

1994

# In the Matter of the Estate of Mildred C. Meeks, deceased. George F. Naillon v. Robert Gitlin : Brief of Appellant

Utah Court of Appeals

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Jeffrey R. Hill; Hill, Harrison & Hill; Attorneys for Appellant.

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IN THE COURT OF APPEALS

STATE OF UTAH

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In the Matter of the Estate )  
of Mildred C. Meeks, deceased.)

---

GEORGE F. NAILLON,  
Appellant,

vs.

ROBERT GITLIN,  
Appellee.

Case No. 940101-CA  
District Court  
Probate No. 923700043

Priority

---

BRIEF OF APPELLANT

---

APPEAL FROM THE ORDER OF THE  
SEVENTH JUDICIAL DISTRICT COURT OF UTAH  
THE HONORABLE BRUCE K. HALLIDAY

---

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### JURISDICTION

This is an appeal of a probate case heard in the Seventh Judicial District Court for the State of Utah, Carbon County. On February 16, 1993 Appellant filed a Petition to Vacate or Set Aside Order under Rule 60(b)(1) and (2), Utah Rules of Civil Procedure which was denied by Judge Bruce K. Halliday of the Seventh Judicial District Court in his order dated October 12, 1993. Appellant filed a Notice of Appeal of the district court's order on October 12, 1993, with the Supreme Court of Utah and which was subsequently poured over to the Court of Appeals. The jurisdiction of this Court is invoked under 78-2-2(3)(j)(4).

### ISSUE PRESENTED

1. Whether the trial court erred in refusing to grant Naillon a continuance so that he could be represented at the hearing and have an opportunity to be heard. Review of the trial Court's decision is under an abuse of discretion. Birch v. Birch, 771 P.2d 1114 (Utah Ct. App. 1989).

2. Whether the trial court erred in failing to vacate or set aside the Order Appointing Robert Gitlin as Personal Representative and admitting the will into probate. Review of the Court's conclusions concerning whether to vacate the order is under an abuse of discretion. Id.

### **DETERMINATIVE PROVISION**

Appellant is not aware of any constitutional provisions, ordinances, regulations, statutes, rules, or cases which are solely determinative of the issues presented in this appeal.

### **STATEMENT OF THE CASE**

This case seeks a review of the trial court's denial of a request for a continuance to permit Appellant an opportunity to formally object to the appointment of Robert Gitlin as the personal representative of the estate of Mildred C. Meeks and admitting the will into probate and further seeks a review as to the court's decision to not vacate or set aside the order admitting the will into probate and appointing Robert Gitlin as personal representative. Naillon timely filed a U.R.C.P. 60(b) Petition to Vacate or Set Aside the Probate Order which was denied by the district court on November 10, 1993. (R. 27-53.) On March 12, 1993, Gitlin filed a Motion To Dismiss Petition of George Naillon to Vacate Or Set Aside Order. (R. 64-106.) A Response to Gitlin's Motion To Dismiss was filed on March 26, 1993. (R. 120-129.) A Reply Memorandum was filed by Gitlin on April 5, 1993. (R. 130-135.) On September 3, 1993 the court issued a Memorandum Decision denying Naillon's request for relief. (R. 145-149.) The final order of the court was filed October 12, 1993. (R. 150-151.) A Notice of Appeal was filed on November 10, 1993. (R. 152-153.) On

December 13, 1993, Gitlin moved for summary dismissal on the basis that the Supreme Court lacked jurisdiction in this matter. The Supreme Court denied Gitlin's motion on January 25, 1994. The Supreme Court poured this case over to the Court of Appeals for disposition on February 16, 1994.

The opinion of the Seventh Judicial District Court for the State of Utah, Carbon County is unreported, and contained in the Transcript of Record filed with the court.

**A. STATEMENT OF FACTS**

1. Mildred Crandall Meeks passed away on August 10, 1992, at the age of eighty-one (81) years. (R. 1.) The stated cause of death was carcinoma of the stomach. Additionally, immediately prior to her death the deceased was suffering from a broken hip and was hospitalized and medicated. (R. 34.)

2. The Decedent was a resident of Carbon County, Utah, and at the time of her death left an estate therein. (R. 1-5.)

3. The deceased's purported last will and testament dated October 18, 1988, has been deposited with the Court. This will allegedly supersedes and revokes the decedent's prior will. (R.7-11.)

4. On or about October 27, 1992, Robert Gitlin filed with the Court a Petition for Formal Probate of Will and Appointment of Personal Representative. (R. 1-6.)

5. Notice was sent to the Appellant on November 5, 1992.  
(R. 12-14.)

6. Appellant, George Naillon, resides in Auburn, California, and received said Notice on or about Saturday, November 7, 1992, informing him of the hearing scheduled for Monday, November 16, 1992. (R. 30-35.)

7. Upon receiving notice from the Court, Petitioner immediately attempted to contact attorneys in the Price, Provo and Salt Lake areas to represent him at the hearing and to file an objection on his behalf. Petitioner was unable to retain an attorney to represent him. The Petitioner contacted his California attorney, Rod Shepard and requested that he call the Court to request a continuance of said hearing until he could retain local counsel to represent him at the hearing. (R. 30-35.)

8. Naillon's counsel contacted the Court and requested a continuance. (R. 32.) This is supported by the Court's Minute Entry dated November 16, 1992. (R. 18.)

9. Despite Naillon's request for a continuance the Court granted Gitlin's Petition for Formal Probate of Will and Appointment of Personal Representative on November 16, 1992. (R. 15-17.)

11. The Acceptance of Appointment and Letters Testamentary were filed with the Court on November 17, 1992. (R. 19-20)

12. Seven (7) days prior to the deceased's death, Gitlin prepared a quit-claim deed and had Mildred C. Meeks transfer her real property to him. This took place at the Utah Valley Regional Medical Center while Mildred C. Meeks was under the influence of pain medication which was being given to her for her stomach cancer and broken hip . (R. 30-35, 46-47.)

13. Upon information and belief, prior to the death of the deceased, she received approximately \$85,000.00 from Star Pelton, a sister. Upon further information and belief it is understood that Mr. Gitlin received approximately \$70,000.00 and claims that the same was a gift from the deceased. (R. 30-35.)

14. Subsequent to the order appointing Gitlin as personal representative and formally probating the will, Naillon hired the services of a private investigator, Bruce DeYoung, to look into facts surrounding the death of Mildred Meeks and her relationship with Gitlin. It was he who determined that the real property of Mildred Meeks had been transferred seven (7) days prior to the deceased's death and furthermore that the \$70,000.00 had been received by Gitlin. (R. 30-35.)

15. All the information obtained was after the November 16, 1992, hearing and could not have been ascertained prior thereto or within a short period of time thereafter.

### SUMMARY OF ARGUMENT

The District Court erred in refusing to vacate or set aside the November 16, 1992 Probate Order ("Probate Order") based upon the facts as set forth in the Petition to Vacate or Set Aside Order, dated February 16, 1993 and the subsequent memoranda filed therewith . The District Court summarily refused to grant Naillon's request for a continuance, thereby precluding Naillon from obtaining counsel and denying him a reasonable opportunity to be heard. Had Naillon been granted an opportunity to be heard, his objections would surely have been referred to the trial calendar for an evidentiary hearing. The court also erred in failing to set aside or vacate the November 16, 1993 order formally probating the will and appointing Gitlin as personal representative.

The District Courts are endowed with considerable latitude and discretion in granting and denying motions to set aside but they should not act arbitrarily and they should be indulgent toward permitting full inquiry and knowledge of disputes so that they can be settled advisedly and in conformity with law and justice. Naillon's request for a continuance was timely and should have been considered in light of the factual circumstances surrounding the situation. Naillon has also demonstrated excusable neglect and other reasons justifying relief from the Probate Order in addition to expending considerable time and monies to discover meritorious

claims which would alter the disposition of this matter if remanded for further proceedings. The District Court abused its discretion in refusing to vacate or set aside the Probate Order appointing Gitlin as Personal Representative and admitting the will into probate. This Court should remand this case for further proceedings to permit Naillon the opportunity to present his objection and the supporting evidence.

#### **ARGUMENT**

##### **I. THE DISTRICT COURT ERRED IN REFUSING TO VACATE OR SET ASIDE THE PROBATE ORDER**

Naillon seeks review of the District Court's Order refusing to vacate or set aside the Probate Order appointing Robert Gitlin as personal representative and admitting the will into probate.

It is undisputed that Naillon has an absolute legal right to file a motion under Rule 60(b) of the Utah Rules of Civil Procedure to have the Court consider the setting aside or vacating of an Order if the Petitioner can demonstrate sufficient cause. It is not in dispute that Appellant's 60(b) motion was timely filed nor that the denial of said motion is a final appealable order. Amica Mutual Insurance Co. v. Schetter, 768 P.2d 950, (Utah 1989), Mascaro v. Davis, 741 P.2d 938, 946 (Utah 1987). Accordingly, this Court has jurisdiction to address the issue as to whether or not the District Court erred in refusing to vacate or set aside the November 16, 1992 order as requested in Naillon's February 16, 1993



Petition.

The Supreme Court of Utah announced its standard for consideration of motions to vacate or set aside the judgments in Mayhew v. Standard Gilsonite Company, 376 P.2d 951 (Utah 1962), wherein it stated that:

It is undoubtedly correct that the trial court is endowed with considerable latitude of discretion in granting or denying such motions. However, it is also true that the court cannot act arbitrarily in that regard, but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly and in conformity with law and justice.

It is a fundamental right that an individual have a fair opportunity to be heard and that further that inappropriate decisions by the court be subjected to review. Under the appropriate circumstances, judgments or orders entered by the lower courts are and should be susceptible to attack. It is also to be kept in mind that access to the courts for the protection of rights and the settlement of disputes is one of the most important factors in the maintenance of a peaceable and well ordered society. Interstate Excavating v. AGLA Development 611 P.2d 369 (Utah 1980). Thus, the uniformly acknowledged policy of law is to accord litigants the opportunity for a hearing on the merits, where that can be done without serious injustice to the other party. Id. at 371.

In the case before this Court, it is clear from the pleadings

and the record below that Naillon was denied the opportunity to present evidence and object to the appointment of Gitlin as personal representative and which also resulted in admitting the will to probate. The District Court ignored the limited notice provided to the Naillon, ignored the reasonable request by Naillon's counsel for a continuance, ignored the considerable efforts made to procure local counsel prior to the hearing, and ignored the meritorious claims to be brought forth during the proceedings if remanded for trial as raised by the Petition to Vacate or Set Aside. Surely, Naillon was denied a reasonable opportunity to be heard.

Naillon, a resident of California, made every effort to secure local representation upon his receipt of notice of the hearing on November 7th, 1992 but was unsuccessful. Obviously, Naillon was unprepared for such a hearing and contacted the probate clerk on November 11, 1992, to determine how to obtain an extension but was told to retain an attorney. Naillon immediately sought to engage local counsel and spoke with over thirteen Utah firms who were unable to appear on his behalf. Naillon's counsel from California then contacted the Probate Court prior to the hearing and requested a continuance to permit Naillon to obtain counsel and file an objection. The court was well aware that it was Naillon's desire to file an objection but because no written objection was on file

the court summarily refused Naillon's request and appointed Gitlin as Personal Representative over Naillon's objection.

The purpose behind the well established practice of permitting continuances is to permit parties in interest an opportunity to be heard. The court refused to grant Naillon's request for a continuance and violated Utah's virtually universal practice of turning probate matters over to the trial calendar when any form of an objection is entered. In desperation, Naillon relied upon the final efforts of his California counsel to make a telephonic request prior to the hearing, hoping that the telephonic request would be sufficient for a party in interest to obtain a continuance of a probate matter. Naillon concedes that his reliance upon the assurances of his out-of-state counsel as a last resort constitutes some form of neglect, but clearly, it is excusable. In Miller v. Brocksmith, 825 P.2d 690 (Utah App. 1992), the Utah Court of Appeals noted that reliance on the assurances of an attorney could, in the appropriate circumstances, be seen as excusable neglect. In Miller the Court did not find excusable neglect because it found no evidence to believe that the movant had ever retained the attorney. The record in the present case, however, clearly indicates more than a suggestion of retention in this matter. The court's minute entry clearly indicates that Naillon's California counsel contacted the court, spoke with the Judge and requested the continuance which

was summarily denied.

In Heath v. Mower, 597 P.2d 855 (Utah 1979) the Supreme Court of Utah declined to reverse the trial courts refusal to vacate or set aside its judgment because the defendant did not offer the trial court a reasonable excuse for his nonappearance so as to bring him under the rule that courts should liberally exercise their power to set aside judgments. In the case before this court, the court arbitrarily ignored the due diligence exercised by Naillon and the reasonableness for his nonappearance by rejecting the request for a continuance. It is a well-established practice that upon appearing and entering an objection of almost any nature, the Court will set the matter over to the trial calendar for hearing. The only element lacking in this case was the Petitioner's physical appearance.

The Court in Heath found it compelling that the party seeking to set aside the judgement offered "no explanation as to why [he] was unable to attend personally or be represented by an attorney at the pre-trial hearing." Further, the Utah Supreme Court has stated that a party attempting to set aside a judgement "must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control." Heath v. Mower, 597 P.2d 855 (Utah 1979), (citing Airkem Intermountain, Inc. v. Parker, 513 P.2d at 431). Naillon exercised due diligence in

attempting to obtain local counsel, but the unforeseeable refusals of some thirteen law firms were beyond his control. It is without question that Naillon's efforts were considerable, his reasons for nonappearance reasonable, and, his neglect in failing to appear personally without representation excusable.

## **II. MERITORIOUS DEFENSES EXIST TO THIS ACTION**

Throughout this action, from its beginnings in 1992 through the pendency of this appeal, Naillon has spent a great deal of his personal funds to hire professional investigators on behalf of all parties in interest. The results of months of intensive investigations have resulted in evidence of duress, undue influence, fraud and other issues which negate the initial findings of the Court indicating that the 1988 will admitted to probate expressed the testamentary intent of Mildred C. Meeks. Specifically, Naillon has discovered that it appears that the deceased may have been forced or under undue influence or medication when she signed her real property over to Gitlin within the week prior to her death as her signature was obtained while Mildred Meeks (the deceased) was in the hospital under heavy medication and incoherent.

Naillon's interests, together with the interests of all parties in interest, require an opportunity for justice to prevail in this matter. Justice demands the opportunity for all parties to

present evidence regarding Mildred C. Meeks true testamentary intent.

The facts and circumstances offered above operate to establish not only a second basis for this Court's decision to set aside the judgement of the District Court, but add the requirement of a meritorious defense to the action. Downey State Bank v. Major-Blankeney Corp., 545 P.2d 507 (Utah 1976); Mason v. Mason, 597 P.2d 1322 (Utah 1979). A meritorious defense is one that would "justify a trial of the issue thus raised". State by and through Department of Social Services v. Musselman, 667 P.2d 1053 (Utah 1983).; See also Id. Further, a meritorious defense exists where specific and sufficiently detailed facts which if proven, would have resulted in a judgement different than the one entered. Id. at 1057 (citing Lopez v. Reserve Insurance Co., 525 P.2d 1204 [Colo. App. 1974]).

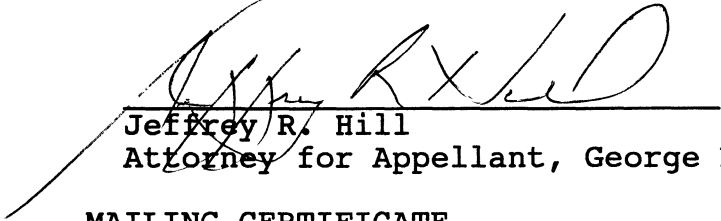
The facts specifically set forth above if given the opportunity to be heard before a trier of fact would reverse the decision of the lower court. Mr. Gitlin exacted undue influence upon the deceased in an attempt to defraud the parties in interest and negate the true testamentary intent of Mildred C. Meeks. The proceedings in this matter have been sped along without any opportunity for the presentation of evidence and to probe into the cloudy transfers and circumstances involved herein. Naillon seeks such an opportunity on behalf of all parties in interest. If this

Court remands and permits a trial on the issues thus raised, the lower courts judgment cannot stand.

CONCLUSION

For all of the foregoing reasons, the judgement of the District Court should be reversed and remanded for proceedings on the merits.

DATED this 6th day of April, 1994.



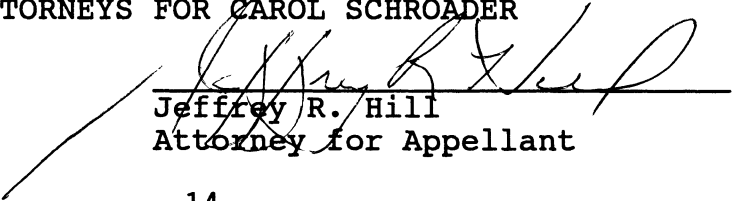
Jeffrey R. Hill  
Attorney for Appellant, George Naillon

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally caused to be mailed a true and correct copy of the foregoing Appellant's Brief on this 6th day of April, 1994, by first-class U.S. mail, postage prepaid, to the following:

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ATTORNEYS FOR CAROL SCHROADER



Jeffrey R. Hill  
Attorney for Appellant

IN THE COURT OF APPEALS

## STATE OF UTAH

In the Matter of the Estate )  
of Mildred C. Meeks, deceased.)

GEORGE F. NAILLON,  
Appellant,

**vs.**

ROBERT GITLIN,  
Appellee.

Case No. 940101-CA  
District Court  
Probate No. 923700043

Priority 15

ADDENDUM TO BRIEF OF APPELLANT

APPEAL FROM THE ORDER OF THE  
SEVENTH JUDICIAL DISTRICT COURT OF UTAH  
THE HONORABLE BRUCE K. HALLIDAY

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ATTORNEYS FOR APPELLANT



Appellant by and through his attorney Jeffrey R. Hill hereby submits the Addendum to Brief of Appellant which brief was sent to the Court on April 6, 1994.

**ADDENDUM**

- A. Notice & Affidavit of Posting and Mailing
- B. Formal Probate of Will and Appointment of Personal Representative
- C. Minute Entry
- D. Transcript of November 16, 1992, hearing
- E. Petition to Vacate or Set Aside Order
- F. Motion to Dismiss Petition of George Naillon to Vacate or Set Aside Order

Memorandum in Support of Motion to Dismiss Petition of George Naillon to Vacate or Set Aside Order

Motion to Strike Affidavit of George F. Naillon

Memorandum of Points and Authorities in Support of Motion to Strike Affidavit of George F. Naillon

Certificate of Service

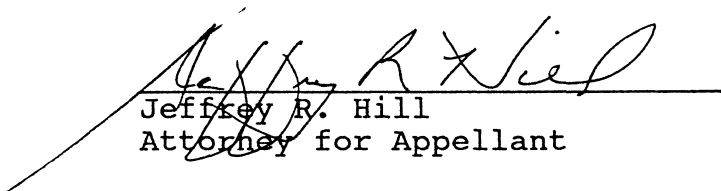
- G. Response to Motion to Strike Affidavit of George F. Naillon
- Response to Memorandum in Support of Motion to Dismiss Petition of George F. Naillon to Vacate or Set Aside Order and Request for Oral Arguments
- H. Reply Memorandum in Support of Motion to Dismiss Petition of George F. Naillon
- I. Memorandum Decision
- J. Order

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally caused to be mailed a true and correct copy of the foregoing Addendum to Appellant's Brief on this 15th day of April, 1994, by first-class U.S. mail, postage prepaid, to the following:

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P.O. Box 45340  
Salt Lake City, UT 84145  
ATTORNEYS FOR APPELLEE

RALPH W. RASMUSSEN  
BRADFORD & BRADY  
389 North University Avenue  
Provo, UT 84601  
ATTORNEYS FOR CAROL SCHROADER



Jeffrey R. Hill  
Attorney for Appellant

FILED

NOV-5 92

SEVENTH DISTRICT COURT  
STATE OF UTAH

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR CARBON COUNTY  
STATE OF UTAH

---

IN THE MATTER OF THE	:	
	:	
ESTATE OF	:	NOTICE
	:	
MILDRED C. MEEKS,	:	
	:	
	:	
DECEASED.	:	
	:	Probate No. 923-43

---

NOTICE IS HEREBY GIVEN THAT ON October 27, 1992, Robert Gitlin, whose address is 398 West 2900 South, Price, UT 84501 filed with the Clerk of the Court a petition praying for: FORMAL PROBATE OF WILL AND APPOINTMENT OF PERSONAL REPRESENTATIVE (A copy of the petition is on file with the Clerk of the Court and may be reviewed upon request.)

Hearing on said petition will be had before the above-entitled Court in Room 120 of the Carbon County Court Complex in Price, Carbon County, State of Utah, on NOVEMBER 16, 1992, at 9:30 o'clock a.m., at which time and place all persons interested in said estate may appear and show cause, if any they have, why said petition should not be granted.

WITNESS the Clerk of said Court and the seal hereof affixed this 5th day of November, 1992.

BARBARA PROCARIONE, CLERK

(S E A L)

BY *Barbara Procarione*  
Clerk

FILED

NOV -5 92

SEVENTH DISTRICT COURT  
STATE OF UTAH

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR CARBON COUNTY

STATE OF UTAH

IN THE MATTER OF THE

ESTATE OF

MILDRED C. MEEKS,

DECEASED.

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:  
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:

AFFIDAVIT OF POSTING  
AND MAILING

Probate No. 923-43

STATE OF UTAH     )  
                      : ss  
COUNTY OF CARBON)

I, Barbara Procarione, being duly sworn, deposes and  
says:

That she is, and at all times herein mentioned, was,  
and now is, the duly appointed, qualified and acting Deputy Court  
Clerk of the District Court of Carbon County, State of Utah. That  
on the 5th day of November, 1992, she caused to be posted in three  
public places in Carbon County, copies of the herein attached  
notice of application for: FORMAL PROBATE OF WILL AND APPOINTMENT  
OF PERSONAL REPRESENTATIVE

TO-WIT: One copy on the bulletin board, front  
corridor, Carbon County Court Complex, Price, Utah; one copy on  
the bulletin board for legal notices, corridor, City Hall, Helper,  
Utah; and one copy on the bulletin board for legal notices at the  
John W. Galbreath Office, East Carbon, Utah--all in Carbon County,  
Utah.

That on the 5th day of November, 1992, she mailed true  
and correct copies of the hereunto attached notice to the persons  
listed below and directed to their respective places of residence

as shown after their names; that the copies so mailed were enclosed in a sealed envelope and deposited in the United States Mail, with postage thereon prepaid:

1. Carol Schroader, c/o Ralph W. Rasmussen, Jr., 389 North University Ave., P. O. Box 432, Provo, UT 84603
2. Starr Pelton, 321 Cameron Drive, Osburn, ID 83849-1023
3. William James Naillon, 498 Vick Drive, Santa Cruz, CA 95060
4. George Francis Naillon, 11103 Mt. Vernon Road, Auburn, CA 95603
5. Margie Ann Naillon, c/o William J. Naillon, 498 Vick Drive, Santa Cruz, CA 95060
6. Patricia Carol Naillon/Candelaria, 2775 Croft Drive, San Jose, CA 95148
7. John Rolland Naillon, Jr., 9507 LaPorte Road, Bangor, CA 95914
8. Michael George Naillon, Sr., 10934 SE 254 Place, Kent, WA 98031
9. Danny William Naillon, 413 San Juan, Los Banos, CA 93635
10. Tammy Michelle Naillon, 2775 Croft Drive, San Jose, CA 95148
11. Robert Gitlin, 398 West 2900 South, Price, UT 84501
12. James D. Gilson, Susan G. Lawrence, VAN COTT, BAGLEY, CORNWALL & MCCARTHY, Attorneys at Law, 50 South Main Street, Suite 1600, P.O. Box 45340, Salt Lake City, UT 84145
13. Nick Sampinos, Attorney at Law, 80 West Main, Suite 201, Price, UT 84501

*R. Brundage*  
Clerk/~~Deputy~~

Subscribed and sworn to before me this 5th day of November, 1992.

*Spencer Brundage*  
~~clerk~~/Deputy

FILED  
NOV 16 1992

NOV 16 92

SEVENTH DISTRICT COURT  
STATE OF UTAH

VAN COTT, BAGLEY, CORNWALL & MCCARTHY  
James D. Gilson (5472)  
Susan G. Lawrence (5305)  
Attorneys for the Petitioner  
50 South Main Street, Suite 1600  
P. O. Box 45340  
Salt Lake City, Utah 84145  
Telephone: (801) 532-3333

IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY,  
STATE OF UTAH, PROBATE DIVISION

In the Matter of the Estate	)	
	)	FORMAL PROBATE OF WILL
of	)	AND APPOINTMENT OF
	)	PERSONAL REPRESENTATIVE
MILDRED C. MEEKS,	)	
	)	
Deceased.	)	Probate No. 923-43
_____	)	

Upon consideration of the Petition for Formal Probate of Will and Formal Appointment of Personal Representative filed by Robert Gitlin, on the 27th day of October, 1992, the Court finds as follows:

1. The Petition for Formal Probate of Will and Formal Appointment of Personal Representative is complete.
2. The petitioner has made oath or affirmation that the statements contained in the Petition are true to the best of his knowledge and belief.
3. The petitioner appears from the Petition to be an interested person as defined by the Utah Uniform Probate Code.

4. On the basis of the statements in the Petition, venue is proper because the decedent was domiciled in Carbon County, Utah at the time of her death.

5. Any required notice has been given or waived.

6. The decedent's Last Will and Testament of MILDRED C. MEEKS constitutes the decedent's Last Will and Testament.

7. The Petition does not indicate the existence of a possible unrevoked testamentary instrument which may relate to property subject to the laws of this state, and which is not filed for probate in this court.

8. The Petition does not relate to one or more of a known series of testamentary instruments (other than Wills and Codicils), the latest of which does not expressly revoke the earlier.

9. It appears from the Petition that the time limit for formal appointment has not expired.

10. Based on the statements in the Petition, Robert Gitlin, the person whose appointment is sought, is nominated in the Last Will and Testament of the decedent as the personal representative, is qualified to act as personal representative, and has a prior right to appointment.

11. On the basis of the statements in the Petition, no personal representative has been appointed in this state or elsewhere.

12. The names, addresses and relationships of the heirs and devisees of the decedent are as follows:

Name	Address	Relationship
Carol Schroader	c/o Ralph W. Rasmussen, Jr. 389 North University Ave. P.O. Box 432 Provo, UT 84603	beneficiary under will
Starr Pelton	321 Cameron Drive Osburn, ID 83849-1023	sister
William James Naillon	498 Vick Drive Santa Cruz, CA 95060	nephew
George Francis Naillon	11103 Mt. Vernon Road Auburn, CA 95603	nephew
Margie Ann Naillon	936 West Julian Street San Jose, CA 95008	niece
Patricia Carol Naillon/Candelaria	2775 Croft Drive San Jose, CA 95148	grand niece
John Rolland Naillon, Jr.	9507 LaPorte Road Bangor, CA 95914	grand nephew
Michael George Naillon, Sr.	10934 SE 254 Place Kent, WA 98031	grand nephew
Danny William Naillon	413 San Juan Los Banos, CA 93635	grand nephew
Tammy Michelle Naillon	2775 Croft Drive San Jose, CA 95148	grand niece

All of the foregoing individuals are adults.

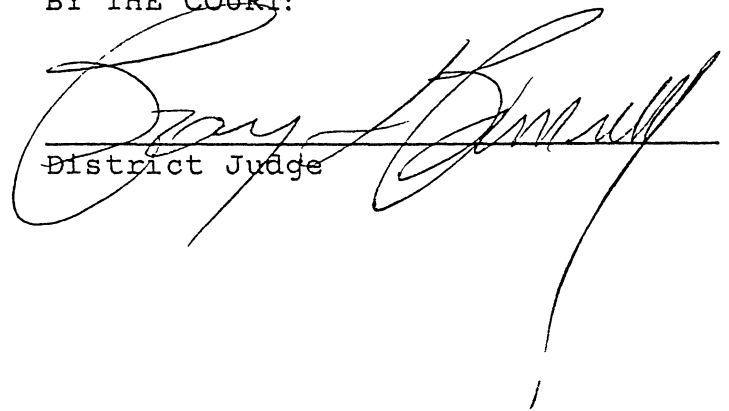
NOW, THEREFORE, the Petition is hereby granted, the Last Will and Testament of MILDRED C. MEEKS, dated October 18, 1988, is hereby formally probated, Robert Gitlin is hereby



appointed personal representative of the decedent's estate, to act without bond in an unsupervised administration, and upon qualification and acceptance Letters Testamentary shall be issued to the said personal representative.

DATED this 16 day of November, 1992.

BY THE COURT:

  
District Judge

SEVENTH JUDICIAL DISTRICT COURT  
COUNTY OF CARBON, STATE OF UTAH

BOYD BUNNELL, DISTRICT JUDGE

DATE: Nov 16, 1992 - 9:30 am

ELECTRONIC RECORDING

CASE NO: Probate No. 923-43

IN THE MATTER OF THE ESTATE

Nick Sampinos

OF

MILDRED C. MEEKS, Deceased

MINUTE ENTRY

PROCEEDINGS BEFORE THE COURT: FORMAL PROBATE OF WILL &  
APPOINTMENT OF PERSONAL REPRESENTATIVE

The Court advised counsel that an attorney from California had called advising that he was representing George Frandsen Nailon and Mr. Nailon was requesting time to confer with local counsel. There was objection from Mr. Sampinos. Said petition being verified and noticed for hearing, and there being no protests on file, the Court now

FINDS AND ORDERS: That the document entitled Last Will and Testament of Mildred C. Meeks is in truth and fact her last will and the same is admitted to probate. The Court will appoint Robert Gitlin as personal representative of this estate upon taking of the oath. No bond will be required.

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Tape 92-59/3700

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IN THE SEVENTH JUDICIAL DISTRICT COURT, STATE OF UTAH  
CARBON COUNTY

-o0o-

IN THE MATTER OF THE ESTATE )  
 )  
OF )  
 )  
MILDRED C. MEEKS. )  
\_\_\_\_\_ )

Case No. 923700043

ORIGINAL

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BE IT REMEMBERED that on the 16th day of November,  
1992, the above-entitled matter came on for hearing before  
the HONORABLE BRUCE K. HALLIDAY, sitting as Judge in the  
above-named Court for the purpose of this cause, and that  
the following proceedings were had.

-o0o-

A P P E A R A N C E S

NICK SAMPINOS  
Attorney at Law  
80 West Main, #201  
Price, Utah 84501

PENNY C. ABBOTT, C.S.P.  
3241 SOUTH 4840 WEST  
WEST VALLEY CITY, UTAH 84120  
PHONE: 966-4862

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1 MR. SAMPINOS: Yes.

2 THE COURT: Well, of course, I tried to explain to  
3 him that that was usually the case, that filing objections  
4 is a waste of everybody's time, but--

5 MR. SAMPINOS: And I feel the same, your Honor.

6 THE COURT: Because a lot of times, you get heirs  
7 who--where you have as many as you've got here, what have  
8 you got, about--

9 MR. SAMPINOS: Seven or eight of them.

10 THE COURT: A whole list of heirs. And some of  
11 them from out of state always think that Aunt Susie left  
12 \$100,000 and I'm not getting my share--

13 MR. SAMPINOS: Right.

14 THE COURT: --when she actually left maybe  
15 \$10,000 and--

16 MR. SAMPINOS: Or less.

17 THE COURT: That's not an unusual scenario we run  
18 into from people that are unfamiliar with facts. but I  
19 hate to bog up the time of the Court.

20 So I told him if you--if you objected, I wouldn't  
21 give him any time, but if you consented, we would continue  
22 it for two weeks, but--

23 MR. SAMPINOS: I'll object.

24 THE COURT: All right. The--let the record show  
25 that this petition is verified, it's noticed for hearing at

1 this day and hour, in accordance with with our rules of  
2 procedure. There are no protests on file.

3 The Court finds that the document filed with the  
4 Court entitled Last Will and Testament of Mildred C. Meeks  
5 is in truth and fact her last will and testament. The  
6 Court hereby appoints Robert Gitlin as the personal  
7 representative of this estate. He will qualify upon taking  
8 the oath. No bond will be required.

9 UNIDENTIFIED SPEAKER: The 16th?

10 THE COURT: The 16th, yeah.

11 MR. SAMPINOS: Thank you, your Honor.

12 THE COURT: Let's see. Barbara, I told  
13 Mr. Shepherd he could check back with you later on today  
14 and you'd tell him what we did in this case, out of courtesy  
15 to him.

16 (Whereupon, this hearing was concluded.)  
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## TRANSCRIBER'S CERTIFICATE

I, Toni Frye, do hereby certify that I am a transcriber for Penny C. Abbott, Certified Shorthand Reporter and Certified Court Transcriber of tape recorded court proceedings; that I received the electronically recorded tape of the within matter and under her supervision have transcribed the same into typewriting, and that the foregoing pages, numbered from 1 to 4, to the best of my ability constitute a full, true and correct transcription, except where it is indicated the tape recorded court proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

DATED at Salt Lake City, Utah, this 7th day of  
December, 1993.

Toni Frey  
Transcriber

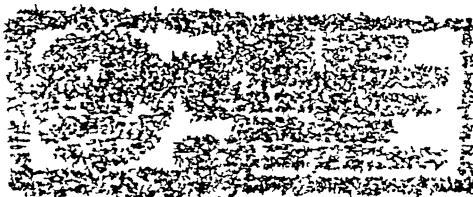
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C E R T I F I C A T E

STATE OF UTAH                    )  
                                      :    SS.  
COUNTY OF SALT LAKE        )

I, PENNY C. ABBOTT, a Certified Shorthand Reporter, do hereby certify that I received the electronically recorded tape (No. 92-59) in the matter of the Estate of Mildred C. Meeks, and that I caused it to be transcribed into typewriting, and that a full, true, and correct transcription of said hearing so recorded and transcribed is set forth in the foregoing pages numbered from 1 to 4, inclusive, and that said pages constitute an accurate and complete transcription of all the proceedings adduced at the hearing and contained on the tape except where it is indicated that the proceeding was inaudible.

WITNESS MY HAND and official seal at Salt Lake City, Utah, this 7th day of December, 1993.



  
Penny C. Abbott, C.S.R.

License #93  
My commission expires:

Sept. 24, 1996



FILED

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SEVENTH DISTRICT COURT  
STATE OF UTAH

HILL, HARRISON, HILL & FISHER  
Jeffrey R. Hill (#4596)  
F. McKay Johnson (#3725)  
3319 North University Avenue, #200  
Provo, Utah 84604  
Telephone: (801) 375-6600  
Attorneys for Petitioner

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY

STATE OF UTAH, PROBATE DIVISION

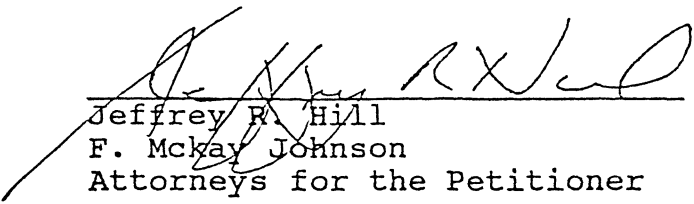
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In the Matter of the Estate	)	PETITION TO VACATE OR SET
	)	ASIDE ORDER
of	)	
	)	
MILDRED C. MEEKS,	)	
	)	
Deceased.	)	Probate No. <u>923700043</u>
	)	

---

An interested party, George Naillon, nephew of the deceased MILDRED C. MEEKS, hereby petitions the court pursuant to the Utah Rules of Civil Procedure 60 (b)(1)(2) to vacate or set aside that certain order dated November 16, 1992. Said document is entitled "Formal Probate of Will and Appointment of Personal Representative". This application of the Utah Rules of Civil Procedure relies upon Utah Code Annotated 75-1-304. This petition is supported by an accompanying Memorandum of Points and Authorities and Affidavit.

000027



Jeffrey R. Hill

F. McKay Johnson

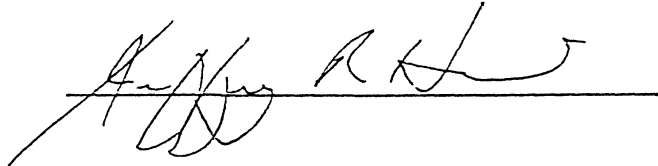
Attorneys for the Petitioner

**MAILING CERTIFICATE**

I CERTIFY a true & correct copy of the foregoing was mailed, postage prepaid, to the following:

JAMES D. GILSON  
Attorney for Personal Representative  
50 South Main, Suite 1600  
Salt Lake City, UT 84144

this 16th day of February, 1993.

A handwritten signature in dark ink, appearing to read "James D. Gilson", is written over a horizontal line.



each and all of said matters in the manner hereinafter set forth in this Affidavit.

3. I am a citizen of the United States and a resident of the State of California; I am over the age of 18 years; I reside at 11103 Mt. Vernon Road, Auburn, CA 95603.

4. I am an interested party in the estate of Mildred C. Meeks, deceased, in that I am a nephew of the decedent, Mildred C. Meeks, who left no surviving spouse and no surviving issue.

5. On Saturday, November 7, 1992, I received notice from the Seventh Judicial District Court for Carbon County, State of Utah, that a hearing would be held on November 16, 1992, on the petition of Robert Gitlin for the formal probate of a will and the formal appointment of personal representative.

6. On November 11, 1992, after receiving the notice, I contacted Barbara Procarione, the probate clerk, and asked her what I needed to do to obtain an extension of time. She informed me that I would need to find an attorney to help me.

7. Upon receipt of this information, I immediately attempted to engage counsel for the purpose of representing me at the hearing.

8. In attempting to engage counsel I contacted the following attorneys by telephone prior to the hearing in an effort to have someone appear at the hearing and represent my interests: Luke Pappas, Joni Pappas White, George Harmon, Mike Jensen, Dan K~~eller~~. Mike Harrison -- all of Price, Utah; Fred Howard, Provo;

Parsons Behle & Latimer (James Lee, president of the firm), Salt Lake City; Jones, Waldo, Holbrook & McDonough, Salt Lake City; Mark Tanner, Castledale; Keith Chiara, Helper; Stanley Litizzette, Helper; and Margaret Taylor, Helper.

9. None of the attorneys I contacted would represent me at the hearing, despite my assurances of ability and willingness to pay. I understood the reluctance of those firms which would have to travel long distances with the short notice under which I was forced to operate. However, I found it curious that no one in the Price area was willing to help me. There seemed to be a general fear or reluctance to become involved.

10. Upon my failure to obtain Utah counsel, I next contacted a California attorney, Rod Shepherd, who called the Court on November 16, 1992, prior to the hearing.

11. Through my California attorney, I requested the Court to reschedule the hearing to allow me the opportunity to engage Utah counsel and to appear and to submit objections. I made sure the Court was aware of my diligent efforts to obtain counsel prior to the hearing and of my concern that I be properly represented.

12. However, on November 16, 1992, despite my earnest requests, the Court admitted the purported will of Mildred C. Meeks to probate and also appointed Robert Gitlin as Personal representative.

13. Upon receipt of the notice from the Court on November 7, 1992 I was shocked and surprised to learn (a) of the existence of

the purported 1988 will, (b) that Robert Gitlin, a total stranger to most of the family, was petitioning the Court to be appointed as personal representative, and (c) that Mr. Gitlin had anything to do with my aunt's estate.

14. Upon obtaining a copy of the purported 1988 will (after November 16, 1992), I was also shocked and surprised to learn that Robert Gitlin was named therein as a recipient of fifty percent (50%) of my aunt's estate.

15. Upon receipt of the above information, I became very suspicious of what was happening; since then I have been diligently engaged in investigating the circumstances of my aunt's last illness and death along with the circumstances of the execution of the 1988 will which was admitted to probate. As I reside out of state, I retained the services of a private investigator to determine the facts surrounding the death of my aunt and her relationship with Robert Gitlin.

16. In the course of this investigation, I have very recently ascertained new evidence which casts grave doubts on the initial finding of the Court that the 1988 will admitted to probate truly expresses the testamentary intent of Mildred C. Meeks.

17. That is, I have recently ascertained new evidence that at the time of the execution of the 1988 will and until my aunt's death, Robert Gitlin exercised undue influence over my aunt and caused her -- against her will -- to execute the 1988 will and other documents which transfer substantially all of my aunt's

property to Robert Gitlin.

18. In addition, upon reviewing a copy of a purported quit claim deed dated August 3, 1992, I was surprised and shocked to see that -- within the week of my aunt's death -- she allegedly signed a deed naming Robert Gitlin as the recipient of substantially all of her real property. (A copy of this purported deed is attached hereto as Exhibit A.)

19. The circumstances surrounding this purported quit claim deed are particularly alarming because I have recently ascertained new evidence that on August 3, 1992, my aunt was in a hospital and under medication for a broken hip and other severe, painful injuries she sustained in a fall on or about July 25, 1992. Further, the Court should be aware that my aunt had stomach cancer and was suffering substantially therefrom at the time of this transfer. She was under constant care and pain medication for the illness which ultimately took her life.

20. Moreover, upon information and belief, my aunt received approximately \$85,000.00 from her sister, Star Pelton, prior to her death. Upon further information and belief, shortly thereafter, Mr. Gitlin received approximately \$70,000.00 from my aunt -- and now claims that the same was a gift.

21. The evidence relevant to the validity of Mildred C. Meeks' purported last will and testament and other purported documents, which I have obtained since November 7, 1992, could not have been ascertained despite due diligence prior to November 16,



1992, as I had no knowledge of the 1988 will nor of Robert Gitlin.

22. I want the Court to know that it is my desire that my aunt's wishes be respected, but I am very concerned that some improper conduct may have taken place. I am also dismayed with the Court's refusal to provide me with an extension of time so that I could object in a timely manner.

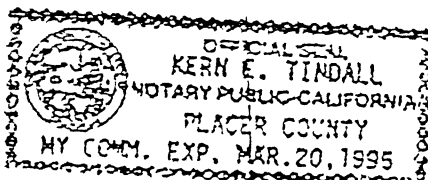
23. It is my desire that the Court set aside the November 14, 1992 order so that I can fully address the objections and concerns which I have.

FURTHER AFFIANT SAITH NOT.

DATED this 16<sup>th</sup> day of February, 1993.

George F. Naillon  
George F. Naillon, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME, THE UNDERSIGNED NOTARY PUBLIC, THIS 16<sup>th</sup> DAY OF FEBRUARY, 1993.



Kern E. Tindall  
NOTARY PUBLIC

FILED

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SEVENTH DISTRICT COURT  
STATE OF UTAH

HILL, HARRISON, HILL & FISHER  
Jeffrey R. Hill (#4596)  
F. McKay Johnson (#3725)  
3319 North University Avenue, #200  
Provo, Utah 84604  
Telephone: (801) 375-6600  
Attorneys for Petitioner

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY  
STATE OF UTAH, PROBATE DIVISION

---

In the Matter of the Estate	)	MEMORANDUM IN SUPPORT
	)	OF PETITION TO VACATE
of	)	OR SET ASIDE ORDER
	)	
MILDRED C. MEEKS,	)	
	)	
Deceased.	)	Probate No. <u>923700043</u>
	)	

---

The Petitioner by and through his attorneys of record hereby submits the following Memorandum of Points and Authority in support of his Petition to Vacate or Set Aside the Order pursuant to Rule 60(b)1,2.

FACTS

1. Mildred Crandall Meeks passed away on August 10, 1992, at the age of eighty-one (81) years. The stated cause of death was carcinoma of the stomach. Additionally, prior to her death the deceased was suffering from a broken hip and was hospitalized and medicated.

2. The Decedent was a resident of Carbon County, Utah, at the time of her death left an estate therein.

3. Upon information and belief the deceased's purported last will and testament dated October 18, 1988, has been deposited with the Court. This will allegedly supersedes and revokes the decedent's prior will.

4. On or about October 27, 1992, Robert Gitlin filed with the Court a Petition for Formal Probate of Will and Appointment of Personal Representative.

5. Notice was allegedly sent to the individuals identified in Paragraph 5 of said Petition on November 5, 1992.

6. The Petitioner, George Naillon, resides in Auburn, California, and received said Notice on or about Saturday, November 7, 1992, informing him of the hearing scheduled for Monday, November 16, 1992. (See Affidavit of George Naillon).

7. Upon receiving notice from the Court, Petitioner immediately attempted to contact attorneys in the Price, Provo and Salt Lake areas to represent him at the hearing and to file an objection on his behalf. Petitioner was unable to retain an attorney to represent him. The Petitioner contacted his California attorney, Rod Shepard and requested that he call the Court to request a continuance of said hearing until

he could retain local counsel to represent him at the hearing.  
(See Affidavit of George Naillon).

8. Petitioner's counsel contacted the Court and requested a continuance. This is supported by the Court's Minute Entry dated November 16, 1992.

9. Despite Petitioner's request for a continuance the Court granted Gitlin's Petition for Formal Probate of Will and Appointment of Personal Representative on November 16, 1992.

10. The Acceptance of Appointment and Letters Testamentary were filed with the Court on November 17, 1992.

11. Seven (7) days prior to the deceased's death, Robert Gitlin prepared a quit-claim deed and had the Mildred C. Meeks transfer her real property to him. This took place at the Utah Valley Regional Medical Center while the deceased was under the influence of pain medication which was being given to her for her stomach cancer and broken hip . See Exhibit "A" attached hereto and incorporated herein by this reference.

12. Upon information and belief, prior to the death of the deceased, she received approximately \$85,000.00 from Star Pelton, a sister. Upon further information and belief it is understood that Mr. Gitlin received approximately \$70,000.00 and claims that the same was a gift from the deceased.

13. Subsequent to the order appointing Robert Gitlin as

personal representative and formally probating the will, George Naillon hired the services of a private investigator to look into facts surrounding the death of Mildred Meeks and her relationship with Robert Gitlin. It was he who determined that the real property of Mildred Meeks had been transferred seven (7) days prior to the deceased's death and furthermore that the \$70,000.00 had been received by Gitlin.

14. All the information obtained was after the November 16, 1992, hearing and could not have been ascertained prior thereto or within a short period of time thereafter.

15. This Petition is being filed in a timely manner.

#### ARGUMENT

Petitioner Naillon is an interested party in this case as he is a nephew of the deceased. The Petitioner's right to be heard and have an opportunity for a hearing has been denied him despite diligent efforts. Immediately after receiving the notice he contacted the probate clerk and inquired as to what he would need to do to obtain an extension. She informed him that he needed to retain an attorney. The Petitioner then attempted to retain the services of thirteen attorneys to represent him in this matter. No one would or could help him

as a result of their conflicts, unwillingness or concern with the short time frame under which he was laboring. When these attempts failed he had Rod Shepard, an attorney in California, contact the Court and request that the matter be continued. In spite of all of these efforts and the Court's apparent awareness of his desires, as is evidenced by the November 16 minute entry, he was denied his opportunity to be heard at said hearing. As a result Robert Gitlin was appointed as personal representative and the will was admitted into formal probate contrary to his request and desire.

Subsequent to the hearing Petitioner obtained the services of a private investigator who determined it was Gitlin who had Mildred Meeks execute a second will naming him as a beneficiary, execute a quit-claim deed in the hospital transferring her property to him only seven (7) days prior to her death and while under the influence of pain medication for stomach cancer and a broken hip. It was also discovered that he curiously received approximately \$70,000.00 from the decedent and classifies the same as a gift. This evidence was discovered after the Order was signed by the Court. It was not reasonably possible that prior to the death and Gitlin's Petition for Probate that this evidence could have been reasonably established or determined due to the fact that the

interested party had no knowledge of who Robert Gitlin was or of the second will.

As the Court is well aware, the standard practice in probate matters, is that upon objections being lodged with the Court, the Court will set the matter over to the trial calendar for further hearing. Petitioner was denied that right in this case as his request was denied and the equivalent of a default was entered against him. R u l e 60(b)(1),(2) in pertinent part reads as follows:

Upon Motion and upon such terms as are just, the Court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise or excusable neglect; (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) . . .

In the case before the Court, due to the fact that Petitioner did not appear or file an objection despite his request for a continuance, the Court signed the Order which is the equivalent of a default judgment. As stated in Westinghouse Elec. Supply Co. v. Paul W. Larson Contractor 544 P.2d 876 (Utah 1975), "where any reasonable excuse is offered by a defaulting party, the Courts generally tend to favor granting relief from default judgment unless it appears that to do so

would in result in substantial injustice to the adverse party." The majority of cases in this area favor the concept that a party should be given an opportunity to litigate an issue on the merits.

In the instant case Petitioner certainly has standing to claim that there exists a reasonable excuse as to why he could not attend the hearing or file an objection in a timely manner. As indicated, he resides in California, he had only nine days notice of the hearing, he contacted the probate clerk and inquired as to an extension, he attempted to locate counsel in the Price and expanded area (13 attorneys) to appear on his behalf, and finally, upon failure to obtain local counsel contacted the Court directly through his California counsel and requested a continuance so that he could obtain counsel to represent him. The Petitioner respectfully asserts that the above efforts constitute a reasonable excuse on his behalf and that he should be afforded an opportunity to be heard. Under the circumstances one certainly questions whether the Petitioner was afforded meaningful due process under the law.

It should also be noted that after the hearing date, the Petitioner exercised due diligence by retaining a private investigator for the purpose of investigating the facts



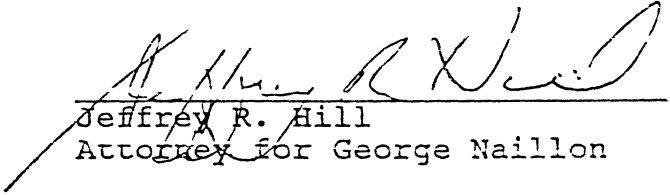
surrounding his aunt's death and her relationship with Mr. Gitlin. It is the information which he has uncovered subsequent to the hearing that create great doubt as to whether or not Robert Gitlin should be appointed as a personal representative due to what could be considered improper conduct on his behalf, undue influence, or at the very least, a conflict of interest.

In the case of Richins v. Delbert Chipman and Sons Company 67 advance reports 12, the court has stated that "in order for a party to be relieved from judgement under Rule 60(b)1, the party must demonstrate not only that the judgment resulted from mistake, inadvertence, surprise, or excusable neglect, but also that the Motion to Set Aside was timely and that there exists issues worthy of adjudication" CF. State ex rel. Utah State Department of Social Services v. Mussleman 667 P.2d 1053 (Utah 1983). This matter is being filed in a timely matter especially considering that the information provided from the private investigator has just been provided to Petitioner. In the instant case it is also apparent that there are issues worthy of adjudication ie. Robert Gitlin's ability to serve as personal representative free of any conflict of interest and free of any suspicion which has been cast upon him as a result of the transfers of money and

property to him by the deceased.

Accordingly, it is the request and belief of Petitioner that pursuant to Rule 60(b)(1)(2) that the Petitioner has been denied his opportunity to be heard despite his diligent efforts and that the same constitutes excusable neglect or surprise, and furthermore, pursuant to Rule 60(b)2 that newly discovered evidence currently exists which could not have been established prior to the time in which Petitioner would have been required to request a new trial. Accordingly, Petitioner respectfully requests this Court that the Court set aside or vacate the Order entering the original will and to probate and appointing Robert Gitlin as personal representative. Petitioner further requests a hearing for oral arguments on this matter.

DATED this 16th day of February, 1993.

  
Jeffrey R. Hill  
Attorney for George Naillon

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing on this 16 day of February, 1993, by first-class U.S. mail, postage prepaid, to the

following:

James D. Gilson  
50 South Main, Suite 1600  
Salt Lake City, UT 84144

  
Secretary

000045

WHEN RECORDED MAIL TO:

RECORDED:

FILED AND RECORDED FOR 430  
S.E. Utah Title

Entry No. 36097  
Indexed ✓  
Abstracted ✓  
Reg. Fee 10.50

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BOOK 319  
PAGE 490-491  
COROS  
COURT ORDER

SPACE ABOVE THIS LINE FOR RECORDER'S USE.

## QUITCLAIM DEED

MILDRED MECKS

Grantor(s), of Price, Utah

, hereby quitclaim(s), to

ROBERT E. GITLIN

of 398 West 2900 South, Price, Utah

Grantee(s), for the sum of \$

ten dollars and other good and valuable consideration

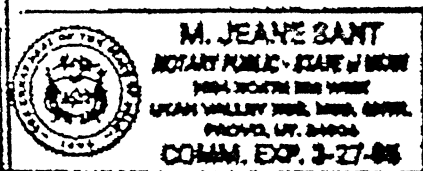
the following described land in Carbon

County, State of Utah:

Attached Exhibit A

WITNESS the hand(s) of said Grantor(s) this 3rd day of August, 1992

*Mildred C Meeks*  
Mildred Meeks



STATE OF UTAH

COUNTY OF CARBON

ss.

On the 3rd day of August, 1992, personally appeared  
*M. Jean Sant* Mildred Meeks

1992, personally appeared

the signer(s) of the above instrument, who duly acknowledged to me that she executed the same.

*M. Jean Sant*  
Notary Public

Residing at: *Provo, UT*

My Commission Expires:

*3-27-95*

000046

EXHIBIT A

The land referred to is situated in the State of Utah, County of Carbon, and is described as follows:

SW 1/4 SE 1/4 Section 32, T14S, R10E, SLEB

LESS the following parcels:

- (a) Beginning at a point 550 feet North and 452 feet East of the S 1/4 corner of Section 32, T14S, R10E, SLEB; and thence East 155 feet; thence North 75 degrees 00' East 60 feet along the road running along the north bank of Carbon Canal; thence North 18 degrees 30' West 94 feet to the Meeks ditch; thence South 56 degrees 00' West 271 feet, more or less, to the point of beginning.
- (b) Beginning at the S 1/4 corner of Section 32, T14S, R10E, SLEB; and running thence North 330 feet; thence East 1320 feet; thence South 330; South 330 feet; thence West 1320 feet to the point of beginning.
- (c) Beginning at a point 530 feet North of the S 1/4 corner of Section 32, T14S, R10E, SLEB; and running thence North 693 feet; thence North 65 degrees 00' East 59 feet; thence South 26 degrees 20' East 793 feet; thence thence South 56 degrees 00' West 50 feet, more or less to a point which is 550 feet North and 452 feet East of the point of beginning; thence South 20 feet; thence West 452 feet to the point of beginning.
- (d) Beginning at a point 330 feet North of the S 1/4 corner of Section 32, T14S, R10E, SLEB; and running thence North 200 feet; thence East 480 feet; thence North 20 feet; thence East 140 feet; thence North 36 degrees 00' East along the North bank of the Carbon Canal 330 feet; thence North 43 degrees 20' East 780 feet along the said canal bank; thence East 200 feet along the same canal bank; thence South 605 feet to the North boundary of the Mason Meeks property; thence West 1320 feet to the point of beginning.
- (e) Beginning at a point 1225 feet North of the S 1/4 corner of Section 32, T14S, R10E, SLEB; and running thence North 95 feet; thence East 249 feet; thence South 28 degrees 20' East 345 feet to the North line of Canal Road; thence South 56 degrees 00' West 72 feet along said road; thence North 17 degrees 30' West 94 feet along the east line of the Day property; thence North 15 degrees 00' East 271 feet along the East line of the Day property; thence South 54 degrees 00' West 57 feet, more or less to the point of beginning.

FILED

FEB 23 93

SEVENTH DISTRICT COURT  
STATE OF UTAH

HILL, HARRISON, HILL & FISHER  
Jeffrey R. Hill (#4596)  
F. McKay Johnson (#3725)--  
3319 North University Avenue, #200  
Provo, Utah 84604  
Telephone: (801) 375-6600  
Attorneys for Petitioner

---

IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY  
STATE OF UTAH, PROBATE DIVISION

---

In the Matter of the Estate )  
of )  
MILDRED C. MEEKS, )  
Deceased. )

AFFIDAVIT OF GEORGE F. NAILLON

Probate No. 923700043

---

STATE OF CALIFORNIA )  
: ss:  
COUNTY OF )

I, GEORGE F. NAILLON, being first duly sworn, depose and state:

1. That the facts herein are based on my personal knowledge and observations.

2. I am of adult years and competent to make this Affidavit. All statements hereinafter set forth in this Affidavit are made by me on the basis of my personal and direct knowledge of the matter to which said statements pertain. If called as a witness by a Court of competent jurisdiction, I am able and shall testify as to

each and all of said matters in the manner hereinafter set forth in this Affidavit.

3. I am a citizen of the United States and a resident of the State of California; I am over the age of 18 years; I reside at 11103 Mt. Vernon Road, Auburn, CA 95603.

4. I am an interested party in the estate of Mildred C. Meeks, deceased, in that I am a nephew of the decedent, Mildred C. Meeks, who left no surviving spouse and no surviving issue.

5. On Saturday, November 7, 1992, I received notice from the Seventh Judicial District Court for Carbon County, State of Utah, that a hearing would be held on November 16, 1992, on the petition of Robert Gitlin for the formal probate of a will and the formal appointment of personal representative.

6. On November 11, 1992, after receiving the notice, I contacted Barbara Procarione, the probate clerk, and asked her what I needed to do to obtain an extension of time. She informed me that I would need to find an attorney to help me.

7. Upon receipt of this information, I immediately attempted to engage counsel for the purpose of representing me at the hearing.

8. In attempting to engage counsel I contacted the following attorneys by telephone prior to the hearing in an effort to have someone appear at the hearing and represent my interests:

Luke Pappas, Joni Pappas White, George Harmon, Mike Jensen, Dan Kaller Mike Harrison -- all of Price, Utah; Fred Howard, Provo;

Parsons Behle & Latimer (James Lee, president of the firm), Salt Lake City; Jones, Waldo, Holbrook & McDonough, Salt Lake City; Mark Tanner, Castledale; Keith Chiara, Helper; Stanley Litizzette, Helper; and Margaret Taylor, Helper.

9. None of the attorneys I contacted would represent me at the hearing, despite my assurances of ability and willingness to pay. I understood the reluctance of those firms which would have to travel long distances with the short notice under which I was forced to operate. However, I found it curious that no one in the Price area was willing to help me. There seemed to be a general fear or reluctance to become involved.

10. Upon my failure to obtain Utah counsel, I next contacted a California attorney, Rod Shepherd, who called the Court on November 16, 1992, prior to the hearing.

11. Through my California attorney, I requested the Court to reschedule the hearing to allow me the opportunity to engage Utah counsel and to appear and to submit objections. I made sure the Court was aware of my diligent efforts to obtain counsel prior to the hearing and of my concern that I be properly represented.

12. However, on November 16, 1992, despite my earnest requests, the Court admitted the purported will of Mildred C. Meeks to probate and also appointed Robert Gitlin as Personal representative.

13. Upon receipt of the notice from the Court on November 7, 1992, I was shocked and surprised to learn (a) of the existence of



the purported 1988 will, (b) that Robert Gitlin, a total stranger to most of the family, was petitioning the Court to be appointed as personal representative, and (c) that Mr. Gitlin had anything to do with my aunt's estate.

14. Upon obtaining a copy of the purported 1988 will (after November 16, 1992), I was also shocked and surprised to learn that Robert Gitlin was named therein as a recipient of fifty percent (50%) of my aunt's estate.

15. Upon receipt of the above information, I became very suspicious of what was happening; since then I have been diligently engaged in investigating the circumstances of my aunt's last illness and death along with the circumstances of the execution of the 1988 will which was admitted to probate. As I reside out of state, I retained the services of a private investigator to determine the facts surrounding the death of my aunt and her relationship with Robert Gitlin.

16. In the course of this investigation, I have very recently ascertained new evidence which casts grave doubts on the initial finding of the Court that the 1988 will admitted to probate truly expresses the testamentary intent of Mildred C. Meeks.

17. That is, I have recently ascertained new evidence that at the time of the execution of the 1988 will and until my aunt's death, Robert Gitlin exercised undue influence over my aunt and caused her -- against her will -- to execute the 1988 will and other documents which transfer substantially all of my aunt's

property to Robert Gitlin.

18. In addition, upon reviewing a copy of a purported quit claim deed dated August 3, 1992, I was surprised and shocked to see that -- within the week of my aunt's death -- she allegedly signed a deed naming Robert Gitlin as the recipient of substantially all of her real property. (A copy of this purported deed is attached hereto as Exhibit A.)

19. The circumstances surrounding this purported quit claim deed are particularly alarming because I have recently ascertained new evidence that on August 3, 1992, my aunt was in a hospital and under medication for a broken hip and other severe, painful injuries she sustained in a fall on or about July 25, 1992. Further, the Court should be aware that my aunt had stomach cancer and was suffering substantially therefrom at the time of this transfer. She was under constant care and pain medication for the illness which ultimately took her life.

20. Moreover, upon information and belief, my aunt received approximately \$85,000.00 from her sister, Star Pelton, prior to her death. Upon further information and belief, shortly thereafter, Mr. Gitlin received approximately \$70,000.00 from my aunt -- and now claims that the same was a gift.

21. The evidence relevant to the validity of Mildred C. Meeks' purported last will and testament and other purported documents, which I have obtained since November 7, 1992, could not have been ascertained despite due diligence prior to November 16,

1992, as I had no knowledge of the 1988 will nor of Robert Gitlin.

22. I want the Court to know that it is my desire that my aunt's wishes be respected, but I am very concerned that some improper conduct may have taken place. I am also dismayed with the Court's refusal to provide me with an extension of time so that I could object in a timely manner.

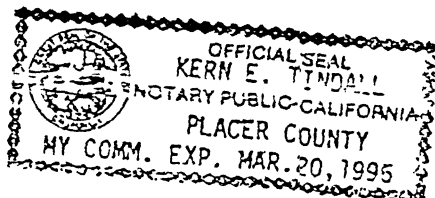
23. It is my desire that the Court set aside the November 16, 1992 order so that I can fully address the objections and concerns which I have.


FURTHER AFFIANT SAITH NOT.

DATED this 16<sup>th</sup> day of February, 1993.

  
George F. Naillon, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME, THE UNDERSIGNED NOTARY  
PUBLIC, THIS 16<sup>th</sup> DAY OF FEBRUARY, 1993.



  
NOTARY PUBLIC

FILED

MAR 12 93

SEVENTH DISTRICT COURT  
STATE OF UTAH

VAN COTT, BAGLEY, CORNWALL & McCARTHY  
James D. Gilson (5472)  
Susan G. Lawrence (5305)  
50 South Main Street, Suite 1600  
P. O. Box 45340  
Salt Lake City, Utah 84145  
Telephone: (801) 532-3333

Attorneys for Robert Gitlin,  
Personal Representative of the Estate

IN THE SEVENTH JUDICIAL DISTRICT OF CARBON COUNTY,  
STATE OF UTAH, PROBATE DIVISION

In the Matter of the Estate	)	
	)	
of	)	MOTION TO DISMISS
	)	PETITION OF
MILDRED C. MEEKS,	)	GEORGE NAILLON TO
	)	VACATE OR SET ASIDE ORDER
	)	
	)	
Deceased.	)	
	)	Probate No. 923700043
	)	

---

ROBERT GITLIN, in his capacity as Personal Representative of the Estate of Mildred C. Meeks, by and through his attorneys of record, submits this Motion to Dismiss the Petition to Vacate or Set Aside Order filed by George Naillon. This Motion is made on the grounds that the Petition is not timely, Petitioner fails to make a prima facie claim to contest the Court's Order of Formal Probate, and Petitioner is without standing to contest the appointment of the Personal Representative in these proceedings. A Memorandum in Support of this Motion has been submitted herewith.

DATED this 11 day of March, 1993.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By James D. Gilson  
James D. Gilson  
Attorney for Robert Gitlin,  
Personal Representative of  
the Estate

FILED

MAR 12 93

CLERK OF DISTRICT COURT  
STATE OF UTAH

VAN COTT, BAGLEY, CORNWALL & McCARTHY  
James D. Gilson (5472)  
Susan G. Lawrence (5305)  
50 South Main Street, Suite 1600  
P. O. Box 45340  
Salt Lake City, Utah 84145  
Telephone: (801) 532-3333

Attorneys for Robert Gitlin,  
Personal Representative of the Estate

IN THE SEVENTH JUDICIAL DISTRICT OF CARBON COUNTY,  
STATE OF UTAH, PROBATE DIVISION

In the Matter of the Estate	)	
	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO DISMISS PETITION
of	)	OF GEORGE NAILLON TO
	)	VACATE OR SET ASIDE ORDER
MILDRED C. MEEKS,	)	
	)	
	)	Probate No. 923700043
Deceased.	)	
_____	)	

ROBERT GITLIN, in his capacity as Personal Representative of the Estate of Mildred C. Meeks, by and through his attorneys of record, submits this Memorandum in Support of his Motion to Dismiss the Petition to Vacate or Set Aside Order that was filed by decedent's California nephew, George F. Naillon.

STATEMENT OF FACTS

1. On October 19, 1988, the decedent, Mildred C. Meeks, executed her Last Will and Testament at the office of her lawyer, Nick Sampinos. The Will had been prepared by Mr. Sampinos at the request of Ms. Meeks. No prior Wills of Mildred

C. Meeks are known to exist. (See Affidavit of Nick Sampinos, attached hereto as Exhibit A.)

2. Decedent's Will designates Robert Gitlin, a long-time friend and neighbor of Ms. Meeks, as personal representative and beneficiary of one-half of her estate. Ms. Carol Schroader, another friend of Ms. Meeks, is named as alternate personal representative and is the beneficiary of the other half of the estate.

3. Mildred C. Meeks died on August 10, 1992, at the age of 81 years. She was a long-time resident of Carbon County, Utah.

4. At the time of her death, decedent had no surviving spouse, no surviving issue, and no surviving parents. Decedent had a half-sister who survived her, named Star Pelton, who then lived in California and who now resides in Shoshone County, Idaho. Decedent's only other sibling, Lucy Naillon, predeceased the decedent on October 29, 1965.

5. Petitioner George Naillon, a long-time resident of the State of California, is one of four children of Lucy Naillon and thus is a nephew of decedent Mildred Meeks.

6. On October 28, 1992, Robert Gitlin filed Ms. Meeks' Will with the Court, together with a Petition for Formal Probate of Will and Appointment of Personal Representative.

7. On November 3, 1992, counsel for Robert Gitlin sent Mr. Naillon a copy of decedent's Will, along with copies of

other documents that Mr. Naillon had requested for "family genealogy" reasons, including the quit-claim deed that is attached to Naillon's Petition. (See letter to G. Naillon from J. Gilson dated November 2, 1992, copy attached hereto as Exhibit B.)

8. On November 5, 1992, the Court sent a Notice of Hearing on Mr. Gitlin's Petition to all persons entitled to receive notice under Utah Code Ann. § 75-3-403, including to George Naillon. The Court's Notice set the hearing for eleven (11) days later on November 16, 1992, in compliance with Utah Code Ann. §§ 75-3-403 and -401. (Copy of Notice attached hereto as Exhibit C.)

9. At the beginning of the hearing on November 16, 1992, the Honorable Judge Boyd Bunnell noted on the record that he had received a telephone call from an attorney in California named Rod Shepard, representing George Naillon, who had requested a two-week continuance of the hearing. The Court advised counsel for Mr. Gitlin, Nick Sampinos, of this requested continuance, which was objected to by Mr. Sampinos. The Court agreed with the objection by Mr. Gitlin's counsel that insufficient cause existed for a continuance, that the Notice of Hearing had been sent in a timely manner, and that no written objection to the Petition had been filed, and thereupon the Court proceeded with the hearing. (See Minute Entry dated November 16, 1992, copy attached as Exhibit D.)



10. Ms. Carol Schroader, the other beneficiary named in decedent's Will, was present at the hearing on November 16, 1992 and did not file or voice any objection to Mr. Gitlin's Petition for Formal Probate of Will and Appointment of Personal Representative.

11. At the conclusion of the November 16, 1992 hearing, the Court signed an Order granting Mr. Gitlin's Petition for Formal Probate of Will and Appointment of Personal Representative. (Copy of Order attached hereto as Exhibit E.) Letters Testamentary were issued to Mr. Gitlin the following day.

12. Three months later, on February 16, 1993, George Naillon filed his Petition to Vacate or Set Aside the Court's Order of Formal Probate of decedent's Will and the Appointment of Mr. Gitlin as Personal Representative of decedent's estate.

#### ARGUMENT

In order to have a final judgment or order set aside under Rule 60(b), the moving party must demonstrate (1) that the motion is timely; (2) that one of the reasons specifically enumerated in subsection (1) through (7) of Rule 60(b) is applicable; and (3) that movant's claim is meritorious and warrants setting aside the court's otherwise final order. State of Utah v. Musselman, 667 P.2d 1053, 1055-56 (Utah 1983). Mr. Naillon's Petition to Vacate or Set Aside the Court's November

16, 1992 Order of Formal Probate is filed on the basis of Rule 60(b)(1), "surprise, or excusable neglect," and Rule 60(b)(2), "newly discovered evidence that could not have been discovered in time." As set forth below, the Petition is not timely, it fails to establish excusable neglect or newly discovered evidence, and in all events the Petition fails to make a prima facie claim to contest the Court's Order of Probate.

I. The Petition is Untimely

The Petition of George Naillon to Vacate or Set Aside the Court's Order is untimely under the Utah Code and the Utah Rules of Civil and Appellate Procedure. Utah law provides that "[f]or good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal." Utah Code Ann. § 75-3-413; see also Utah Code Ann. § 75-3-412 ("Subject to appeal and subject to vacation as provided in this section and in Section 75-3-413, a formal testacy order . . . is final as to all persons with respect to all issues concerning the decedent's estate"); Estate of Christensen v. Christensen, 655 P.2d 646, 648 (Utah 1982) ("order admitting a will to probate in the course of formal testacy proceedings is a final order for purposes of appeal"). The "time allowed for appeal" is thirty days. Utah R. App. P. 4. Thus, Utah's probate code provides that Mr. Naillon's Petition seeking to vacate the Court's November 16, 1992 Order should have been filed with the District Court no later than thirty days after that Order was entered,

i.e., by no later than December 16, 1992. Instead, it was filed two months after that date, on February 16, 1993. The appellate court is without jurisdiction over this matter due to Petitioner's failure to file a notice of appeal, and this Court is similarly without jurisdiction to entertain the Petition since it was filed well beyond the thirty day time period limit set forth in Section 75-3-413 of Utah's probate code.

Mr. Naillon filed his Petition pursuant to Rules 60(b)(1) and (2) of the Utah Rules of Civil Procedure in an attempt to justify his three-month delay in filing his Petition. Nevertheless, a Rule 60(b) motion "shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken." Utah R. Civ. P. 60(b). Mr. Naillon's Petition was filed on the very last day of the three-month outside limit in Rule 60(b).

At the time of his initial request for a continuance at the November 16, 1992 hearing, Mr. Naillon only asked for a two-week extension. As set forth above, he should have filed his petition no later than thirty days after the Court's Order was entered. Petitioner should not be permitted to use Rule 60(b) to circumvent the thirty-day time limit prescribed by Section 75-3-413 or as a substitute for appeal. See Laub v. South Central Utah Tele. Assoc., 667 P.2d 1304, 1306 (Utah 1983) ("court should consider [ ] whether Rule 60(b) is being

II. Petitioner Has Not Demonstrated Excusable Neglect

Under Rule 60(b)(1), there is insufficient justification in the Petition to excuse Mr. Naillon's neglect in filing his Petition until the maximum three-month time period had expired under Rule 60(b). Mr. Naillon was aware in August 1992 that his aunt Mildred Meeks had died. He was not in contact with her during the years prior to her death, and he never came to her funeral nor made any inquiries about her after she had died. Only after he was notified that his aunt had left a Will that devised what little estate she had to her two close friends and that she had designated one such friend, Robert Gitlin, to be the personal representative of her estate, does Mr. Naillon become "shocked and surprised," and begin to show interest in his aunt's affairs.<sup>1</sup> Affidavit of George F. Naillon ¶¶ 13, 14.

His neglect is not excusable under Rule 60(b)(1) to justify his bringing his "suspicions," "concerns," and "grave doubts" (Naillon Aff. at ¶¶ 15, 16, 23) about the administration of his aunt's estate to the attention of the Court at this late date. The fact that thirteen attorneys were unwilling to take

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<sup>1</sup> Had Mr. Naillon been in contact with his aunt prior to her death he would not have been surprised to learn that his aunt wanted Mr. Gitlin to have an interest in her estate, for they were very close friends. (See Open Letter by Mrs. Janis McKinnon Gitlin, dated Feb. 14, 1993, copy attached hereto as Exhibit F, written in the midst of Mr. Naillon's "private" investigation referred to in paragraph 15 of his affidavit.)

Mr. Naillon's case (Naillon Aff. at ¶¶ 8-9) is more of an indication as to the lack of merit of his case than an indication that his neglect is excusable. The affidavit states that he contacted all these attorneys before the November 16, 1992, hearing, not afterwards. There is no indication in Naillon's Petition or Affidavit to justify why he could not have conducted his investigation between the time of his aunt's death on August 10, 1992 and the hearing on November 16, 1992, nor is there any justification why his investigation took three months.

Mr. Naillon states in paragraph 14 of his affidavit that he did not obtain a copy of decedent's Will and did not learn that Robert Gitlin was named as one-half beneficiary until after November 16, 1992. However, counsel for Mr. Gitlin sent Mr. Naillon a copy of decedent's Will on November 3, 1992, along with copies of other documents that Mr. Naillon had requested for "family genealogy" reasons, including the quit-claim deed that is attached to Naillon's Petition. (See letter to G. Naillon from J. Gilson dated November 2, 1992, copy attached hereto as Exhibit B.)<sup>2</sup> Furthermore, Mr. Naillon could have

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<sup>2</sup> Mr. Naillon's statements in paragraphs 14 and 21 of his affidavit that "prior to November 16, 1992, [ ] I had no knowledge of the 1988 will nor of Robert Gitlin," is also directly at odds with his statement in paragraph 13 of his affidavit that "Upon receipt of the notice from the Court on November 7, 1992, I was shocked and surprised to learn (a) of the existence of the purported 1988 will, (b) that Robert Gitlin, a total stranger to most of the family was petitioning the Court to be appointed as personal representative and (c) that Mr. Gitlin had anything to do with my aunt's estate."

obtained a copy of the Will and of the Petition of Robert Gitlin from the Clerk of the Court at any time after it was filed. The Court's Notice dated November 5, 1992 so states. (See Exhibit C.) The Notice of Hearing on Mr. Gitlin's Petition was sent to all persons entitled to receive notice under Utah Code Ann. § 75-3-403, including to George Naillon. The Notice set the hearing for eleven (11) days later on November 16, 1992, in compliance with Utah Code Ann. §§ 75-3-403 and -401. Mr. Naillon has offered no evidence as to why he neglected to simply make a telephone call to the probate clerk to request this information. The information which Mr. Naillon now claims came as a surprise to him could have been, and in fact was, obtained by him over a week prior to the date of the hearing.

The Utah Supreme Court has held that the receipt of notice of a hearing in a probate matter ten (10) days before the hearing gave the parties "more than ample time to appear at the hearing and lodge an objection or ask for a continuance . . . ." In Re Estate of Pepper, 711 P.2d 261, 264 (Utah 1985). In Pepper, the Court was not persuaded by the appellant's argument that because he lived out of state, he did not have adequate opportunity to attend the hearing. The Court stated, "in these days of efficient rapid transportation and relatively inexpensive telecommunications, we are less willing to allow distance alone to weigh heavily on our review of the adequacy of the notice." Id. Mr. Naillon could have personally appeared at

the hearing or filed a written objection with the Court. See Utah Code Ann. § 75-3-4 ("Any party to a formal proceeding who opposes the probate of a will for any reason shall state in his pleadings his objections to probate of the will"). Mr. Naillon did neither of these things and has offered no reasonable explanation to explain his negligence. "Mere inconvenience or the press of personal or business affairs is not deemed as an excuse for failure to appear at trial." Valley Leasing v. Houghton, 661 P.2d 959, 960 (Utah 1983).

Most compelling, however, is the fact that Petitioner did, in fact, enter an objection asking the Court to postpone the hearing. In paragraph 11 of his affidavit, Mr. Naillon expressly states that his California attorney, Rod Shepard, called Judge Bunnell prior to the hearing and requested a continuance. The request was denied by the Court and the hearing took place as scheduled on November 16th. (See Minute Entry, Exhibit D.) Petitioner's proper remedy was to appeal the Court's refusal to grant a continuance and not to try to attack the Order three months later under Rule 60(b). The Utah Supreme Court has stated that this factor, among others, should be considered by the trial court when ruling on a Rule 60(b) motion:

In addition to the concerns that final judgments should not be lightly disturbed and that unjust judgments should not be allowed to stand, other factors the court should consider are whether rule 60(b) is

being used as a substitute for appeal, whether the movant had a fair opportunity to make his objection at trial, and whether the motion was made within a reasonable time after entry of judgment. 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 60.19 (2d ed. 1982).

Laub v. South Central Utah Tele. Assoc., 657 P.2d 1304, 1306 (Utah 1982). Applying these circumstances in the instant case demonstrates that Mr. Naillon's Petition should be denied.

III. The Petition is Without Merit

In his Petition and accompanying affidavit, Petitioner alludes to "newly discovered" evidence which he has discovered with the aid of a private investigator. However, Petitioner fails to state what that evidence is, or why such evidence, if it does exist, could not have been discovered within thirty days after the court entered its Order. Under Rule 60(b)(2), Petitioner has the burden to show that "by due diligence the evidence could have been discovered and produced before judgment." See Hall v. Fitzgerald, 671 P.2d 224, 229 (Utah 1983), citing Doty v. Town of Cedar Hills, 656 P.2d 993 (Utah 1982); see also Utah Code Ann. § 75-3-407 (contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence).

Not only has Petitioner failed to specifically identify what the newly discovered evidence is, he has failed to establish that such evidence warrants vacating the Court's Order of Probate. As the Utah Supreme Court has stated.



"[n]otwithstanding defendant's showing of timeliness and excusable neglect, unless he can show 'some defense of at least ostensible merit as would justify a trial of the issue thus raised,' his motion to set aside cannot justifiably be granted." See Musselman, 1053 P.2d at 1056, citing, Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507 (Utah 1976). The Court in Musselman further stated that a Rule 60(b) movant "must therefore do more than merely dispute or deny the truth of plaintiff's allegations; he must set forth specific facts showing meritorious defenses to those allegation in order to have the default judgment set aside." Id. at 1057.

The Petition fails to "set forth specific facts" (Musselman, 1053 P.2d at 1057) that Ms. Meeks lacked testamentary capacity when she executed her Will in 1988 or that she did so under duress or undue influence. The only statements in Mr. Naillon's affidavit that relate to this issue are found in paragraphs 16 and 17, wherein he claims to have "ascertained new evidence" that "casts grave doubts on the initial finding of the Court that the 1988 will admitted to probate truly expressed the testamentary intent of Mildred C. Meeks," and that indicates that "Robert Gitlin exercised undue influence over my aunt and caused her -- against her will -- to execute the 1988 will." He never states what this new "evidence" is. Such claims are unfounded, conclusory, and are not based on personal knowledge. (See Motion to Strike Affidavit of George F. Naillon and

supporting memorandum, filed concurrently herewith.) Most importantly, they are false. Nick Sampinos, the attorney who met with Ms. Meeks in 1988 and prepared her Will and who has personal knowledge of such facts, testifies that Ms. Meeks executed her Will of her own free will, that neither Robert Gitlin nor anyone else exercised any undue influence over her, and that she was of sound mind. See Affidavit of Nick Sampinos, Exhibit A. The Petition is not "well grounded in fact" as required by Rule 11, Utah Rules of Civil Procedure. In short, Mr. Naillon's unfounded concerns, doubts, and suspicions are insufficient, as a matter of law, for his Petition to present a prima facie claim and it therefore should be dismissed.

IV. Petitioner Lacks Standing to Challenge the Appointment of Personal Representative

Mr. Naillon's claims "upon information and belief" that Mr. Gitlin exercised undue influence over the decedent after the execution of her Will with regard to gifts of property (Naillon Aff. at ¶¶ 17-20) are similarly unfounded, conclusory, not based on personal knowledge, and false. Moreover, Mr. Naillon has no standing under Rule 60(b) to challenge Mr. Gitlin's qualifications as personal representative inasmuch as he is not named as a beneficiary under the 1988 Will and he has no evidence that that Will is invalid. See Taylor v. Estate of Taylor, 770 P.2d 163, 167-68 (Utah App. 1989) (brother of decedent had no standing to assert claims of undue influence

where he had no financial interest in estate); Western Steel  
Erection Co., v. U.S., 424 F.2d 737, 739 (10th Cir. 1970)(only  
parties with standing can make a motion to have final orders set  
aside under Rule 60(b)); see also Utah Code Ann. § 75-3-203  
(person nominated in probated will has first priority for  
appointment as personal representative); Id. at § 75-3-407 ("if  
a will is opposed by a petition for a declaration of intestacy,  
it shall be determined first whether the will is entitled to  
probate"). Mr. Naillon does not have standing to challenge Mr.  
Gitlin's appointment as Personal Representative without first  
establishing by competent evidence that the 1988 Will is  
invalid, which he has not and cannot do.

#### CONCLUSION

Rule 60(b) provides that a motion to vacate an  
otherwise final order can only be granted "upon such terms as  
are just," and "in the furtherance of justice." Based on the  
foregoing, Naillon's request would not serve the ends of  
justice, but would only delay it and make it more costly. The  
Petition to Vacate or Set Aside Order is not properly before the  
Court and is otherwise without merit, and it should be  
dismissed.

DATED this 11 day of March, 1993.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By James D. Gilson  
James D. Gilson  
Attorney for Robert Gitlin,  
Personal Representative of  
the Estate



IN THE SEVENTH JUDICIAL DISTRICT OF CARBON COUNTY,  
STATE OF UTAH, PROBATE DIVISION

In the Matter of the Estate	)	
	)	
<b>of</b>	)	AFFIDAVIT OF
	)	NICK SAMPINOS
MILDRED C. MEEKS,	)	
	)	Probate No. 923700043
Deceased.	)	
_____	)	

STATE OF UTAH	)
	: ss.
COUNTY OF CARBON	)

Affiant, Nick Sampinos, being sworn states that:

1. I have personal knowledge of, and am competent to testify to, the facts stated in this affidavit.
2. I am an attorney licensed to practice law in the State of Utah since May 6, 1983. I have practiced law in Carbon County, Utah since January 1, 1984.
3. I have a general legal practice, which includes estate planning and preparation of wills.
4. I prepared the Last Will and Testament of Mildred C. Meeks dated October 18, 1988, a true copy of which is attached to this affidavit, and the original of which is on file with the Court in this case.
5. I specifically recall being contacted personally by Mrs. Meeks to prepare her Will during or about October 1988.

I was only generally acquainted with Mrs. Meeks prior to that time.

6. In accordance with my usual practice with clients who ask that I prepare their will, I met privately with Mrs. Meeks in my office. There was no other person with her besides myself during our conference.

7. I asked Mrs. Meeks if she had ever executed a will before, and she said that she had not.

8. I discussed with Mrs. Meeks the extent of her property, real and personal. I was satisfied that she understood the scope and extent of her estate as it existed at that time.

9. I discussed with Mrs. Meeks whom she wanted to name as beneficiaries of her estate. She advised me that her husband was deceased and that she had no children. She told me that she desired to bequeath one-half of her estate to Mr. Robert Gitlin, whom she identified as her close friend and neighbor of many years. I was generally acquainted with Mr. Robert Gitlin before that time, but did not know him personally. Mrs. Meeks also expressed her desire that Mr. Gitlin be appointed as personal representative of her estate. Mrs. Meeks further told me that she desired to bequeath the other half of her estate to Ms. Carol Schroader, whom she also identified as her friend. I was not acquainted with Ms. Schroader.

10. In accordance with my usual practice, and inasmuch as the beneficiaries that Mrs. Meeks selected were not her relatives, I specifically inquired of Mrs. Meeks if she was certain that she wanted to bequeath her estate to Mr. Gitlin and Ms. Schroader rather than to her sister, or to any of her nephews or nieces or other living relatives. She assured me that she was certain that she wanted to bequeath her estate to Mr. Gitlin and Ms. Schroader. She also assured me that she was not under duress or pressure of any kind in making her decision, from either Mr. Gitlin or Ms. Schroader, or from anyone else. She stated that neither Mr. Gitlin nor Ms. Schroader had asked her to designate them as beneficiaries of her estate, but that it was her sole decision to do so.

11. I asked Mrs. Meeks if she was taking any medication at the time that may affect her thinking or judgment in any manner, or if she was under the influence of alcohol or any other intoxicants, and she assured me that she was not.

12. Based on my personal observations of the demeanor of Mrs. Meeks, and of my conversations and meetings with her in connection with preparing and finalizing her Will, and based on my experience in meeting with numerous other clients in similar circumstances, it is my firm opinion that Mrs. Meeks was of sound mind, that she knew the extent and object of her bounty, that she possessed the requisite testamentary intent, and that she was not subject to any undue



influence, coercion, or threats of any kind with regard to the decisions and elections that she made with regard to her estate, and that her Will was made of her own free will and choice.

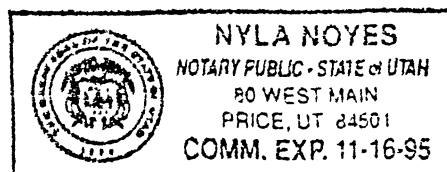
13. I was one of the two witnesses to Mrs. Meeks Will. The other witness, Mr. John E. Schindler, is an attorney who practices law in the same office building as myself. Ms. Nyla Noyes is my secretary and she was the notary public that witnessed Mrs. Meeks' execution of the Will, and she witnessed myself and Mr. Schindler sign the Will as attending witnesses.

Further, affiant sayeth not.

DATED this 12<sup>TH</sup> day of March, 1993.

Nick Sampinos  
NICK SAMPINOS

SUBSCRIBED AND SWORN to before me this 12<sup>th</sup> day of March, 1993.



My Commission Expires:

11-16-95

Nyla Noyes  
NOTARY PUBLIC  
Residing at Price, Utah

000087

LAST WILL AND TESTAMENT

OF

MILDRED C. MEEKS

I, MILDRED C. MEEKS, a legal resident of Carbon County, State of Utah, being of sound and disposing mind and memory, and not acting under duress, coercion, or undue influence, hereby revoke any prior wills and codicils made by me and declare this to be my Last Will.

ARTICLE 1

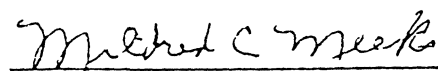
I hereby declare that I am a widow and I have no children.

ARTICLE 2

I direct that all my just debts and expenses of my last sickness, funeral expenses and the cost of administration, be paid out of the principal of my estate as soon after my death as is practicable.

ARTICLE 3

I appoint my friend, ROBERT GITLIN, of Carbon County, State of Utah as Personal Representative of this my Last Will, to serve without bond in any jurisdiction. If the said ROBERT GITLIN is unwilling or unable to so act at the time of my death, I appoint CAROL SCHROADER as alternate Personal Representative to serve without bond in any jurisdiction.

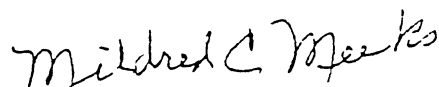
  
MILDRED C. MEEKS

ARTICLE 4

I give, devise, and bequeath the remainder of my estate, including all property, both real and personal, tangible and intangible, of every kind and description, wheresoever situated as follows: One-half of my said estate to the said ROBERT GITLIN and the other one-half of my estate to the said CAROL SCHROADER. In the event that ROBERT GITLIN shall fail to survive me, then his share of my estate shall be distributed to CAROL SCHROADER. In the event that CAROL SCHROADER fails to survive me, then her share of my estate shall be distributed to ROBERT GITLIN.

ARTICLE 5

Except as otherwise provided in this, my Last Will, I have intentionally omitted to provide herein for any other relative or for any other person, whether claiming to be an heir of mine or not. In the event that any person shall claim to be an heir of mine or have an interest in my estate otherwise than herein provided, and a court of competent jurisdiction shall determine that such person is entitled to share in my estate, then I leave to such person the sum of One Dollar (\$1.00) and no other sum.

  
MILDRED C. MEEKS

Last Will of  
Mildred C. Meeks  
Page 3

IN WITNESS WHEREOF, I, MILDRED C. MEEKS, sign, seal, publish and declare this as my Last Will in the presence of the persons witnessing it at my request this 18th day of October, 1988, at Price, Utah.

Mildred C. Meeks  
MILDRED C. MEEKS

This instrument, consisting of five pages was this 18th day of October, 1988, signed, sealed, published and declared by MILDRED C. MEEKS, to be her Last Will in the presence of us who, at her request and in her presence and in the presence of each other, have signed our names as Witnesses; and we declare that at the time of the execution of this instrument, to the best of our knowledge, MILDRED C. MEEKS was of sound mind and under no constraint or undue influence.

WITNESS:

W. L. Simpson  
John E. Schindler

ADDRESS:

Price, Utah  
Price, ut

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Last Will of  
Mildred C. Meeks  
Page 4

AFFIDAVIT OF PROOF OF LAST WILL

STATE OF UTAH       )  
                              : ss.  
COUNTY OF CARBON )

We, MILDRED C. MEEKS, NICK SAMPINOS, and JOHN E. SCHINDLER, Testatrix and the witnesses, respectively, whose names are signed to the foregoing instrument, being first duly sworn, do declare that the foregoing instrument was signed, published, and declared by the Testatrix as and for her Last Will in the presence of the Witnesses, who, at her request; and in her presence and in the presence of each other, have subscribed their names to this instrument as attesting Witnesses on the day and year last above written; that the Testatrix executed the foregoing instrument as her free and voluntary act for the purposes therein expressed; and that to the best of their knowledge, opinion, and belief, the Testatrix was at the time eighteen (18) years of age or older, of sound and disposing mind and memory, and under no constraint or undue influence.

Mildred C. Meeks  
MILDRED C. MEEKS

Nick Sampinos  
WITNESS

John E. Schindler  
WITNESS

Last Will of  
Mildred C. Meeks  
Page 5

SUBSCRIBED AND SWORN to before me by MILDRED C. MEEKS, the  
Testatrix, and NICK SAMPINOS and JOHN E. SCHINDLER,  
Witnesses, this 18th day of October, 1988.

*Nyla Noyes*  
NOTARY PUBLIC

My Commission Expires:

November 16, 1991

Residing At:

Price, Utah

000002





DAVID E. SALISBURY  
 4 SCOTT WOODLAND  
 NORMAN S. JOHNSON  
 RICHARD K. SAGER  
 STEPHEN D. SWINDLE  
 ROBERT D. MERRILL  
 WILLIAM G. FOWLER  
 JREGORY P. WILLIAMS  
 ILAN F. MECHAN  
 BRENT J. GIAUQUE  
 : SCOTT SAVAGE  
 KENNETH W. YEATES  
 RAND L. COOK  
 JOHN A. SNOW  
 DAVID A. GREENWOOD  
 MAXILIAN A. FARBMAN  
 ARTHUR B. RALPH  
 ILAN L. SULLIVAN  
 ROBERT A. PETERSON  
 J. KEITH ADAMS  
 PHILLIP WM. LEAR  
 THOMAS T. BILLINGS  
 RICHARD C. SKEEN  
 JOHN T. NIELSEN  
 MICHAEL F. RICHMAN  
 DANNY C. KELLY  
 STEVEN D. WOODLAND  
 RICHARD H. JOHNSON II  
 H. MICHAEL KELLER  
 BRENT D. CHRISTENSEN  
 ELIZABETH A. WHITSETT  
 JEFFREY E. NELSON  
 PATRICIA M. LEITH  
 R. STEPHEN MARSHALL  
 THOMAS G. BERGGREN  
 ERVIN R. HOLMES  
 RONALD G. MOFFITT  
 ERIC C. OLSON  
 PATRICK J. O'HARA

MATTHEW F. McNULTY III  
 S. ROBERT BRADLEY  
 JON C. CHRISTIANSEN  
 GUY P. KROESCHKE  
 JOHN A. ANDERSON  
 WAYNE D. SWAN  
 GREGORY H. BARRICK  
 SCOTT M. HADLEY  
 TIMOTHY W. BLACKBURN  
 DONALD L. DALTON  
 GERALD H. SUNTVILLE  
 MARILYN H. HENRIKSEN  
 MARVIN D. BAGLEY  
 DAVID L. ARRINGTON  
 JOHN W. ANDREWS  
 CASEY K. MCGARVEY  
 DOUGLAS A. TAGGART  
 KATHRYN H. SNEDAKER  
 SUSAN G. LAWRENCE  
 PHYLLIS J. VETTER  
 JEREMY M. HOFFMAN  
 CLARK K. TAYLOR  
 BRYON J. BENEVENTO  
 ROBERT W. PAYNE  
 JAMES D. GILSON  
 DOUGLAS C. TINGEY  
 NATHAN W. JONES  
 ELIZABETH D. WINTER  
 JON E. WADDUPS  
 DAVID E. SLOAN  
 SCOTT K. MAYEDA  
 BRADLEY R. CAMOON  
 DAVID E. ALLEN  
 MELISSA D. DAVIDSON  
 CRAIG W. DALLON  
 MICHELE BALLANTYNE  
 THOMAS W. CLAWSON  
 DANIEL P. MCCARTHY  
 MICHAEL T. ROBERTS

A PROFESSIONAL CORPORATION  
 SUITE 1600  
 50 SOUTH MAIN STREET  
 SALT LAKE CITY, UTAH 84144  
 TELEPHONE (801) 532-3333  
 FACSIMILE (801) 534-0058  
 TELEX 453149

ADDRESS ALL CORRESPONDENCE TO  
 POST OFFICE BOX 45340  
 84145-0450  
 WRITER'S DIRECT DIAL NUMBER

November 3, 1992

BENNETT HARKNESS & KIRKPATRICK  
 1874-1890  
 BENNETT MARSHALL & BRADLEY  
 1890-1896  
 BENNETT HARKNESS, HOWAT  
 SUTHERLAND & VAN COTT  
 1896-1902  
 SUTHERLAND VAN COTT & ALLISON  
 1902-1907  
 VAN COTT ALLISON & RITER  
 1907-1917  
 VAN COTT, RITER & FARNSWORTH  
 1917-1947  
 2404 WASHINGTON BOULEVARD  
 OGDEN, UTAH 84401  
 (801) 394-5783  
 314 MAIN STREET  
 PARK CITY UTAH 84060  
 (801) 649-3889  
 3549 N UNIVERSITY AVENUE  
 PROVO UTAH 84604  
 (801) 375-5666  
 100 WEST LIBERTY  
 RENO, NEVADA 89501  
 (702) 333-6800  
 OF COUNSEL  
 LEONARD J. LEWIS  
 CLIFFORD L. ASHTON  
 JAMES P. COWLEY  
 JOHN CRAWFORD JR.  
 WILLIAM L. FILLMORE  
 DAVID L. GILLETTE  
 MARLIN K. JENSEN  
 GEORGE M. MCMILLAN  
 JOEL G. MOHBERGER


Mr. George F. Naillon  
 11103 Mt. Vernon Road  
 Auburn, California 95603

Dear Mr. Naillon:

Enclosed please find copies of the documents you requested during our telephone conversation on November 2, 1992:

1. Will of Mildred Meeks
2. Death Certificate of Mildred Meeks
3. Death Certificate of Star Macey Cook
4. Quitclaim Deed by Mildred Meeks to Robert Gitlin.

Very truly yours,



James D. Gilson

JDG:jl  
 enclosures: as noted



IN THE SEVENTH JUDICIAL DISTRICT COURT FOR CARBON COUNTY  
STATE OF UTAH

IN THE MATTER OF THE  
ESTATE OF  
MILDRED C. MEEKS,  
  
DECEASED.

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NOTICE

Probate No. 923-43


NOTICE IS HEREBY GIVEN THAT ON October 27, 1992, Robert Gitlin, whose address is 398 West 2900 South, Price, UT 84501 filed with the Clerk of the Court a petition praying for: FORMAL PROBATE OF WILL AND APPOINTMENT OF PERSONAL REPRESENTATIVE (A copy of the petition is on file with the Clerk of the Court and may be reviewed upon request.)

Hearing on said petition will be had before the above-entitled Court in Room 120 of the Carbon County Court Complex in Price, Carbon County, State of Utah, on NOVEMBER 16, 1992, at 9:30 o'clock a.m., at which time and place all persons interested in said estate may appear and show cause, if any they have, why said petition should not be granted.

WITNESS the Clerk of said Court and the seal hereof affixed this 5th day of November, 1992.

BARBARA PROCARIONE, CLERK

(S E A L)

BY   
Clerk

000036



SEVENTH JUDICIAL DISTRICT COURT  
COUNTY OF CARBON, STATE OF UTAH

BOYD BUNNELL, DISTRICT JUDGE

DATE: Nov 16, 1992 - 9:30 am

ELECTRONIC RECORDING

CASE NO: Probate No. 923-43

IN THE MATTER OF THE ESTATE

Nick Sampinos

OF

MILDRED C. MEEKS, Deceased

MINUTE ENTRY

PROCEEDINGS BEFORE THE COURT: FORMAL PROBATE OF WILL &  
APPOINTMENT OF PERSONAL REPRESENTATIVE

The Court advised counsel that an attorney from California had called advising that he was representing George Frandsen Nailon and Mr. Nailon was requesting time to confer with local counsel. There was objection from Mr. Sampinos. Said petition being verified and noticed for hearing, and there being no protests on file, the Court now

FINDS AND ORDERS: That the document entitled Last Will and Testament of Mildred C. Meeks is in truth and fact her last will and the same is admitted to probate. The Court will appoint Robert Gitlin as personal representative of this estate upon taking of the oath. No bond will be required.

bap  
Tape 92-59/3700

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FILED OCT 27 1992

OCT 15 92

VAN COTT, BAGLEY, CORNWALL & MCCARTHY  
James D. Gilson (5472)  
Susan G. Lawrence (5305)  
Attorneys for the Petitioner  
50 South Main Street, Suite 1600  
P. O. Box 45340  
Salt Lake City, Utah 84145  
Telephone: (801) 532-3333

SEVENTH DISTRICT COURT  
STATE OF UTAH

IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY,  
STATE OF UTAH, PROBATE DIVISION

In the Matter of the Estate	)	
	)	FORMAL PROBATE OF WILL
of	)	AND APPOINTMENT OF
	)	PERSONAL REPRESENTATIVE
MILDRED C. MEEKS,	)	
	)	
Deceased.	)	Probate No. 923-43
<hr/>		

Upon consideration of the Petition for Formal Probate of Will and Formal Appointment of Personal Representative filed by Robert Gitlin, on the 27th day of October, 1992, the Court finds as follows:

1. The Petition for Formal Probate of Will and Formal Appointment of Personal Representative is complete.
2. The petitioner has made oath or affirmation that the statements contained in the Petition are true to the best of his knowledge and belief.
3. The petitioner appears from the Petition to be an interested person as defined by the Utah Uniform Probate Code.

4. On the basis of the statements in the Petition, venue is proper because the decedent was domiciled in Carbon County, Utah at the time of her death.

5. Any required notice has been given or waived.

6. The decedent's Last Will and Testament of MILDRED C. MEEKS constitutes the decedent's Last Will and Testament.

7. The Petition does not indicate the existence of a possible unrevoked testamentary instrument which may relate to property subject to the laws of this state, and which is not filed for probate in this court.

8. The Petition does not relate to one or more of a known series of testamentary instruments (other than Wills and Codicils), the latest of which does not expressly revoke the earlier.

9. It appears from the Petition that the time limit for formal appointment has not expired.

10. Based on the statements in the Petition, Robert Gitlin, the person whose appointment is sought, is nominated in the Last Will and Testament of the decedent as the personal representative, is qualified to act as personal representative, and has a prior right to appointment.

11. On the basis of the statements in the Petition, no personal representative has been appointed in this state or elsewhere.



12. The names, addresses and relationships of the heirs and devisees of the decedent are as follows:

Name	Address	Relationship
Carol Schroader	c/o Ralph W. Rasmussen, Jr. 389 North University Ave. P.O. Box 432 Provo, UT 84603	beneficiary under will
Starr Pelton	321 Cameron Drive Osburn, ID 83849-1023	sister
William James Naillon	498 Vick Drive Santa Cruz, CA 95060	nephew
George Francis Naillon	11103 Mt. Vernon Road Auburn, CA 95603	nephew
Margie Ann Naillon	936 West Julian Street San Jose, CA 95008	niece
Patricia Carol Naillon/Candelaria	2775 Croft Drive San Jose, CA 95148	grand niece
John Rolland Naillon, Jr.	9507 LaPorte Road Bangor, CA 95914	grand nephew
Michael George Naillon, Sr.	10934 SE 254 Place Kent, WA 98031	grand nephew
Danny William Naillon	413 San Juan Los Banos, CA 93635	grand nephew
Tammy Michelle Naillon	2775 Croft Drive San Jose, CA 95148	grand niece

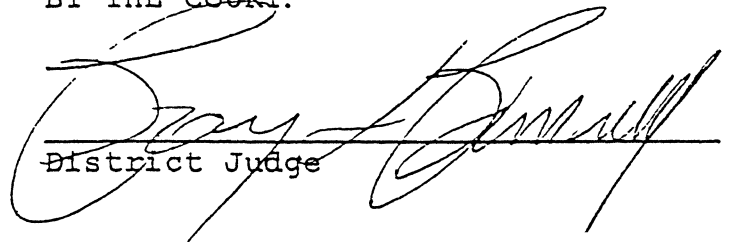
All of the foregoing individuals are adults.

NOW, THEREFORE, the Petition is hereby granted, the Last Will and Testament of MILDRED C. MEEKS, dated October 18, 1988, is hereby formally probated, Robert Gitlin is hereby

appointed personal representative of the decedent's estate, to act without bond in an unsupervised administration, and upon qualification and acceptance Letters Testamentary shall be issued to the said personal representative.

DATED this 16 day of November 1992.

BY THE COURT:

  
District Judge



February 14, 1993

In the midst of all the investigation that is going on, and along with all the sadness and discomfort it has caused us, I feel the need to speak what is on my mind and in my heart. Maybe someone will read these words, maybe no one will, but I will feel much better for having said them.

Bob and Mildred were very special friends. In a lifetime one could only hope to share such a friendship. He was completely devoted to her care and well being. As his wife I can tell you that Mildred was always a main concern to Bob. If he was working dayshift, afternoons, or evenings, Mildred's place was his first stop after work. He would do the farm chores, feed and water the animals, take care of her furnace, and run errands for her. Hardly a day went by that she didn't have him get something at the store for her or do something in town for her. If she had an appointment, he would drive her, as he was concerned about her driving safely. If she had an out of town appointment he would take off work to take her to it. When she was in the hospital, or nursing home he would go to see her every day. Even when she was in the hospital in Provo 90 miles away, he drove there and back every day. Then he came home and went to work. He'd sleep five hours and get up and go again. If we were going out of town for the weekend, making arrangements for Mildred's care came first. He would call public health, or home health, or our family members, or good friends and hers Thelma and Ramon Madrid. They did her chores and called on her to see if she needed anything. While we were away, Bob always called to see how she was doing. But beyond all of this, they were simply good friends. They would sit at the old kitchen table, drink tea, and laugh and talk of hours. Bob enjoyed Mildred's wit and incredible sense of humor. We all did, she was such a joy to be around. During those years of helping Mildred many a supper got cold, and many a plan was delayed, but we didn't mind so much, Mildred was worth it. Through all her hard times, she never complained. She was so strong.

This friendly relationship did not just start 15 years ago when we bought land from the Meeks's. My family way back were friends with them both, years before Bob and I came home from college to live here. My grandfather, a vet, came to this area over 80 years ago. He, my father, and his brothers were in the livestock business for years. They ran Archie's cattle on our summer range in the Gentry Mountains for nothing. They knew they didn't have much money and could not afford to pay. Archie was a good cowhand though, and an honest man. He would help out when he could. Archie would ride the 22 miles to the mountain on horseback to check on his cows. At that time he didn't even have a truck. Our ranch was a half-way point, and often he would eat a meal with us before continuing on his way. I remember my mother and grandmother giving Mildred clothes, silverware, and coats, as well as visiting with her while she waited for Archie. Mildred had a great deal of respect for the McKinnon family and appreciated their kindness.

Mildred was a very proud and private person. She would never ask for anything from anyone. Maybe that is why we became such good friends with her, she never had to ask. We just offered, for no other reason than this. we just cared for her and she was a good person.

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We saw Mildred every day, and to my knowledge, we were the only ones that helped her on a daily basis. She had her personal friends whom she loved and kept in close touch with, but they were all too old to help. She had some church people who would come around, but they too were never there when she needed them, or she felt they had their hands out. As far as her own family, they were not available to her, something to this day, we do not understand. She wrote letters to her mother and talked with her on the phone. In the last years of her mother's life, Mildred wanted to see her. Bob offered to see that she got there, but she was told not to come.

Mildred made her own decisions, and we never questioned them. The last several years Mildred was having a hard time taking care of herself at home. Yet she wanted to be at home as long as possible. We promised her we would abide with her wishes, and we made all the special arrangements necessary to keep her there and comfortable. This made her very happy. At times it was incredibly difficult for us, but we just took each day as it came. We even offered to take her into our home, but of course she would never consider this. She loved her home, her little farm, and her animals. We did the best we could for her each day. When she got so she wouldn't eat much, I sent dinner down to her each night. Bob would often stay and eat something with her to give her someone to talk to during meals. We always, of course, invited her to join in with us at holidays.

When I look back over the years, even I have to marvel at Bob's efforts. I think back to when Archie was dying of colon cancer and wanted to be at home. Because of her bad back, Mildred could not lift him or help him around. Archie, being a modest man, did not want the care of a female nurse at times, so Bob bathed him, diapered him, lifted and carried him. Archie had to quit smoking years earlier because of his lungs and heart. One of his last wishes was to have a cigarette. He had Bob hold it to his mouth for him while he had a few puffs. Later, when he died Mildred and Bob were at his side.

I believe that Mildred loved and trusted Bob more than anyone, and rightly so. I guess this is why when there are so many questions being asked about Bob, and his character is being scrutinized, it hurts me so much. I know first hand that Bob, for years, gave unselfishly of his time, effort, and love. Beyond that I guess nothing else really matters, but I challenge anyone to do what he has done for another human being, and before people question him or judge him, they should have walked a mile in his shoes over the past 15 years.

In my opinion the questions being asked repeatedly of our friends, neighbors, and associates in our small community causes suspicion and constitutes harassment. I am very much upset by it. It is unnecessary and uncalled for. It has made our lives difficult over these past few weeks. Considering the circumstances, and all of our efforts on Mildred's behalf, we strongly feel we are certainly undeserving of this kind of treatment.

Sincerely,

*James McKinnon Dittus*

FILED

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SEVENTH JUDICIAL COURT  
STATE OF UTAH

VAN COTT, BAGLEY, CORNWALL & McCARTHY

James D. Gilson (5472)

Susan G. Lawrence (5305)

50 South Main Street, Suite 1600

P. O. Box 45340

Salt Lake City, Utah 84145

Telephone: (801) 532-3333

Attorneys for Robert Gitlin,  
Personal Representative of the Estate

IN THE SEVENTH JUDICIAL DISTRICT OF CARBON COUNTY,

STATE OF UTAH, PROBATE DIVISION

In the Matter of the Estate	)	
	)	
of	)	MOTION TO STRIKE
	)	AFFIDAVIT OF
	)	GEORGE F. NAILLON
MILDRED C. MEEKS,	)	
	)	Probate No. 923700043
Deceased.	)	
_____	)	

Robert Gitlin, Personal Representative of the Estate, hereby moves this Court, pursuant to Rule 56(e) of the Utah Rules of Civil Procedure, for an order striking certain portions of the Affidavit of George F. Naillon relied upon by petitioner, George F. Naillon, in support of his Petition to Vacate or Set Aside Order. His affidavit contains matters which are inadmissible in evidence.

Specifically, paragraphs 16, 17, 19 and 20 of Mr. Naillon's affidavit should be stricken because the statements are without foundation, are conclusory, and not based on personal knowledge, in violation of Rules 701, 602 and 802 of the Utah Rules of Evidence. Further, paragraphs 4 and 21 of Mr. Naillon's affidavit are legal conclusions and should be

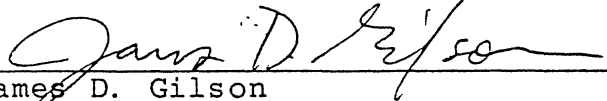
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stricken pursuant to Rule 701. Finally, portions of paragraphs 9, 13, 18, 22, and 23 are inadmissible as evidence on the basis that Mr. Naillon's subjective opinions, concerns, doubts and suspicions are not relevant to these proceedings and are therefore inadmissible under Rule 402.

This Motion is supported by a memorandum of points and authorities, filed herewith.

DATED this 11 day of March, 1993.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By   
James D. Gilson  
Attorney for Robert Gitlin  
Personal Representative

FILED

MAR 12 93

SEVENTH DISTRICT COURT  
STATE OF UTAH

VAN COTT, BAGLEY, CORNWALL & McCARTHY  
James D. Gilson (5472)  
Susan G. Lawrence (5305)  
50 South Main Street, Suite 1600  
P. O. Box 45340  
Salt Lake City, Utah 84145  
Telephone: (801) 532-3333

Attorneys for Robert Gitlin,  
Personal Representative of the Estate

IN THE SEVENTH JUDICIAL DISTRICT OF CARBON COUNTY,  
STATE OF UTAH, PROBATE DIVISION

In the Matter of the Estate	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF
of	)	MOTION TO STRIKE AFFIDAVIT
	)	OF GEORGE F. NAILLON
MILDRED C. MEEKS,	)	
	)	Probate No. 923700043
Deceased.	)	
_____	)	

Rule 56(e) of the Utah Rules of Civil Procedure provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." See also Maiorana v. MacDonald, 596 F.2d 1072, 1080 (4th Cir. 1979); Carney v. Beans, 500 F. Supp. 580, 583 (E.D. Pa. 1980) (supporting affidavit must be made on personal knowledge, devoid of hearsay and conclusory language and statements). In the case at hand, Petitioner George Naillon has filed a supporting affidavit which does not comply with Rule 56(e).



### ARGUMENT

#### THE NAILLON AFFIDAVIT CONTAINS STATEMENTS WHICH ARE INADMISSIBLE AS EVIDENCE

Paragraphs 16, 17, 19 and 20 of the affidavit of George F. Naillon, which make conclusory allegations that decedent lacked testamentary intent and that undue influence was exerted by Robert Gitlin, are inadmissible as evidence inasmuch as Mr. Naillon has failed to state the specific factual basis or foundation for such conclusions. Utah Rules of Evidence 701 excludes as evidence the opinions of a lay witness unless such opinions "are (a) rationally based on the perception of the witness and (b) helpful to clear understanding of the witness' testimony or the determination of a fact in issue." Utah R. Evid. 701.

Paragraphs 16, 17, 19 and 20 are also inadmissible in that they are not based on Mr. Naillon's personal knowledge as required by Rule 602, Utah Rules of Evidence. Mr. Naillon's only basis for his conclusory allegations is that he hired a private investigator, whom he does not identify, and who presumably reported some information to Mr. Naillon, the substance of which Mr. Naillon does not identify.

To the extent that Mr. Naillon implies in his affidavit that his statements are based on statements given to him by his private investigator or by any other person, such statements are based on inadmissible hearsay under Rule 802 of the Utah Rules of Evidence and they should be stricken.

Paragraphs 4 and 21 of Mr. Naillon's affidavit, stating that he is an interested party in these proceedings, and that he has exercised due diligence in attempting to ascertain new evidence that he does not disclose, are opinions and legal conclusions for the Court to decide, and are inadmissible under Rule 701.

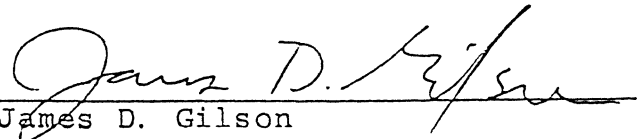
Finally, portions of paragraphs 9, 13, 18, 22 and 23 are inadmissible as evidence on the basis that Mr. Naillon's subjective opinions, concerns, doubts and suspicions are not relevant to these proceedings. Utah R. Evid. 402. The issues raised by the Petition are to be determined by the facts and the law, not on Mr. Naillon's unfounded suspicions as to what he thinks the facts may be.

#### CONCLUSION

Based on the foregoing, the aforementioned paragraphs of the Affidavit of George F. Naillon submitted in support of his Petition to Vacate or Set Aside Order should be stricken and not considered as evidence in these proceedings.

Dated this 11 day of March, 1993.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By   
James D. Gilson  
Attorney for Robert Gitlin,  
Personal Representative  
of the Estate

FILED

MAR 12 93

SEVENTH DISTRICT COURT  
STATE OF UTAH

VAN COTT, BAGLEY, CORNWALL & McCARTHY  
James D. Gilson (5472)  
Susan G. Lawrence (5305)  
50 South Main Street, Suite 1600  
P. O. Box 45340  
Salt Lake City, Utah 84145  
Telephone: (801) 532-3333

Attorneys for Robert Gitlin,  
Personal Representative of the Estate

IN THE SEVENTH JUDICIAL DISTRICT OF CARBON COUNTY,  
STATE OF UTAH, PROBATE DIVISION

In the Matter of the Estate	)	
	)	
<b>of</b>	)	CERTIFICATE OF SERVICE
	)	
MILDRED C. MEEKS,	)	
	)	
	)	
Deceased.	)	
	)	Probate No. 923700043
_____	)	

I HEREBY CERTIFY THAT on this date I caused true and correct copies of the Motion to Dismiss Petition of George Naillon to Vacate or Set Aside Order, Memorandum in Support of Motion to Dismiss Petition of George Naillon to Vacate or Set Aside Order, Motion to Strike Affidavit of George F. Naillon, Memorandum in Support of Motion to Strike Affidavit of George F. Naillon, and this Certificate of Service to be mailed, postage prepaid, to the following:

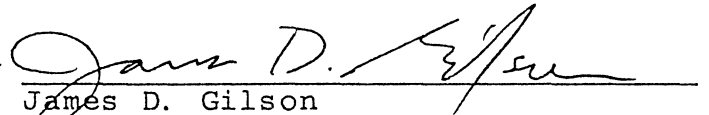
Jeffrey R. Hill, Esq.  
Attorney for George Naillon  
3319 North University Avenue, #200  
Provo, Utah 84604

Ralph W. Rasmussen, Jr., Esq.  
389 North University Avenue  
P. O. Box 432  
Provo, Utah 84603

DATED this 12 day of March, 1993.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By

A handwritten signature in cursive script, appearing to read "James D. Gilson", written over a horizontal line.

James D. Gilson  
Attorney for Robert Gitlin,  
Personal Representative of  
the Estate

FILED

MAR 26 93

SEVENTH DISTRICT COURT  
STATE OF UTAH

HILL, HARRISON, HILL & FISHER  
Jeffrey R. Hill (#4596)  
F. McKay Johnson (#3725)  
3319 North University Avenue, #200  
Provo, Utah 84604  
Telephone: (801) 375-6600  
Attorneys for Petitioner

---

IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY  
STATE OF UTAH, PROBATE DIVISION

---

In the Matter of the Estate	)	RESPONSE TO MOTION
	)	TO STRIKE AFFIDAVIT
of	)	OF GEORGE F. NAILLON
	)	
MILDRED C. MEEKS,	)	
	)	
Deceased.	)	Probate No. <u>923700043</u>
	)	

---

GEORGE F. NAILLON by and through his attorney of record hereby responds to the Motion to Strike the Affidavit of George F. Naillon.

ARGUMENT

1. Paragraphs 16, 17, 19, and 20 of the Affidavit of George F. Naillon should be found to be admissible as the same are based upon his knowledge. He is simply stating therein that he has ascertained evidence which gives rise to a belief on his part that create in his mind great doubt and suspicion. It is interesting to note that Robert Gitlin has not refuted

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or disputed the claims made in the Affidavit of George Naillon. There is little question that the Deed naming Mr. Gitlin as the recipient of all the property of Mildred Meeks was executed by the deceased approximately seven (7) days prior to her death. There is little question that the deceased had stomach cancer and was suffering therefrom. There is little question that she was suffering from a broken hip and was hospitalized at this time and under medication.

2. Paragraph 4 is clearly a statement of fact and should not be stricken. The statement of Mr. Naillon in Paragraph 21 that he has exercised due diligence in attempting to ascertain new evidence is his perception of his acts to his hiring of a private investigator and contacting approximately thirteen (13) attorneys and of having his California attorney contact the Court and request a continuance. Certainly his acts speak for themselves. This statements hould not be stricken as conclusory as legal conclusions.

3. Mr. Gitlin has alleged that portions of Paragraphs 9, 13, 18, 22, and 23 are inadmissible pursuant to Utah Rules of Evidence 402 as not being relevant. As indicated in the Motion to dismiss the Petition of George F. Naillon, Mr. Gitlin has alleged that the Petitioner Naillon must

demonstrate facts or allegations to give rise to the Court's belief that justice should dictate that the Order should be set aside. The opinions, concerns, doubt, and suspicions are substantiated by stated facts which exist in these paragraphs and accordingly are relevant to the proceedings. They also are helpful to the trier of fact in make a determination as to what is appropriate under the circumstances.

CONCLUSION

Based on the foregoing the paragraphs as contained in the Affidavit of George F. Naillon should not be stricken and should be fully considered by the Court.

DATED this 24 day of March, 1993.

  
\_\_\_\_\_  
Jeffrey R. Hill  
Attorney for George F. Naillon

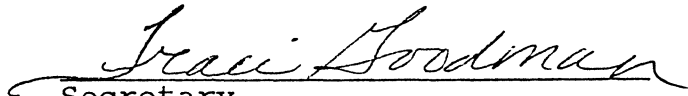
MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing Response to Motion to Strike Affidavit of George F. Naillon on this 24 day of March,

1993, by first-class U.S. mail, postage prepaid, to the following:

Ralph Rasmussen  
389 N. University  
Provo, UT 84601

James D. Gilson  
50 S. Main St., Suite 1600  
P.O. Box 45340  
Salt Lake City, UT 84145

  
Secretary



FILED

MAR 26 93

SEVENTH DISTRICT COURT  
STATE OF UTAH

HILL, HARRISON, HILL & FISHER  
Jeffrey R. Hill (#4596)  
F. McKay Johnson (#3725)  
3319 North University Avenue, #200  
Provo, Utah 84604  
Telephone: (801) 375-6600  
Attorneys for Petitioner

---

IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY  
STATE OF UTAH, PROBATE DIVISION

---

In the Matter of the Estate	)	RESPONSE TO MEMORANDUM
	)	IN SUPPORT OF MOTION
	)	TO DISMISS PETITION
of	)	OF GEORGE F. NAILLON
	)	TO VACATE OR SET ASIDE
	)	ORDER AND REQUEST FOR ORAL
	)	ARGUMENTS
MILDRED C. MEEKS,	)	
	)	
Deceased.	)	Probate No. <u>923700043</u>
	)	

---

George F. Naillon, an interested party, by and through his attorneys of record submit the following Response to the personal representative's Motion to Dismiss Petition of George F. Naillon to Vacate or Set Aside Order.

STATEMENT OF FACTS

The pertinent facts have previously been accurately set

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forth by both Mr. Naillon and the Personal Representative in the prior pleadings.

#### ARGUMENT

Mr Naillon's Petition to Vacate or Set Aside Order is timely and does establish sufficient grounds under U.C.A. 60(b) to permit the Court to vacate the Order of Probate.

1. The Petition Was Filed in a Timely Manner

Utah Code Annotated Section 75-1-304 provides that:

Unless specifically provided to the contrary in this Code or unless inconsistent with its provisions, the Rules of Civil Procedure, including the rules concerning vacation of orders and appellate review, govern formal proceedings under this Code.

thus, the probate codes adoption of the Rules of Civil Procedure, makes Rule 60(b) a proper method by which to set aside or vacate orders of the probate court. As has been acknowledged by the Personal Representative and as is evident by the Court's file, the Petition to Vacate the Order in this case was filed in a timely manner. Utah Code Annotated Sections 75-3-412 and 413 make provision for modification or vacation of a court order within a thirty (30) day time period of date of entry of the order. This however, does not limit

or supersede the provisions of Rule 60(b) which permits the Court to vacate or set aside a judgment or order should there be satisfactory grounds to do so. The application of Rule 60(b) is no different in the probate arena than is in the civil arena, but in no situation does the appeal period prohibit a party from seeking relief under Rule 60. Accordingly, the Personal Representative improperly argues that the petition is untimely since an appeal or modification was not filed within thirty (30) days after entry of the order. The Petitioner has met the time requirements of Rule 60 which is the applicable rule.

2. Petitioner Has Met The Requirements of Rule 60(b)(1),(2)

The second issue to consider is whether the Petitioner has established sufficient grounds to set aside a judgment based upon mistake, inadvertence, surprise, excusable neglect or that newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) was discovered.

Petitioner has detailed his diligent efforts of (1) contacting the Court clerk and requesting a continuance, (2) contacting over thirteen attorneys in the local area to aide

him with the filing of an objection, and (3) upon his failure to obtain counsel, having a California attorney contact the Court and request a continuance. These efforts all took place within the week prior to the hearing. In spite of his diligent efforts, which were made known to the Court, the Court refused to grant a continuance. Rule 60(b) states that "on motion and upon such terms as are just, the Court may in furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding...." Certainly justice would have been better served had the Court continued the hearing and permitted Petitioner to air his grievance or file objections with the Court.

The most compelling case cited by the Personal Representative is In re Estate of Pepper, 711 P. 2d 261 (Utah 1985). In Pepper, the appellants petitioned the probate division of the district court pursuant to Rule 60(b) to set aside its prior order approving the final accounting, settlement and distribution. The out-of-state appellants although represented by counsel and having been involved in the probate process for a lengthy period of time, failed to appear at the hearing, object or request the Court for a

continuance. In light of these facts, the Court states as follows:

If appellant did not agree with the amount shown on the Summary, they had more than ample time to appear at the hearing and lodge an objection or ask for a continuance to study the documents. Continuances of this type are given as a matter of course by the Court in probate proceedings. Additionally, appellants have three (3) months in which they could have moved for relief under Rule 60(b)(1)(2)(4). We acknowledge that the granting of a continuance is discretionary with the trial Court and that the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." (emphasis added)

As noted above the Court indicates that in probate matters continuances should be granted as a matter of course and that a request for a continuance should be given strong consideration in order to ensure that due process is preserved. In the case at bar, not only did Petitioner make zealous efforts to make arrangements to be heard and to obtain a continuance, but upon his failure to obtain a continuance he has now filed for relief under Rule 60(b) as was suggested by the Pepper court. The Courts denial of a continuance served to deny Petitioner his due process. Accordingly, Petitioner should be given an opportunity to be heard.

Petitioner has also demonstrated that new evidence has surfaced that could not have been discovered prior to the time

in which to file a motion for a new trial. Mr. Naillon has indicated to the Court that after the Order was entered and after having received notice of the same, he hired a private investigator for purposes of determining whether any further action should be taken on his part. His actions were not surprising or uncalled for, as he was genuinely surprised by Mr. Gitlin's being named as personal representative. The first notice Petitioner received of this fact was upon receiving a copy of the will just two (2) days prior to receiving notice from the clerk. After hiring a private investigator it was discovered that the deceased's property was conveyed to Mr. Gitlin just seven (7) days prior to her death while in the hospital suffering from cancer and a broken hip and while heavily medicated. It was also at this time that Petitioner discovered that approximately \$70,000.00 had earlier been transferred to Mr. Gitlin from the deceased. It was upon discovering these facts that Mr. Naillon determined it appropriate to file the proper documents with the Court. The Petition to vacate the order could not in good faith have been filed until after further investigation was complete. Had the court granted the continuance, objections could have been filed, a trial or hearing date would have set and proper

investigation could have taken place. It should be clear that this evidence could not be determined until after it was determined that Mr. Gitlin was to be appointed as the personal representative.

It should further be noted that the Petitioner's seeking relief from the Court is not an attempt to circumvent the thirty (30) day time limit prescribed by Section 74-3-413 or as a substitute for appeal. The Personal Representative cites Laub v. South Central Utah Tele. Assoc., 667 P 2d 1304, 1306 (Utah 1983) as controlling authority on this point. Laub however, poses the question whether the movant had a fair opportunity to make his objection at trial and whether the motion was made within a reasonable time after entry of judgment. In the instant case, due to the road blocks which Petitioner encountered, i.e., his being out of state, his inability to secure counsel despite diligent effort, and the failure of the Court to grant an extension, it is clear that he did not have a fair opportunity to make his objections known even though the Court was aware that he was concerned and desired to voice objections. The focus of this Petition should be on the merits of whether the Petitioner has grounds to have the judgment set aside, not whether he missed the

appeal deadline.

The Personal Representative claims that he will be prejudiced should the Court grant this Petitioner's Motion. The Personal Representative has claimed that he has expended funds to pursue claims against the estate or against the decedent's mother's estate in Idaho. It is difficult to address this issue without raising the issue of whether or not undue influence or coercion may have existed on the part of the Personal Representative. It is clear that he has much to gain in being named and remaining the personal representative and by maintaining the suit in Idaho as he will be the primary beneficiary. Further, the Personal representative can be reimbursed for the expenses rendered on behalf of the estate thus making his argument moot. However, any prejudice that the Personal Representative might suffer should not overshadow the rights of the Petitioner to be heard.

### 3. Standing is a Moot Issue

The Personal Representative's argument that Petitioner lacks standing to challenge the appointment of Personal Representative is moot at this time, moreover, it is interposed into this argument simply for the purposes of



confusion. The Personal Representative recognizes that Mr. Naillon is a nephew of the deceased and by virtue thereof an interested party. If Petitioner was not an interested party he would not have received notice. Furthermore, until such time as the Court determines if the will advanced by the Personal Representative is valid, the standing of Petitioner cannot be properly determined.

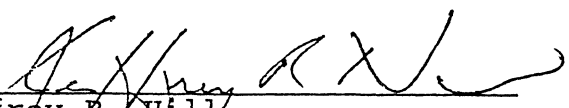
Lastly, the purpose of this Petition is not to address the merits of the case but to present and establish sufficient grounds to set aside the judgment which has been entered. Discussions which deal with issues beyond this rather narrow issue are superfluous and should properly be dealt with at subsequent hearings on the merits.

#### CONCLUSION

Rule 60(b) provides that a Motion to Vacate a final order can only be granted "upon such terms as are just and in the furtherance of justice." Based on the foregoing justice will not be served unless the order is set aside and the Petitioner is given an opportunity to be heard.

Petitioner respectfully requests oral arguments to present this matter to the Court.

DATED this \_\_\_\_ day of March, 1993.

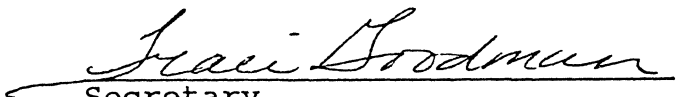
  
\_\_\_\_\_  
Jeffrey R. Hill  
Attorney for George F. Naillon

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing Response to Motion to Strike Affidavit of George F. Naillon on this 24 day of March, 1993, by first-class U.S. mail, postage prepaid, to the following:

Ralph Rasmussen  
389 N. University  
Provo, UT 84601

James D. Gilson  
50 S. Main St., Suite 1600  
P.O. Box 45340  
Salt Lake City, UT 84145

  
\_\_\_\_\_  
Secretary

FILED

APR -5 93

SEVENTH DISTRICT COURT  
STATE OF UTAH

VAN COTT, BAGLEY, CORNWALL & MCCARTHY  
James D. Gilson (5472)  
Susan G. Lawrence (5305)  
50 South Main Street, Suite 1600  
P. O. Box 45340  
Salt Lake City, Utah 84145  
Telephone: (801) 532-3333

Attorneys for Robert Gitlin,  
Personal Representative of the Estate

IN THE SEVENTH JUDICIAL DISTRICT OF CARBON COUNTY,

STATE OF UTAH, PROBATE DIVISION

In the Matter of the Estate	)	REPLY MEMORANDUM
	)	IN SUPPORT OF MOTION
of	)	TO DISMISS PETITION
	)	OF GEORGE F. NAILLON
MILDRED C. MEEKS,	)	
	)	Probate No. 923700043
Deceased.	)	
	)	

George Naillon's response to the Personal Representative's Motion to Dismiss his Petition to Vacate or Set Aside the Court's November 16, 1989 Order of Formal Probate in this case still fails to demonstrate a prima facie claim under Rule 60(b). Mr. Naillon has failed to meet his burden of demonstrating (1) that his Rule 60(b) Petition is timely; (2) that excusable neglect exists to explain why his claims about decedent's Will or the appointment of the Personal Representative were not raised earlier, and (3) that Petitioner's claim is meritorious and warrants setting aside the court's otherwise final order. State of Utah v. Musselman, 667 P.2d 1053, 1055-56 (Utah 1983). Petitioner's attempt to satisfy these requirements is unavailing.

I. Petitioner Fails to Make a Prima Facia Claim

Four months and two briefs later, Mr. Naillon still has not given the Court cause to set aside its Order of Formal Probate. Absolutely no evidence has been presented or even identified that Mrs. Meeks was not of sound mind or that her Will was procured through undue influence. "[U]nless [Mr. Naillon] can show 'some defense of at least ostensible merit as would justify a trial of the issue thus raised,' his [Rule 60(b)] motion to set aside cannot justifiably be granted." See State of Utah v. Musselman, 667 P.2d 1053, 1056 (Utah 1983), quoting, Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507 (Utah 1976).

The affidavit of attorney Nick Sampinos submitted in support of the Motion to Dismiss Naillon's Petition is the only competent evidence before the court on this issue, and it remains unchallenged by Petitioner. After his three month investigation, all Mr. Naillon says is that he has "ascertained new evidence" that "casts grave doubts on the initial finding of the Court that the 1988 will admitted to probate truly expressed the testamentary intent of Mildred C. Meeks." Affidavit of George F. Naillon ¶ 16. He never state what that new evidence is. His claims are, unfounded, conclusory, and are not based on personal knowledge.

Unless and until Petitioner comes forth with competent evidence to challenge the court's finding that the 1988 Will is not the last will and testament of decedent, he

has no standing to claim that Mr. Gitlin is an inappropriate personal representative. See Taylor v. Estate of Taylor, 770 P.2d 163, 167-68 (Utah App. 1989). Further, Petitioner's attempt to impugn the appropriateness of Mr. Gitlin serving as personal representative is not based on any evidence or sound logic. The fact that Mrs. Meeks quit-claimed her home to Mr. Gitlin the week before she died does not establish, ipso facto, that undue influence was used or that she did not understand what she was doing. Mr. Gitlin vigorously disputes this insinuation by Petitioner. But, this unsupported allegation cannot be raised by Petitioner Naillon where he no demonstrated financial interest in this estate.

II. The Petition was not filed "Within a Reasonable Time"

Mr. Naillon's sole argument as to the timeliness of his Rule 60(b) claim is that it was filed on the three month anniversary of the date that the Order of Probate was entered. Rule 60(b) provides that a motion to set aside a final order or judgment based on excusable neglect or newly discovered evidence "shall be made within a reasonable time and. . . not more than 3 months after the judgment, order, or proceeding was entered or taken." Utah R. Civ. P. 60(b)(emphasis added). In Maertz v. Maertz, 827 P.2d 259, 2671 (Utah App. 1992), the court explained that what constitutes "reasonable time" under Rule 60(b) "depends upon the facts of each case, considering such factors as the interest in finality, the reason for delay,

the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties."

Petitioner Naillon ignores the reasonable time requirement. Petitioner does not explain, nor can he, why his investigation took three months. His efforts to contact local counsel took place before the order was entered, not afterwards. Utah law provides that an order in a formal testacy proceeding "may be modified or vacated within the time allowed for appeal," which is within thirty days. Utah Code Ann. § 75-3-413; Utah R. App. P. 4. Thirty days would have been "a reasonable time." No evidence or argument has been made by Petitioner as to how waiting ninety days was a "reasonable time."

Petitioner Naillon continues to ignore the fact that at the time of his initial request for a continuance at the November 16, 1992 hearing, only a two-week extension was discussed. Petitioner should not be permitted to use Rule 60(b) to circumvent the thirty-day time limit prescribed by Section 75-3-413 or as a substitute for appeal. See Laub v. South Central Utah Tele. Assoc., 667 P.2d 1304, 1306 (Utah 1983) ("court should consider [ ] whether Rule 60(b) is being used as a substitute for appeal"); Morse-Starrett Prods. Co. v. Steccone, 205 F.2d 244, 249 (9th Cir. 1953)(same). If Petitioner felt that Judge Bunnell's denial of his oral request for a continuance was improper, then he should have sought an

appeal of that ruling, and not simply wait ninety days and file a Rule 60(b) petition.

Judge Bunnell was well within his discretion in denying the oral motion for continuance where no proper notice had been sent in a timely fashion, no written objection had been filed, and no reason was given to why the Will should not be accepted to probate.

#### CONCLUSION

George Naillon's Rule 60(b) Petition to Vacate or set aside the court's order of formal probate and appointment of personal representative without any substance and it was not filed with a "reasonable time." It fails to raise a colorable claim to justify setting aside this court's final order in that regard, which has been relied upon by the Personal Representative in his substantial efforts in settling this estate during the past six months.

The Personal Representative does not believe that any hearing is necessary in order for the court to rule on the Motion to Dismiss the Petition of Mr. Naillon, or on the Motion to Strike Mr. Naillon's affidavit.

DATED this   1   day of April, 1993.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

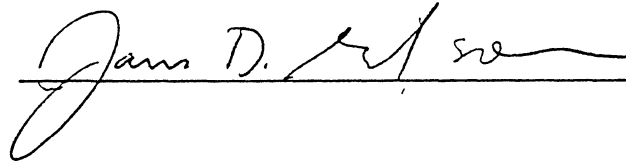
By James D. Gilson  
James D. Gilson  
Attorney for Robert Gitlin,  
Personal Representative of  
the Estate

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing Reply Memorandum in Support of Motion to Dismiss Petition of George F. Naillon to be mailed, postage prepaid, this 1 day of April, 1993, to the following:

Jeffrey R. Hill, Esq.  
3319 North University Ave., #200  
Provo, Utah 84604

Ralph Rasmussen, Jr., Esq.  
389 North University Ave.  
Provo, Utah 84601

  
\_\_\_\_\_



FILED

SEP -3 93

SEVENTH DISTRICT COURT  
STATE OF UTAH

IN THE SEVENTH JUDICIAL DISTRICT COURT  
CARBON COUNTY, STATE OF UTAH

---

In the Matter of the Estate	:	MEMORANDUM DECISION
	:	
of	:	
	:	
	:	
MILDRED C. MEEKS,	:	
	:	
Deceased.	:	Probate No. 923700043 ES

---

The Court having reviewed the file herein finds that a Petition to Probate was filed and Order granting same was subsequently entered. Subsequent thereto, a Petition to Vacate was filed by Petitioner Naillon. The Court deems this to be a Motion to Vacate under Rule 60(b) of the Utah Rules of Civil Procedure, hereafter "Motion to Vacate", Memorandum in support was attached thereto. Subsequently, a Motion to Dismiss the Petition of Naillon was filed by the attorney for the Personal Representative together with a Memorandum in Support thereof. The Court concludes that this should have been an Objection to the Motion to Vacate and attached Memorandum in Support thereof, hereafter "Objection". At the same time a Motion to Strike the Affidavit of Naillon was filed, pursuant to Rule 56(e), together with a Memorandum in Support thereof. A document entitled Assent to Personal Representative's Motion was also filed. The Court deems same to be a joinder by Carol Schroader in the Objection filed on behalf of the Personal Representative and for the reasons set forth therein.

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Subsequently, Naillon filed a response to the Motion to Strike Affidavit on March 26, 1993 and also filed a reply to the "Objection" and Memorandum in Support of Motion to Dismiss the Petition. Subsequent thereto, on behalf of the Personal Representative, a "Reply Memorandum" in Support of the Motion to Dismiss was filed and an Objection to that Reply Memorandum was filed on behalf of Naillon. Finally, a response to Objection to the Reply Memorandum was filed on behalf of the Personal Representative. The last three filed documents appear to misperceive the procedural posture of the case, at least as far as the Court has concluded and outlined above.

The Court concludes that the matters at issue herein, as of the present time, are first, should the Affidavit of Naillon be stricken and secondly, whether the Motion to Vacate under Rule 60(b) should be granted. The Court herein concludes that the Affidavit although somewhat inartfully drafted, e.g. drawing conclusions and not setting forth facts upon which those conclusions were drawn and not setting forth factual information from individuals who may have known the deceased and could have testified (by Affidavit) of her mental condition at the time the Will was executed, does never the less, provide some factual information and the Court is able to ferret out the other conclusionary matters. Having said that however, the Court finds the Affidavit to be insufficient to give rise to a justifiable

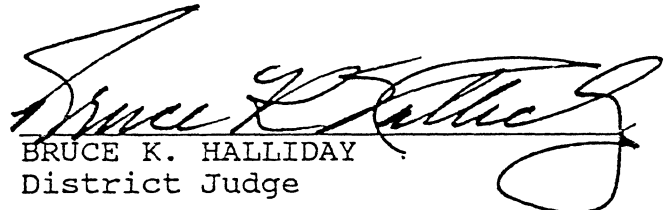
reason for setting aside the original Order of Judge Bunnell. This is so, even though as is necessary under these circumstances, the Court must view the Affidavit and Motion of the moving party, Naillon, in the light most favorable to Movant.

The Court does conclude that the Motion was filed within the time limitations set forth herein and does not believe that the Motion was a substitute Motion for an appeal which may otherwise have cut off the remedies available to Petitioner. The standing issue raised in the pleadings of the Personal Representative is misperceived. The Court concludes that an individual to have standing in this situation, need only be an interested party. It is true that a number of individuals would have priority to appointment, but it is further true that the Petitioner Naillon herein has standing as being an interested party and in the event of relinquishment by the other parties might actually be entitled to appointment as the Personal Representative, although based upon the pleadings herein, it seems unlikely that such a relinquishment would take place. Finally, in the event that Petitioner Naillon had filed a Petition for Declaration for Intestacy along with his Motion to Vacate, and had set forth therein sufficient allegations for the Court to conclude that a hearing thereon must necessarily be held, there would have been an opportunity for Petitioner Naillon to produce evidence showing undue influence.

The only factual allegation contained in the Affidavit that

bears upon some undue influence at the time of the execution of the Will is really inferential, and that is from the fact that Mr. Gitlin was named in the Will as a donee five years ago and was named as a grantee in a deed executed seven days prior to the decedent's death, at a time when Affiant believed she may have been in pain and under the influence of some unspecified drugs. We are asked to infer that Gitlin exercised undue influence over the Decedent's execution of the Will. That inference requires a leap of faith that this Court cannot make.

DATED this 31<sup>st</sup> day of September, 1993.

  
BRUCE K. HALLIDAY  
District Judge

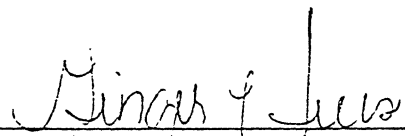
## CERTIFICATE OF MAILING

I hereby certify that on the 3<sup>rd</sup> day of September, 1993, a true and correct copy of the foregoing MEMORANDUM DECISION was mailed, postage prepaid, to the following:

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Secretary



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SEVENTH DISTRICT COURT  
STATE OF UTAH

Attorneys for Robert Gitlin,  
Personal Representative of the Estate

IN THE SEVENTH JUDICIAL DISTRICT OF CARBON COUNTY,  
STATE OF UTAH, PROBATE DIVISION

In the Matter of the Estate	)	
	)	
of	)	ORDER
	)	
MILDRED C. MEEKS,	)	
	)	Probate No. 923700043
Deceased.	)	
_____	)	

Pending before the Court is the Petition to Vacate or Set Aside Order that was filed by petitioner George F. Naillon, through his attorney Jeffrey R. Hill, which was opposed by Robert Gitlin, the Personal Representative of decendant's estate, through his attorney James D. Gilson. Carol Schroader, through her attorney Ralph W. Rasmussen, Jr., joined in the opposition filed by the Personal Representative. Also pending is the Motion to Strike Affidavit of George F. Naillon, which was filed by the Personal Representative.

The Court, having reviewed the file herein, and having reviewed the briefs filed in connection with the above referenced Petition and Motion to Strike, and based upon the reasons set forth in the Court's Memorandum Decision dated September 3, 1993 in connection therewith,

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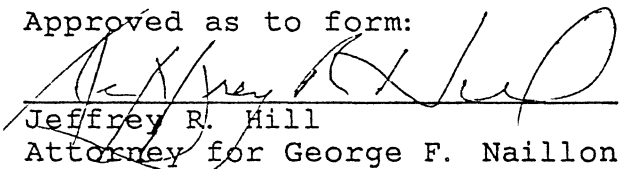
IT IS HEREBY ORDERED that the Motion to Strike the Affidavit of George F. Naillon is denied;

IT IS FURTHER ORDERED that the Petition to Vacate or Set Aside Order filed by petitioner Naillon is denied.

DATED this 11<sup>th</sup> day of ~~September~~ OCTOBER, 1993.

  
BRUCE K. HALLIDAY  
District Judge

Approved as to form:

  
Jeffrey R. Hill  
Attorney for George F. Naillon