907).....	18
<i>In re Williams Estates</i> , 348 P.2d 683 (Utah 1960).....	1, 3, 6, 8, 9, 10, 11, 14, 15, 16
<i>Johnson v. Johnson</i> , 617 N.W.2d 97 (N.D. 2000).....	4, 6
<i>Laney v. Fairview City</i> , 57 P.3d 1007 (Utah 2002).....	1
<i>Martin v. Scholl</i> , 678 P.2d 274 (Utah 1983).....	7
<i>Matter of Adoption of Holloway</i> , 732 P.2d 962 (Utah 1986)	12
<i>Olseth v. Larson</i> , 158 P.3d 532 (Utah 2007).....	5
<i>Poncho v. Bowdoin</i> , 126 P.3d 1221 (Ct. App. N.M. 2005).....	6
<i>Riding v. Riding</i> , 329 P.2d 878 (Utah 1958)	8

<i>State v. Menzies</i> , 889 P.2d 393 (Utah 1994).....	1, 3
<i>State v. Houston</i> , 263 P.2d 1226 (Utah Ct. App. 2011)	5
<i>Van Natta v. Heywood</i> , 195 P. 192 (Utah 1920)	6

Statutes

NEW MEX. S. ANN. §§ 45-1-101 (1993).....	5
NO. DAK. CIV. C. 30.1-01 (1973)	5
UTAH CODE ANN. § 75-1-102 (1975).....	6
UTAH CODE ANN. § 75-1-201 (2004).....	17
UTAH CODE ANN. § 75-2-103 (1998).....	2
UTAH CODE ANN. § 75-2-114 (1998).....	4
UTAH CODE ANN. § 75-2-514 (1998).....	6
UTAH CODE ANN. § 75-3-718 (1992).....	17
UTAH CODE ANN. § 75-7-407 (2004).....	7
UTAH CODE ANN. § 78A-3-102(3)(j) (2009)	vii
25 U.S.C. § 1901 (1982).....	13

Treatises

122 A.L.R. 5th 205, “Modern Status of Law as to Equitable Adoption or Adoption by Estoppel,” (2004)	4
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STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over this appeal pursuant to UTAH CODE ANN. § 78A-3-102(3)(j) (2009).

STATEMENT OF THE ISSUES

1. Whether a basis exists for this Court to overturn the longstanding precedent of equitable adoption as detailed in *In re Williams Estates*, 348 P.2d 683 (Utah 1960). *Laney v. Fairview City*, 57 P.3d 1007 (Utah 2002).

2. Whether adoption by the state of Utah of the Uniform Probate Code, or other statutory enactments subsequent to the *Williams* decision, are inconsistent with the continued availability of equitable adoption in this jurisdiction.

3. Whether a subsequent decision regarding the right of a child to support from his or her parents, *Hillis v. Hillis*, 638 P.2d 516 (Utah 1981), is inconsistent with the continued applicability of equitable adoption in this jurisdiction.

4. Whether the trial court's unchallenged findings of fact support its determination of the deceased's equitable adoption of Willis Nakai. *In re Williams Estates*, 348 P.2d 683 (Utah 1960).

5. Whether remand is appropriate to revisit the award of attorney fees and costs incurred on behalf of Mr. Nakai as personal representative of the estate.

STATUTORY PROVISIONS

Utah Code Ann. § 75-2-103 Share of Heirs Other Than Surviving Spouse

(1) Any part of the intestate estate not passing to a decedent's surviving spouse under Section 75-2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals who survive the decedent:

(a) to the decedent's descendants per capita at each generation as defined in Subsection 75-2-106(2);

(b) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent if only one survives;

(c) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them per capita at each generation as defined in Subsection 75-2-106(3);

(d) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents:

(i) half to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation as defined in Subsection 75-2-106(3); and

(ii) half to the decedent's maternal grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the descendants of the decedent's maternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation as defined in Subsection 75-2-106(3);

(e) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the maternal but not the paternal side, to the decedent's relatives on the side with one or more surviving members in the same manner as the half described in Subsection (1)(d);

(f) if there is no taker under Subsection (1)(a), (b), (c), (d), or (e), but the decedent has:

(i) one deceased spouse who has one or more descendants who survive the decedent, the estate or part of the estate passes to that spouse's descendants who survive the decedent, the descendants taking per capita at each generation as defined in Subsection 75-2-106(4); or

(ii) more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part of the estate passes to each set of descendants, the descendants taking per capita at each generation as defined in Subsection 75-2-106(4).

(2) For purposes of Subsections (1)(a), (b), (c), (d), (e), and (f) any nonprobate transfer,

as defined in Section 75-2-205, received by an heir is added to the probate estate in calculating the intestate heirs' shares and is conclusively treated as an advancement under Section 75-2-109 to the heir in determining the heir's share.

Utah Code Ann. § 75-2-114 (2) Parent and Child Relationship

(2) An adopted individual is the child of the adopting parent or parents and not of the natural parents, but adoption of a child by the spouse of either natural parent has no effect on:

- (a) the relationship between the child and that natural parent; or
- (b) the right of the child or a descendant of the child to inherit from or through the other natural parent.

Utah Code Ann. § 75-2-514 Contracts Concerning Succession

(1) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after July 1, 1998, may be established only by:

- (a) provisions of a will stating material provisions of the contract;
 - (b) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or
 - (c) a writing signed by the decedent evidencing the contract.
- (2) 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(1) 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.

Utah Code Ann. § 75-1-201 (24) General Definitions

(24) “Interested person” includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, other fiduciaries representing interested persons, a settlor of a trust, if living, or the settlor's legal representative, if any, if the settlor is living but incapacitated. The meaning as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.

25 United States Code § 1901 (5)

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

STATEMENT OF THE CASE

Willis Nakai and the deceased, Father William J. Hannifin, enjoyed a lifelong relationship until Father Hannifin's death in 2009. During his lifetime Father Hannifin ensured that the bulk of his assets, including his Episcopal life insurance policy, bank accounts and investment accounts, transferred to Mr. Nakai upon his death. Father Hannifin was never married and had no natural born children. Mr. Nakai was appointed as personal administrator of the estate and petitioned the court for a determination of heirs. Mr. Nakai maintained that although no formal adoption occurred, he was equitably adopted by Father Hannifin. Max Hill, acting on behalf of himself and nineteen of the collateral heirs of Father Hannifin opposed a determination of an equitable adoption of

Mr. Nakai by Father Hannifin arguing the concept was no longer valid in the state of Utah and, in any event, the facts did not support such a determination.

Proceedings before the Trial Court

On May 26, 2010, Willis Nakai, filed his verified Application for Informal Appointment as Personal Representative of the Estate of William Hannifin. R.1-20. On July 30, 2010, the Court entered an “Order of Appointment of Personal Representative.” R.29-30. Following entry of the Order of Appointment, on August 4, 2010, the Reverend Canon Caryl Marsh, contested Mr. Nakai’s appointment as Personal Representative and filed on August 4, 2010 a pleading entitled “Ex-Parte: Notice of Interested Persons and Heirs; Request for Hearing; Motion for Restraining Order to Prevent Access to Estate Assets; Award of Attorney fees,” claiming to act on behalf of some of Father Hannifin’s “rightful” heirs. R. 35-39. In conjunction with her Ex Parte filing, Canon Marsh also submitted an “Ex Parte Temporary Restraining Order and Order to Vacate Appointment and Letters.” R. 41-44. The trial court modified the proposed language of the Order to requesting the appointment be set aside, ordering “subject to further court determinations in relation to this proceeding, the Appointment of Mr. Willis Nakai as Personal Representative of the Estate of William Hannifin is stayed.” R. 42, ¶ 1. After additional pleadings and hearings, the trial court issued an Order on September 27, 2010 in which it continued Mr. Nakai’s appointment as personal representative for the purpose of gathering assets and paying outstanding bills. R. 196-198.

On October 29, 2010, counsel for Canon Marsh submitted Notice of Withdrawal of Counsel. R. 237. On November 12, 2010, Mr. Nakai filed a Petition for Adjudication of Intestacy and Determination of Heirs. R. 242-303. On November 29, 2010, Canon Marsh notified the trial court by letter she was no longer a party to the case and no longer represented any collateral relatives. R. 304.

On December 28, 2010, Appellant 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; and (iv) for Miscellaneous Relief.” R. 316-343. Appellant sought appointment as the Special Administrator of the estate with the limited duty and power to represent nineteen of Father Hannifin’s collateral relatives to contest Mr. Nakai's claim to the estate. *Id.* The trial court approved the appointment of Appellant as Special Administrator, and approving the fee agreement requested by Appellant and counsel by its order dated January 19, 2011. R. 381-383.

Mr. Nakai filed his “First Application for Attorney Fees and Costs as Personal Representative,” on March 4, 2011 (R. 393-405) to which Appellant filed a Response in Opposition on March 17, 2011. R. 406-414. Mr. Nakai Supplemented his First Application for Attorney Fees and Costs as Personal Representative on July 18, 2011. R. 480-487. The trial court, the Honorable Robert J. Hilder presiding, held a bench trial on July 21, 2011 addressing Mr. Nakai’s claim to inheritance as an equitably adopted child and his application for attorney fees.

Trial Court Decision

On July 27, 2011, the trial court entered its “Findings of Fact, Conclusions of Law, Ruling and Order,” (*hereinafter* “Findings”) R. 566-581. Following the controlling precedent of *In re Williams Estates*, 10 Utah 2d 83, 348 P .2d 683 (Utah 1960), the trial court determined Mr. Nakai was entitled to be treated as Father Hannifin’s equitably adopted son, and as such was the sole beneficiary of Father Hannifin’s estate, and granted him attorney fees (payable from the estate). *Id.* On August 1, 2011, the trial court entered a “Ruling and Order Attorney Fees” further detailing its reasoning for awarding attorney fees to Mr. Nakai. R. 582-85.

Post Trial Proceedings

On August 4, 2011, Appellant filed a “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) with accompanying Memorandum (R. 590-624). The trial court¹ conducted a hearing on the Motion and entered its Order denying Appellant’s Motion on December 15, 2011. R.722-728. Appellant filed his Notice of Appeal on December 29, 2011. R. 729.

¹ At the time the hearing was held on Appellant’s Motion, the Honorable Judge Robert Hilder had retired and the case was reassigned to the Honorable Judge Royal Hansen, who ruled on the Motion.

RELEVANT FACTS

1. William J. Hannifin was born August 3, 1930. He became a deacon in the Episcopal Church in 1954 and a Priest in 1955. He lived his entire life serving his church. Findings R. 566, ¶ 1.
2. Father Hannifin never married and had no biological children. *Id.*
3. Willis Nakai was born May 13, 1944 to Hilda Nakai and Tony Begay. Mr. Nakai is and was a member of the Navajo Tribe. Findings R. 566, ¶ 2; 567, ¶4.
4. Father Hannifin spent much of his life in communication with and often in close proximity to Native American people, including many Navajos. Findings R. 566, ¶ 3.
5. Father Hannifin first met Mr. Nakai around 1956, when Mr. Nakai was 12 years old after Mr. Nakai enrolled in the Intermountain Indian School ("IIS") in Brigham City, Utah. Findings, R.567, ¶3.
6. Mr. Nakai was raised from infancy by his childless aunt until her tragic death when he was five or six years old. Although deemed to be 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 and spent very little time actually residing with either his parents or his grandparents. Findings R. 567, ¶¶ 5-6.
7. In the summer of 1958, Father Hannifin drove to the Navajo Reservation near Aneth, Utah, to transport several children, including Mr. Nakai, to attend Camp

Tuttle, a youth camp near Salt Lake City sponsored by the Episcopal Church. Findings R. 567-568, ¶ 7.

8. At the time of the visit, Mr. Nakai was living with his mother and/or his maternal grandparents. Findings, R. 568, ¶ 8.

9. During this visit 1958, Father Hannifin had a conversation with Mr. Nakai's mother and maternal grandfather regarding Mr. Nakai. Findings, R. 568, ¶ 9.

10. Mr. Nakai's father Tony was not very involved in the family and was working for the railroad and frequently away from home. Mr. Begay was not a party to the 1958 conversation. Findings, R. 568, ¶¶ 8, 10.

11. Although there were difficulties in understanding occasioned by the parties respective primary languages, the gist of the conversation was that Mr. Nakai's mother asked Father Hannifin to take Mr. Nakai, who at the time was fourteen years old, and raise him as his own child. Findings, R. 568, ¶¶ 9, 11.

12. Father Hannifin agreed to take Mr. Nakai on the condition that Mr. Nakai's family "take me as one of your children, as one of your relatives." Findings, R. 568-69, ¶ 11.

13. Mr. Nakai did not immediately transition to the custody of Father Hannifin at the time of the conversation in the summer of 1958, but did move to IIS during the school year and began his lifelong involvement with Father Hannifin, with Father Hannifin assuming a parental role over Mr. Nakai. Findings, R. 569, ¶¶ 13-14.

14. Because Mr. Nakai was attending boarding school at this time, he initially would spend weekends and holidays with Father Hannifin at his home. Findings, R. 570 ¶ 15.

15. After a period of time, Mr. Nakai developed some health problems. He then moved into Father Hannifin's home, which became Mr. Nakai's full time home for the remainder of his secondary education and throughout his college education at Utah State University. Findings, R. 570, ¶ 5.

16. Mr. Nakai continued to live with Father Hannifin until Mr. Nakai's marriage on January 25, 1969. Findings, R. 570, ¶ 15.

17. While attending IIS, the Bureau of Indian Affairs paid all of Mr. Nakai's tuition, books, and boarding expenses. However, Father Hannifin consistently provided emotional and material support for Mr. Nakai as a father would for a son. 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 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. Findings, R. 570-71, ¶ 16.

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

19. At all times both Mr. Nakai and Father Hannifin held themselves out to the community and to family as father and son. Findings, R. 571, ¶ 19.

20. Father Hannifin assumed the role of and actively participated as a father to Mr. Nakai, and later as grandfather to Mr. Nakai's children. *Id.*

21. Mr. Nakai's parents agreed to relinquish all their rights to the child to Father Hannifin as demonstrated by the supporting factual determinations:

(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) 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.

Findings, R.573-74, ¶ 24

22. In the Navajo tradition, under which Mr. Nakai, his parents and grandparents were raised and in which they lived, adoption within families is not uncommon, but Navajo parents never voluntarily relinquish their rights to their children when it does occur. Findings, R.575, ¶ 25.

23. In the context of this ancient tradition, and in light of the conversations that took place in 1958 and the parties' subsequent actions, Mr. Nakai's biological mother and maternal grandfather agreed to relinquish all practical parental rights to the child. Findings, R.576, ¶ 27-28.

24. Mr. Nakai's father, Tony Begay, relinquished his rights to the child as well as demonstrated by the supporting factual determinations;

(a) Up to and prior to the 1958 discussions Tony Begay never participated actively in his son's life;

(b) Although he was present on the property at the time the 1958 discussion occurred, he made no effort to take part and he never objected to the placement of Mr. Nakai with Father Hannifin;

(c) Tony Begay's conduct was consistent with the Navajo custom of a matriarchal structure, and determination of clan structure through maternal bloodlines.

(d) There was no evidence to suggest Mr. Begay expected to be more active in the placement decision. Findings, R.576, ¶ 30.

25. Mr. Nakai submitted a First Application for Attorney Fees and Costs as Personal Representative, R. 393-405, and a Supplement to First Application for Attorney Fees and Costs as Personal Representative. R. 480-487.

26. Regarding the fees requested, the trial court determined:

(a) The work done was clearly explained, and nothing suggested the work done was inappropriate in any way;

(b) Under the unusual circumstances of the case, the personal representative's counsel did only what was needed;

(c) The billing rates of the personal representative's counsel are eminently fair;

(d) The outcome of the case vindicates the personal representative's litigation and administration decisions.

(e) The costs or expenses incurred by personal representative's counsel were necessary and appropriate.

R. 582-583.

ARGUMENT

I. EQUITABLE ADOPTION REMAINS A VIABLE LEGAL CONCEPT.

Appellant has failed to establish a valid basis to overturn the prior precedence of this Court recognizing the concept of equitable adoption as detailed in *In re Williams Estates*, 348 P.2d 683 (Utah 1960). Under Utah law, and the doctrine of *stare decisis*, to which Appellant has cited, “those asking [the Court] to overturn prior precedent have a substantial burden of persuasion.” *State v. Menzies*, 889 P.2d 393, 398 (Utah 1994). This Court “will not overturn precedent ‘unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.’” *Laney v. Fairview City*, 57 P.3d 1007, (Utah 2002) (citing *Menzies*, 889 P.2d at 398 (quoting Hanna, John, *The Role of Precedent in Judicial Decision*, 2 Vill. L.Rev. 367, 367 (1957))). In this matter, Appellant has failed to meet this burden to overturn the prior precedent of the *Williams* case and the concept of equitable adoption remains viable in this jurisdiction.

The underpinnings of the statutory nature of adoption existed prior to, and at the time of, the *Williams* decision. The right of an individual to testamentary disposition of his or her property existed at the time of the *Williams* decision, and the concept that property may be disposed of by will has no relevance to equitable adoption. Further, this matter does not involve a will. Determinations regarding equitable adoption in the context of a will, as would any determinations regarding intestacy in the same context, would be nothing more than an advisory opinion. As this Court has repeatedly held, “We

generally do not decide issues unnecessary to the outcome of the case, *see Provo City Corp. v. Thompson*, 86 P.3d 735 (Utah 2004) (finding the court of appeals' discussion of an issue to be merely advisory in nature where the court of appeals' conclusion on the issue 'lack[ed] . . . any meaningful effect to the parties'), and we are disinclined to issue advisory opinions, *Miller v. Weaver*, 66 p.3d 592 (Utah 2003).” *Goebel v. Salt Lake City Southern R. Co.*, 104 P.3d 1185, 1196 (Utah 2004) (citations in original). Reference to wills and will statutes lacks any meaningful effect to the parties in this matter, and is misplaced.

Neither does anything cited by Appellant establish any type of legislative or societal indication of a shift in the basic tenets of adoption and intestate succession. In fact, if anything, the scope of intestate succession is expanding rather than contracting. For example, at the time of the *Williams* decision, the law in Utah limited intestate succession by adopted children to their adoptive parents, but not the adoptive parents' parents, as adoptive children were not “issue” as defined by the statute. *See e.g., In re Estate of Smith*, 326 P.2d 400, 406 (Utah 1958) (upholding prior decision of court construing statute). Conversely, the Utah probate code now refers to “descendants” rather than “issue” to allow for full intestate succession rights for adopted children. *See* UTAH CODE ANN. § 75-2-103 (1998). The Uniform Law Comments note specifically, “the word ‘descendants’ replaces the word ‘issue’ in this Section and throughout the revisions of Article II. . . . Now that inheritance rights, in certain cases, are extended to adopted children, the term descendants is a more appropriate term.” UNIFORM LAW

COMMENTS, UPC § 2-103. The broadening of the inheritance rights of adoptees controverts Appellant's position changes in the probate code invalidate the equitable adoption concept.

As noted in Appellant's brief, the majority of states have adopted, and continue to apply, the doctrine of equitable adoption. *See* Appellant's Brief at p. 1, citing 122 A.L.R. 5th 205, "Modern Status of Law as to Equitable Adoption or Adoption by Estoppel," (2004). Appellant cannot claim, and has not shown, "the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent." *See State v. Menzies, supra*. Consequently, Appellant has failed to establish a basis for overturning the Court's precedence in this area. Equitable adoption in Utah, as with other states, is applicable in limited situations to effect the principle that equity regards as done what should have been done, and is simply a mechanism "to award a child the same distributive share of the adoptive parents' estate as it would have been entitled to had the child actually been adopted" *Williams, supra*, at p. 684. Legislative changes in the distributive share available to a statutorily adopted child, while potentially changing the amount of the share, do not change or invalidate the concept. For these reasons, the Court should decline to overrule the precedent of the *Williams* decision.

II. CHANGES TO THE PROBATE CODE IN UTAH HAVE NOT OVERRULED THE EQUITABLE ADOPTION DOCTRINE.

Appellant's legal arguments to the effect equitable adoption should be overturned

based on changes to the Utah Probate Code are similarly faulty. Appellant cites to the Uniform Probate Code in an attempt to color equitable adoption as a procedure which circumvents the statutory requirements of statutory adoption, or which endows equitable adoption with rights and responsibilities mimicking statutory adoption. Equitable adoption, however, is not, and has never been, a replacement for statutory adoption. Application of the doctrine is limited to narrow circumstances to effect its purpose. As noted in the North Dakota case, *Johnson v. Johnson*, 617 N.W.2d 97, 101 (N.D. 2000), equitable adoption “is not intended to create the legal relationship of parent and child, with all its attendant consequences, and does not effect a legal adoption.” Thus, attempting to argue for a overturning of prior precedence based on readings of statutes related to formal adoptions fails.

A recent Missouri case, *Coon v. American Compressed Steel*, 133 S.W.3d 75 (Mo. Ct. App. 2004) clearly describes the concept. “While an adoption is effective for all purposes, an equitable adoption . . . addresses only the particular property right in question in the proceeding and does not address the status of the parent-child relationship.” *Id.* at 81 (citation omitted). “An adoption is an action *in rem*, which is binding on the whole world and entitles the adoptee to all the rights tied with the status of legal adoption. An *equitable* adoption, in contrast, is a result of an *in personam* proceeding binding only on the parties to the action in which it is conducted and those in privity with them.” *Id.* (emphasis in original, citations omitted). “[T]he proceeding is brought in the court having jurisdiction over the deceased’s estate . . . and is an ancillary

part of the proceedings to administer the estate Equitable adoption is a principle and rule of equity only.” *Id.* (citations and internal quotations omitted).

It should also be noted, had the legislature intended to overturn *Williams*, it could have easily modified the language of the Probate Code to specifically accomplish this. *See State v. Houston*, 263 P.2d 1226, 1230 (Utah Ct. App. 2011) (“[w]e presume the Legislature is aware of our case law.” (citing *Olseth v. Larson*, 158 P.3d 532 (Utah 2007))); *see also Olseth*, 158 P.3d at 539 (noting if legislature wants to change statute, it is always free to do so, but rather it has accepted the court’s interpretation of the statute at issue for almost ninety years). No provision in the Probate Code mentions, let alone abolishes, equitable adoption. As the legislature has not specifically abolished equitable adoption in the more than 50 years since the *Williams* case, there is no basis for this Court to assume such legislative intent through a tortured reading of the statutes.²

Further, other jurisdictions which, like Utah, have adopted the Uniform Probate Code continue to recognize the application and viability of equitable adoption within that legal framework. For example, New Mexico and North Dakota have both adopted the Uniform Probate Code, including Article II. *See* NEW MEX. S. ANN. §§ 45-1-101 (1993), *et seq.*; NO. DAK. CIV. C. 30.1-01 (1973), *et seq.* Despite the adoption of the Uniform Probate Code, both states continue to recognize equitable adoption. *See e.g., Poncho v.*

² Appellant cites, for example, the legislature’s intent that an adopted child “inherit only from the adopting parent.” *But see* Utah Code Ann. § 75-2-114 (2), “An adopted individual is the child of the adopting parent or parents and not of the natural parents, but adoption of a child by the spouse of either natural parent has no effect on: . . . (b) the right of the child or a descendant of the child to inherit from the other natural parent.

Bowdoin, 126 P.3d 1221 (Ct. App. N.M. 2005). *See also, Johnson, supra*, 617 N.W.2d 97 (N.D. 2000) (noting North Dakota law clearly recognizes the doctrine of equitable adoption). In fact, despite Appellant's incomplete cite to UTAH CODE ANN. § 75-1-102 (2) (1975) (*see* Appellant's Brief at p. 8), rather than being inconsistent with the Probate Code's stated purpose, equitable adoption supports the stated purpose "to discover and make effective the intent of a decedent in distribution of his property." UTAH CODE ANN. § 75-1-102(2)(b) (1975).

Neither does the enactment of UTAH CODE ANN. § 75-2-701; repealed and reenacted as § 75-2-514; L. 1998, ch. 39, § 57, support overturning *Williams*. Beyond the bases cited herein, *supra*, to the effect equitable adoption is not a judicially created analog to statutory adoption, an agreement to adopt is not of the same character as an agreement to a contract concerning succession. An agreement to adopt is based on "the adoptive parents' agreement to adopt such child and to care and provide for it the same as though it were their own child." *Williams, supra*, 348 P.2d at 684. Conversely, a contract concerning succession can be alleged in many circumstances with consideration being as simple as providing services for the deceased. *See e.g., Van Natta v. Heywood*, 195 P. 192 (Utah 1920). The legislature's specific limitations on contracts for succession as detailed in UTAH CODE ANN. § 75-2-514 (1998) are based on particular problems associated with such contracts and do not pronounce a broad repudiation of equitable adoption. *See* UNIFORM LAW COMMENTS, UPC § 2-514 (Oral contracts not to revoke wills have given rise to much litigation in a number of states). Neither does the Utah

Probate Code ban all oral contracts. *See* UTAH CODE ANN. § 75-7-407 (2004) (“except as required by a statute other than this chapter, a trust need not be evidenced by a trust instrument”); *see also*, *Martin v. Scholl*, 678 P.2d 274, 275 (Utah 1983) (“part performance allows a court in equity to enforce an oral agreement”). In sum, the adoption of the Uniform Probate Code in Utah, both in general and in terms of specific statutes related to intestate succession, does not equate to a repudiation of the equitable concepts outlined in the *Williams* case. For these reasons, the Court should decline to overrule *In re Williams Estates*.

A. Appellant’s Cited cases do not establish an “Effective Overruling” of the Equitable Adoption Doctrine.

Appellant claims this Court’s pronouncement regarding child support in *Hillis v. Hillis*, 638 P.2d 516 (Utah 1981) effectively overruled the doctrine of equitable adoption. However, *Hillis v. Hillis*, and related cases, do not correlate to the concept of equitable adoption, nor do these cases represent a change in the law that would affect the ability of a parent to place their child with adoptive parents. As noted in Appellant’s brief, *Hillis* dealt with a divorcing father attempting to be relieved of his child support obligations through an agreement with the child’s mother. *Hillis*, 638 P.2d at 516. The holding in *Hillis* and related cases was simple, the right to support belongs to a child, and a parent determined to have parental obligations to that child cannot merely stipulate to avoid that responsibility. *Id.* at 517. Conversely, the holding in *Hillis* has no effect whatsoever on a parent’s right to give a child up for adoption.

Of even greater import for purposes of Appellant's argument in this regard, *Hillis* does not represent a change in the law related to a child's right to support. The *Hillis* court cited to case law dating back to 1965 in support of its holding. In fact, the legal position of *Hillis* predates the *Williams* case establishing equitable adoption. See e.g., *Riding v. Riding*, 329 P.2d 878, 880 (Utah 1958) (holding father cannot be relieved of the obligation to support his child except under the adoption statute). At the time of the *Williams* decision, the Court was well aware of the legal basis upon which *Hillis v. Hillis* was decided. Then, as now, the statutory restrictions related to child support or adoption to not preclude application of the principle of equitable adoption under certain limited circumstances.

III. THE TRIAL COURT PROPERLY CONSIDERED AND APPLIED THE FACTS TO THE ACCEPTED LEGAL FRAMEWORK FOR EQUITABLE ADOPTION IN UTAH IN DETERMINING NAKAI WAS EQUITABLY ADOPTED BY FATHER HANNIFIN.

The trial court was well aware of the requirements of the *Williams* case, and noted its July 27, 2011 Findings of Fact, Conclusions of Law, and Order ("Findings" R. 566-581), "all parties agree the primary authority for Utah's equitable adoption doctrine is the case of *In re Williams Estates*, 348 P.2d 683 (Utah 1960)." See Findings. R. 572-73 ¶ 22.

Pursuant to *Williams*, a party may establish an adoption without formal proceedings under certain circumstances. As this Court stated:

[I]t is generally recognized that where a child's parents agree with 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. Appellant's basic premise from which his arguments flow is that a valid enforceable contract must be determined to be "valid when executed" regarding promises made and promises fulfilled. Appellant ignored and failed to mention the clear direction in *Williams* and in other cases to the effect a contract to adopt "may be proved by circumstantial evidence," (*Id.*), and instead propounds his own set of requirements which he claims must be proven by clear and convincing evidence. See Appellant's Brief at p. 14. The *Williams* court made clear the difficulties in working from the inception of the contract under circumstances as exist here, because the parties to the contract may be deceased, it is not necessary that "the court first have direct proof of the making of the contract, and then proceed forward from the contract thus established to the conduct evidencing its existence." *Id.* at 685 (quoting *Roberts v. Roberts*, 223 F.775, 776 (8th Cir. 1915)). Rather, "it is possible to reverse that process, and if the statements and conduct of the adopting parents are such to furnish clear and satisfactory proof that an agreement of adoption must have existed, then the agreement may be found as an inference from that evidence." *Id.* at 86. The trial court correctly concluded, based on the unrefuted evidence in the trial, the conduct and statements of Father Hannifin throughout his life as well as those of Mr. Nakai and his parents, working back to the date

of the agreement, provide clear and convincing evidence an agreement of adoption *must* have existed. These facts are clearly laid out in the trial court's Findings.

A. The Trial Court Correctly Concluded Mr. Nakai's Mother and Grandfather Relinquished Their Rights to Mr. Nakai.

Appellant argues the contract to adopt was void because the trial court made a finding "there was no formal relinquishment" by Mr. Nakai's mother and grandfather, precluding a legal conclusion there was an agreement to adopt. *See* Appellant's Brief at p. 15. Once again, however, Appellant ignores the language of the *Williams* decisions in making this argument. Specifically, *Williams* notes the child's parents must agree to "relinquish all their rights to the child." *Id.* at 684. As the trial court noted, and as is clear from the *Williams* case and others wherein the doctrine is considered, "the Court does not require proof that a formal relinquishment occur, otherwise there would be a formal adoption." Findings, R. 575, ¶ 26. Facts regarding the relinquishment of the child, "as other facts, may be proved by circumstantial evidence" *Williams* at 684. Tellingly, the facts in *Williams* do not show a "formal" relinquishment. Rather, relinquishment was determinable by the actions and statements of the parties. *See Williams, supra*, at 685 (noting mother placed child in care of the Williams, returned a year later to retrieve child but did not when Williams asked that child stay with them, mother never attempted to regain custody of child).³

³ Mr. Nakai recognizes the *Williams* Court did not make factual determinations as this was before the Court on an appeal of a grant of summary judgment, however, neither did the Court opine appellee was entitled to judgment as a matter of law for want of a

There is no legal support for Appellant's contention that certain talismanic words be used at the time of the adoption agreement to establish a formal relinquishment of rights to the child. What parties to such an agreement have ever heard of the word "relinquishment," let alone are aware of the legal meaning of the term? Rather, it is the conduct of the parties over time, going back to the time the agreement was initiated, that establishes this determination, and which the trial court correctly determined herein. The trial court made specific factual findings supporting the determination an agreement to relinquish rights to the child, as required under *Williams*, existed. See Findings, R. 575 ¶ 14.

Further, the trial court correctly concluded Father Hannifin's agreement to take Mr. Nakai and raise him as his owns on met the requirements of equitable adoption. See Findings, R. 569-59 ¶ 11. *Williams* requires only the "agreement to adopt such child, and to care and provide for it the same as though it was their own child." *Id.* at 684. Appellant's arguments, without legal support, to the effect Father Hannifin's promises amount only to a foster parent agreement are semantic arguments at best, and ignore not only the totality of facts determined by the trial court, but also the long established basis for the concept of equitable adoption. See e.g., *Ellison v. Thompson*, 242 S.E.2d 95, 96-97 (1978) (stating the principle was first recognized in Georgia in 1913 when it was applied to allow a child to participate in the estate of a foster parent).

Neither does equitable adoption require a parent to sever all contact with a child a

definitive determination of formal relinquishment.

requirement to establish relinquishment of parental rights. Appellant fails to cite to any legal support for this contention. Even in the context of a statutory adoption, contact with birth parents is not determinative of a relinquishment of rights. *See e.g., In re Gary's Estate*, 211 P.2d 815, 820 (Ariz. 1949) (noting as part of contract to adopt, grandmother surrendered legal and technical custody of appellant to the deceased based on his promises, but kept physical custody of appellant at request of deceased while he was away working as a lineman). *See also, Matter of Adoption of Holloway*, 732 P.2d 962, 972, n. 11 (Utah 1986) (noting with approval the concept of "open adoption" which allows for communication between natural parent and child as child grows up).

In a footnote, Appellant makes passing reference to the trial court's consideration of Navajo culture as "granting a privileged status to Navajos" in application of equitable adoption not available to Non-Navajos. *See* Appellant's Brief at p. 17. However, in making determinations as to the agreements between the parties, who have never heard of the *Williams* case, and who may have no concept of relinquishing rights to a child, it is appropriate for a court, in equity, to consider the context in which the agreement is made. *See generally, Hughes v. Cafferty*, 89 P.3d 148, 153 (Utah 2004) (obligation of court sitting in equity is to effectuate a result that serves equity given the overall facts and circumstances of the individual case). The trial court found Father Hannifin "spent much of his life in communication with and often in proximity, to Native American people, including many Navajo people." Findings, R. 567 ¶ 3. As expressed through his statements to Mr. Nakai's mother (Findings, R. 568-69 ¶ 11), Father Hannifin understood

Navajo culture and Navajo Common Law in that adoption “is not concerned with the termination of parental rights or creating a legalistic parent and child relationship because those concepts are irrelevant in a system which has obligation to children that extends beyond parents. . . . The mechanism [of adoption] is informal and practical and based upon community expectation founded in religious and cultural belief.” *In the Matter of the Interest of J.J.S., a Minor*, 4 Navajo Rptr. 192, ¶ 40 (Navajo D. Ct. 1983). “Many Navajo adoptions have a different focus than Anglo-European law. As such, it is not principally concerned with the exchange of legal parents. Navajo adoption is based on need, mutual love and help. Children may or may not change the surname. Either way the family is a unit with strong, supportive, extended family and clan ties. It has worked for hundreds of years without adoption agencies and courts of law.” *Id.* ¶¶ 36-37.

The federal government acknowledged the need to recognize these cultural differences in passing the Indian Child Welfare Act of 1978 (25 U.S.C. §§ 1901-1963 (1982)) wherein Congress noted “the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.” 25 U.S.C. § 1901 (5). It would be inappropriate in this context, therefore, to disregard the context in which this equitable adoption took place, within the Navajo Nation and culture. This understanding as expressed by the trial court recognizes the realities of this particular situation, as any court sitting in equity should do. *See Hughes, supra*, 89 P.3d at 153 (Utah 2004) (noting

cases in equity afford courts discretion and wide latitude in fashioning equitable remedies).

B. Verbal and Specific Relinquishment of Parental Rights at the Time of the Agreement by Mr. Nakai's Father Not Required to Establish Equitable Adoption.

Appellant's related point, that the adoption agreement fails because Mr. Nakai's birth father Tony Begay, failed to consent to the adoption, is similarly without support and attempts to force the concept of equitable concept into the strict construction requirements of statutory adoptions. Once again, the Court need not look further than the *Williams* case to determine such consent can be determined by the actions of the parties after the inception of the adoption agreement. *See Williams, supra*, at 686 (finding mother placed child in the Williams' custody, mother married at time and later divorced from father, Williams' raising child with the knowledge of the father and the consent of the mother). *See also, Barlow v. Barlow*, 463 P.2d 305, 309 (Col. 1969) (as the doctrine of equitable adoption comes under the category of equity, consent can be established by conduct); *Hulsey v. Carter*, 588 S.E.2d 717, 718 (Ga. 2003) (natural mother alone may contract for equitable adoption when it is shown natural father acquiesced).

It is uncontroverted Nakai's birth father acquiesced to this adoption and never questioned the arrangement as the trial court found. The facts as determined by the trial court are clear in establishing Mr., Begay "never actively participated 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 with Father

Hannifin.” Findings, R. 576, ¶ 30. As in the *Williams* case and others, Mr. Begay’s knowledge and acquiescence of the adoption of Mr. Nakai by Father Hannifin is borne out by his conduct and actions subsequent to the agreement to adopt. Findings, R. 573, ¶ 24; 576, ¶ 30.

C. Trial Court Properly Applied the Facts of the Matter to the *Williams* Requirements.

The trial court properly applied the facts of this case to the *Williams* case factors to determine an equitable adoption did in fact occur. Contrary to Appellant’s position, *Williams* does not stand for the proposition, an equitable adoption occurs “if and only if there is no formal adoption.” Appellant’s Brief at p.19. Equitable adoption does not require the parties to comply with every statutory requirement for formal adoption, other than the presentation of a petition before a court. Rather the equitable concept, as clearly defined in *Williams*, is that the parties intended for the adoptive parents to “care and provide for [the child] the same as though it were their own child and such agreement was fully performed by all the parties connected with such contract, except there is no actual adoption . . .” *Id.* at 684. The protections of equitable adoption are not for the benefit of the birth parents or the adoptive parents, they are for the child placed in this situation that allow him to participate in the estate of his adoptive parents. There is no discussion in *Williams*, of the statutory requirements for adoption and compliance with or disregard of such requirements. Appellant’s attempt to rely on such statutory requirements to support his position mischaracterizes the holding of the *Williams*, the

basis for the concept, and fails to establish a legal basis for his requested relief.

The trial court was aware of, and cited to, the proper Supreme Court precedence, *In re Williams Estate*, in determining the facts supported a determination of an equitable adoption. The trial court did not, as suggested by Appellant, refuse to apply the requirements of *Williams*, but rather, recognized equitable adoption is an equitable and fluid concept based on the “doctrine that equity regards as done what should have been done.” *Williams*, *supra* at 684. Sitting in equity, the trial court was not asked to determine whether all statutory requirements for formal adoption were followed, but rather, to determine whether “the statements and conduct of the adopting parents are such as to furnish clear and satisfactory proof that an agreement must have existed.” *Id.* at 685. The facts as established at trial in this matter clearly show the Court appropriately applied these accepted and uncontroverted facts to this legal framework for equitable adoption. Compliance with the statutory requirements for *de jure* adoptions is not required, and does not work to establish the trial court’s determinations in this regard “violated the doctrine of *stare decisis*.” For these reasons, the Court should uphold the trial court’s determinations in this regard.

IV. THE TRIAL COURT CORRECTLY AWARDED ATTORNEY FEES TO NAKAI PURSUANT TO HIS DESIGNATION AS PERSONAL REPRESENTATIVE AND REMAND IS NOT APPROPRIATE REGARDLESS OF THE COURT’S DECISIONS.

Regardless of the determinations of this Court as to the equitable adoption of Mr. Nakai, remand for further determinations as to attorney fees awarded is not warranted.

Mr. Nakai submitted a fee claim in relation to his serving as personal representative of the estate. R. 393-405. It is undisputable “a personal representative and an attorney are entitled to reasonable compensation for their services.” UTAH CODE ANN. § 75-3-718 (1992). Mr. Nakai was appointed the personal representative of the estate. Appointment requires the applicant to be an interested person. UTAH CODE ANN. § 75-1-201(24) (2004) defines an “interested person” as “heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of the decedent, ward, or a protected person.” Mr. Nakai maintained a claim as an equitably adopted child of Father Hannifin. Further, the meaning of an interested person “may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.” *Id.* Accordingly, Mr. Nakai is appropriately an “interested person” as defined by statute. Whether or not this Court determines Mr. Nakai was equitably adopted by Father Hannifin, it is beyond dispute Mr. Nakai maintained a life-long father and son relationship with Father Hannifin and that Mr. Nakai was the beneficiary of the majority of Father Hannifin’s assets at his death. In conjunction with the determinations of the trial court, there is no legal basis to deny Mr. Nakai attorney fees, either in general or specifically in acting as personal representative, as detailed in his Fee Application. R. 393-405.

As detailed in his fee request, in acting as personal representative, Mr. Nakai acted in every way appropriately to identify and preserve the remaining assets of the estate, locating proceeds from the Western Life Insurance Company in the amount of

\$128,197.15 and filing tax returns on behalf of Father Hannifin resulting in tax rebates in the amount of \$2,754.00. *See* Fee Application, R. 395, ¶ 10. Further, Mr. Nakai conducted extensive investigations into the existence of additional assets of the estate as a result of a trust agreement signed by Father Hannifin in 1998, located in documents produced by Caryl Marsh pursuant to subpoena and not previously disclosed. *See* Supplement to First Fee Application, R. 481, ¶ 5. All these actions were in accordance with the mandate of a personal representative and were not for Nakai's personal gain. The actions benefitted the estate regardless of a determination of the entitled heirs might be. Conversely, Mr. Nakai did not seek reimbursement from the estate for attorney fees incurred during Caryl Marsh's failed attempt to have Mr. Nakai removed as personal representative, nor for the extensive fees and costs generated in preparing for, and proceeding through trial on Mr. Hill's objection to Mr. Nakai's Petition to Determine Heirs. In sum, Mr. Nakai's appointment as personal representative was proper at the outset, and the actions undertaken by Mr. Nakai's attorneys in reliance on this determination entitle them to reasonable compensation for their services, as specifically detailed in his Fee Requests. *See In re Owens Estate*, 91 P. 283, 285 (Utah 1907) (though administrator was erroneously appointed, still entitled to reasonable compensation on behalf of the estate, including attorney fees).

CONCLUSION

For the reasons stated above, Appellee requests this Court deny Appellant's request to overturn *In re Williams Estates* and to allow the trial court's order to stand both

with regard to the equitable adoption of Mr. Nakai and attorney fees and costs awarded pursuant to his service as personal representative of the estate.

CERTIFICATE OF COMPLIANCE WITH RULE 24

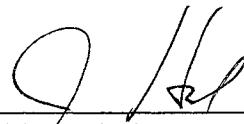
1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) as it contains 9,293 words, excluding parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) as it has been prepared in proportionally spaced Times New Roman typeface, font size 13, using Microsoft Word 2007.

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DATED this 16th day of May, 2012.

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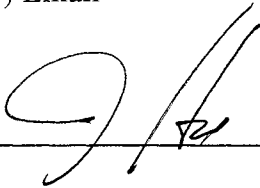
Attorneys for Willis Nakai

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May 2012, I caused a true and correct copy
of the foregoing document to be served on the following:

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☒ (x) U.S. Mail, Postage Prepaid
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ADDENDUM

APPELLEE REFERS THE COURT TO THE ADDENDUM OF APPELLANT
FOR THOSE PARTS OF THE RECORD OF CENTRAL IMPORTANCE TO THE
DETERMINATION OF THE APPEAL